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SUBJECT INDEX

'C'

Code of Civil Procedure, 1908- Section 9 - A dispute between an employer and a single workman cannot be termed as an industrial dispute but may become one, if it is taken up by Union or number of workmen- the case of the plaintiff was not taken up by the Union, therefore, civil Court had jurisdiction to hear and entertain and suit.

Title: M/s Cosmo Ferrites Limited and others Vs. Rajinder Singh Page-525

Code of Civil Procedure, 1908- Section 11- Plaintiff filed a suit for injunction which was dismissed on the ground that defendants were in possession of the suit land without any right, title or interest- plaintiff subsequently filed a suit for possession of the suit land and also for claiming damages for unauthorized use and occupation, which was decreed- held, that in earlier suit, findings were recorded regarding the defendants being in unauthorized occupation over the suit land- the plea of the defendants having become owner by way of adverse possession stood repelled – these findings were never challenged by the defendants- defendants pleaded that they had become owners on the basis of sale deed- they had also pleaded adverse possession which is not permissible- Court had rightly decreed the suit partly for possession.

Title: Kehar Singh and another Vs. Ramesh Chand (dead), through LRs. Page-539

Code of Civil Procedure, 1908- Section 24- A Petition for transfer was filed by the tenant stating that no Lawyer was ready to take up his case as the respondent had a great influence in the society- held, that a petition for transfer is not to be dealt with in a light hearted manner – transfer of a case from one Court to another should not be granted readily as a matter of course - power has to be exercised with extreme care, caution and circumspection- petitioners had failed to mention the name of Lawyer who had refused to accept the brief under the influence of respondent- petitioners are adopting delaying tactics to prolong the trial by filing such application- petition is a gross abuse of the process of the Court, hence, same is dismissed with cost of Rs. 50,000/-.

Title: Rakesh Kumar & Anr. Vs. Pratap Chand & Others Page-373

Code of Civil Procedure, 1908- Section 34- Interest is in the nature of the compensation for the loss of money by one who is entitled to the same.

Title: Vinay Bodh Vs. Dolekar & others Page-429

Code of Civil Procedure, 1908- Section 79- An award was passed for the sum of Rs.1,78,000/- as compensation- awarded amount was partly ordered to be released to the plaintiffs, however, a sum of Rs. 1,25,000/- was ordered to be invested in Kisan Vikas Patra- this amount was not deposited by the employee of the Court- this fact came to the notice when an application for release of the amount was filed- FIR was registered and the employee was convicted – Civil Writ Petition was filed for the recovery of the amount which was disposed of with the liberty to the plaintiffs to seek appropriate remedy in accordance with law- plaintiff filed a civil suit for recovery of Rs. 3,57,500/-- held, that employee was a government servant and the State and the employer are liable for the acts of the employees - therefore, defendant No. 1 and 2 were rightly held liable to pay amount - however, they are at liberty to recover the amount from the employee in accordance with law.

Title: The Presiding Officer, Motor Accident Claims Tribunal Vs. Jitwar Singh deceased through his LRs Sadhna Devi and others Page-400

Code of Civil Procedure, 1908- Section 100- Court will not upset the concurrent finding of fact, unless the findings are perverse, without consideration of material evidence based on no evidence or misreading of evidence or is grossly erroneous or if allowed to stand, would result in miscarriage of justice. Title: Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud & others Page-771

Code of Civil Procedure, 1908- Order 8 Rule 1- Defendants were granted time for filing written statement on 08.07.2014 and on 01.08.2014- defendant No. 1 died thereafter and application for bringing on record legal representatives was allowed on 25.11.2014 – application was filed for placing on record written statement- held, that main case could not proceed further on account of death of defendant No. 2-delay was not unreasonable which could not be compensated in terms of money- trial Court had rightly exercised the discretion to allow the defendant to file written statement.

Title: Sumitra Rani Vs. Vinod Kumar and others Page-847

Code of Civil Procedure, 1908 - Order 16- Insurance Company relied upon the verification report issued by the Licencing Authority- owner produced another driving licence which was put for the first time to RW-2 –Insurance Company filed an application to lead additional evidence by placing on record certain documents to show that licence was fake- application was allowed and last opportunity was granted to produce the witnesses on self responsibility- adjournment prayed was declined on the ground that Petition was old and was filed in the year 2011- held, that Commissioner should not have imposed cost when Insurance Company was not at fault and the licence was produced for the first time by the claimants- further, Commissioner had refused to provide any assistance for summoning the witnesses and had directed the company to produce the witnesses from Manipur on self responsibility – order passed by the Commissioner to close the evidence of the Insurance Company was not sustainable- Petition allowed and the Commissioner directed to allow the Insurance Company to lead additional evidence.

Title: National Insurance Company Ltd. Vs. Jhanpli Devi alias Mukka Devi and others Page-547

Code of Civil Procedure, 1908- Order 19- Plaintiff relied upon an affidavit - however, he had not made specific averment in the plaint regarding the execution of affidavit- he had not examined the Executive Magistrate who had attested the affidavit- compromise was already arrived at and there was no question of executing the affidavit – held, that in these circumstances, affidavit was not admissible in evidence.

Title: Chobe Ram Vs. Chander Kala & ors. Page-359

Code of Civil Procedure, 1908- Order 21- Petitioner filed a Writ Petition before the High Court which was transferred to Administrative Tribunal- petition was allowed and the respondent No. 1 was directed to constitute Review Departmental Promotion Committee and place the cases of the petitioners before the Committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted and in case petitioners are ordered to be promoted they would be entitled to all consequential benefits- respondent promoted the petitioner notionally and denied the benefits of arrears of salary to the petitioner- petitioner claimed the higher pay only on the ground that one 'K' was drawing more pay than him but record showed that 'K' was stagnated on the post of Senior Assistant and was given two proficiency increments- this difference was only on the ground of fortuitous circumstances – the petitioner cannot be equaled to 'K' as he had not suffered the

pain and pangs of stagnating on one post for more than 21 years- hence, pay was rightly fixed- petition dismissed.

Title: Sada Ram vs. Chief Secretary Govt. of H.P. (D.B.) Page-725

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff had obtained demarcation from the revenue authorities- report was not accepted by trial Court- plaintiff moved an application for appointment of local commissioner, which was allowed- defendant raised objections to the report which were decided along with main appeal- report was supported by Aks Tatima Shajra as well as the copy of Field Book- it was in accordance with the instructions issued by Financial Commissioner - when a fresh local commissioner was appointed, the earlier report would be of no consequences.

Title: Jagdishwari Devi Vs. Subhash Chand Page-366

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit seeking injunction for transferring the defendants from Cosmo Ferrites Limited Jabli for restraining the defendant from causing any obstruction in entering the factory premises for attending his job- he also sought an injunction, which was allowed- an appeal preferred against the order was dismissed- according to Clause 20 of the Standing Order, the workman can be transferred according to exigency of the work from one department to another provided that his wages, grade, continuity of service and other conditions of service are not adversely affected by such transfer - such transfer can be made only when the workman consents after getting a reasonable notice - plaintiff had brought to the notice of the management that he was not capable of performing heavy work and that he may be given work according to his capability- he had never requested for his transfer- transfer was made simply because the workman had participated in a strike and an FIR was also registered against him, therefore, trial Court below had rightly granted injunction.

Title: M/s Cosmo Ferrites Limited and others Vs. Rajinder Singh Page-525

Code of Criminal Procedure, 1973- Section 2 (wa)- Victim is a person who has suffered any loss or injury on account of an act or omission with which accused persons have been charged- petitioner claimed that he had set the criminal law in motion and, therefore, he falls within the definition of victim- complainant had made a complaint on the basis of which an inquiry was conducted but FIR was not lodged– complainant has enmity with accused and, therefore, possibility of filing complaint to wreak-vengeance cannot be ruled out- when the prosecution lodged an FIR on the basis of complaint, it is only the State which can prefer an appeal and not the complainant or informant who is not victim.

Title: S.M. Katwal Vs. Virbhadra Singh and others Page-486

Code of Criminal Procedure, 1973- Section 401- Counsel submitted that in view of compromise executed between the parties, revisionist does not want to continue with the present petition - hence, in view of statement; Revision Petition dismissed as withdrawn.

Title: Vikram Verma Vs. Manju Verma Page-423

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioners for the commission of offences punishable under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 IPC- held that in case a person is suspected of a crime of an offence punishable with death or imprisonment for life, there must be ground to negate the existence of reasonable grounds for believing that such a person is guilty of an offence

punishable with sentence of death or imprisonment for life - Court must record reasons for prima facie concluding as to how bail was granted- the heinous nature of the crime warrants more caution and there is a greater chance of rejection of bail- mere fact that accused surrendered themselves will not entitle them to bail- investigation is at initial stage- many accused are yet to be arrested- release at this stage would be a serious threat to the peace and tranquility and threat to the safety of the complainant and her family members- release at this stage will also affect the investigation- application dismissed.

Title: Nikhil Vs. State of Himachal Pradesh Page-442

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 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- in the present case, challan has already been filed in the Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed.

Title: Pankaj Sharma son of Dina Nath Vs. State of Himachal Pradesh Page-550

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 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- in the present case, challan has already been filed in the Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed.

Title: Rakesh Kumar son of Gola Ram Vs. State of Himachal Pradesh Page-553

Code of Criminal Procedure, 1973- Section 482- Husband was directed to pay monthly maintenance @ Rs.4,000/- to wife and minor child as well as to provide one room in the shared household – husband contended that accommodation belongs to his mother and will not fall in the definition of shared household- he is ready to hire a separate accommodation for the wife and the child- held, that wife does not have a right to reside in a particular property – she only has a right in the property of her husband - husband had failed to prove that house belongs exclusively to his mother- it has come on record that he along with his mother had taken a loan for building and he was repaying the loan – therefore, his contention that house is not shared household cannot be accepted- petition dismissed.

Title: Sandeep Gupta Vs. Indu Gupta Page-556

Code of Criminal Procedure, 1973- Section 482- Matter was compromised before Lok Adalat- petitioner claimed that he had never authorized Advocate to appear before Lok Adalat or to make any statement on his behalf- held, that the proceedings before Lok Adalat cannot be challenged before the High court by filing a petition- statement of facts as to what transpired in the hearing is conclusive regarding the facts so recorded in the judgment and no one can contradict such statement by filing affidavit or by leading evidence- further,

petitioner had not placed any material to show that he had taken action against either of the counsels- therefore, in these circumstances, petition dismissed.

Title: Rajan Chopra Vs. Uttam Chand Page-453

Constitution of India, 1950- Article 226- Appellant was not a party before the Writ Court and had not filed any application seeking leave to appeal- held, that leave can be granted to 3rd party provided it carves out a case to the effect that the judgment is prejudicial to its rights and interests- since no such case was made out therefore, writ Petition dismissed as not maintainable.

Title: Devta Balu Nag Ji Vs. Devta Shring Rishi Ji & others (D.B.) Page-674

Constitution of India, 1950- Article 226- Government of India had introduced Voluntary Retirement Scheme for the employees of the public enterprises- scheme was adopted by State Government as well as by HPSIDC- however, subsequently scheme was modified and instead of 1½ months' emoluments for each completed year, one month's emoluments were proposed to be given- the representation was made to the State Government which was rejected without a speaking order- held, that fixation of the date was arbitrary and had no nexus sought to be achieved by retirement scheme- all the employees who were in the service of State Government and Corporation were given the benefit - modified order is quashed and set aside- Corporation directed to grant ex-gratia payment equivalent to 1½ months emoluments as per original scheme.

Title: HPSIDC Employees Union Vs. State of H.P. & anr. Page-466

Constitution of India, 1950- Article 226- It was stated on behalf of petitioner that Writ Petition was disposed of in terms of reply- counsel for the respondent stated that he has no objection for adopting this course- hence, petition disposed of in terms of para-14 (I to IX) of the reply and respondent directed to do needful within 8 weeks.

Title: Anu Mahindru Vs. State of Himachal Pradesh & others (D.B.) Page-454

Constitution of India, 1950- Article 226- Names of the petitioners were sponsored by District Employment Officer, Hamirpur, for interview to the post of TGT (Med.) under the quota reserved for wards of ex-servicemen- petitioners were not interviewed on the ground that married daughters were not eligible to get the benefit- held, that son of ex-servicemen was eligible for consideration as the ward of ex-servicemen, even though he is married, however, the daughters were not being considered to be the wards of ex-servicemen- this amounted to discrimination on the basis of sex and is violative of the constitution- it has no nexus with the object sought to be achieved – petition allowed and respondents directed to interview the petitioners for the advertised post.

Title: Jyoti Kumari & ors. Vs. The Secretary Education & anr. Page-436

Constitution of India, 1950- Article 226- Petitioner and 1600 workmen were retrenched on 9.2.2004- services of more than 1000 workmen were reinstated but the services of the petitioner were not reinstated- retrenchment order was set aside but the petitioner was not given employment- petitioner raised an industrial dispute but his case was rejected on the ground of delay and was not referred to Industrial Tribunal- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay.

Title: Vyasa Devi wife of Sh. Shyam Lal Vs. State of H.P. & others Page-734

Constitution of India, 1950- Article 226- Petitioner applied for 42 days earned leave, which was sanctioned- he applied for extension of leave and when he came to join his duty he was told that his services had been terminated- he made various representations which were rejected- Municipal Corporation Act provides for giving a reasonable opportunity to the employee to the show cause- petitioner was never served with any show cause notice- petitioner was never told that his leave was not sanctioned - no inquiry was conducted – absence is not misconduct unless it is pleaded or proved that absence was willful- employer had failed to prove that absence was willful, therefore, services of the petitioner were wrongly terminated and the Writ was rightly allowed.

Title: Municipal Corporation, Shimla Vs. Mohinder Singh Malhi and others Page-481

Constitution of India, 1950- Article 226- Petitioner claimed that retail outlets are being opened indiscriminately without any regard to distance, volume and growth potential- High Court issued an order that no letter of intent shall be issued without obtaining order from the Court- Government of India issued fresh guidelines stating that existing roster was closed in July, 2012- petitioner contended that order issued by High Court was not complied with in letter and spirit- held, that respondents have complied with major portion of the directions except that the locations already advertised were ordered to be governed as per the old conditions- respondents directed to consider the old cases which are pending at the time of filing of the petition as per new guidelines.

Title: Himachal Pradesh Petroleum Dealers Association vs. Neeraj Mittal and others Page-740

Constitution of India, 1950- Article 226- Petitioner sought the transfer of investigation in FIR to CBI or to Delhi- record shows that closure report had been submitted to the Court of competent jurisdiction- interference by High Court will amount to taking over the jurisdiction and powers of the Magistrate- petitioner had filed similar petition before Delhi, High Court which was withdrawn in view of submission of cancellation report- when investigation is complete, it is not permissible to direct the police to conduct further investigation- there can be further investigation but no fresh investigation- second FIR cannot be registered when an FIR had already been registered- petition dismissed.

Title: Raj Pal Singh Vs. Central Bureau of Investigation & others (D.B.) Page- 859

Constitution of India, 1950- Article 226- Petitioner was appointed as a cleaner on daily wages on 1.10.1986- he was subsequently regularized on 6.11.1997- respondents were shown senior – although they were appointed later- held, that seniority list should have been drawn on the basis of length of service- respondents directed to re-draw the seniority list and to promote the petitioner if otherwise found eligible.

Title: Suraj Bahadur Vs. H.P. State Forest Development Corporation Ltd. and ors. Page-394

Constitution of India, 1950- Article 226- Petitioner was appointed on adhoc basis on a consolidated salary of Rs. 1500/- per month in H.P.U. Model School on 31.5.1997 – a committee recommended creation of regular posts of Headmaster and teachers in the regular pay scale- these recommendations were accepted subject to the approval of Executive Council- petitioners were put in a regular pay scale but the increment was not released to them- held, that petitioners were appointed after completing all the codal formalities – therefore, they should have been granted annual increments from the initial date of appointment - Vice Chancellor had created posts subject to the approval by

Executive Council and appointment on such post is valid until set aside- since, appointments were regularized by Executive Council- therefore, the appointee are entitled to annual increment as well as GPF at par with regular employees.

Title: Raj Bala Gaur Vs. H.P. University and others Page-411

Constitution of India, 1950- Article 226- Petitioner was an employee of BCB - she was declared surplus and was redeployed to the NSSO (FOD)- she claimed grant of higher pay scale with ACP- Government of India had taken a decision in the year 1986-1987 to afford fresh option to Ex-BCB employees but she was not given a chance to exercise the option- respondent stated that she was placed in Punjab Government pay-scale and similarly situated person had approached Central Administrative Tribunal and the judgment was upheld by the High Court as well as by the Apex Court- held, that similarly situated person should be treated similarly irrespective of the fact that only one person had approached the Court- denying the benefits to the person who had not approached the Court is unjustified.

Title: Union of India and others Vs. Tripta Sharma (D.B.) Page- 426

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages basis on muster roll as Beldar - services of 1087 workmen including petitioner were retrenched by respondent No. 3- 43 workmen raised industrial dispute and their services were reinstated – petitioner raised an industrial dispute after this order but his case was rejected and was not referred to Industrial Tribunal on the ground of delay- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay.

Title: Deepi Devi wife of Sh. Rupia Ram Vs. State of H.P. & others Page-703

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages on 22.3.1983- he was regularized as electrician on 1.4.1995- he was re-designated as Technician Grade-I and his pay was fixed at Rs. 4,550/-- he was informed subsequently that Rs. 4,68,300/- was wrongly released to him- his pay was re-fixed as per audit para- held, that it was not permissible for the respondent to recover the amount or to re-fix his pay after a long time - respondent had not taken into consideration the representation filed by the petitioner assailing the combined seniority list- petition allowed and the order re-fixing the salary set aside.

Title: Jagdish Chand Vs. State of H.P. & another Page-408

Constitution of India, 1950- Article 226- Respondent No. 6 started work of the widening the road by cutting and excavating the hill rock - it resulted in massive amount of boulders rolling down the hills causing damage to the plants and land of the petitioners- damage assessment report was prepared but compensation was not paid- held, that respondents should have redressed the grievances of the petitioners on their own level and should have paid the compensation- State has vicarious liability to pay compensation for acts of its employees- a person cannot be deprived of the use of his property except in accordance with law- respondent No. 6 directed to pay compensation of Rs. 15,00,000/- along with interest @ 9% p.a. from the date of filing of the petition.

Title: Vishan Dass & anr. Vs. State of H.P. & ors. (D.B.) Page-456

Constitution of India, 1950- Article 226- State Government had granted extension of one year of service to some of the employees- extension was withdrawn subsequently by the

State- held, that policy was promulgated by the State Government in exercise of executive powers and the Policy was withdrawn by exercising the same power and authority – it was specifically mentioned in the policy that it was conditional and could be withdrawn at any stage - once employee accepted the extension in terms of policy, he cannot complain, however, it is directed that any adverse remarks will not affect the petitioners and such remarks are expunged.

Title: Lal Chand Prasad Vs. State of H.P. and others (D.B.) Page-440

Constitution of India, 1950- Article 226- State pleaded that it was not in a position to consider the cases of employees for the allotment of Government accommodation as per their entitlement and prayed that government be directed to examine the cases of government servant and to make allotment as per the rule - statement is acceptable to the Counsel for the respondent - accordingly State directed to make allotment as per rules which would be subject to the outcome of the Writ Petition.

Title: State of H.P. through Secretary (GAD) Vs. Purushottam Sharma (D.B.)
Page- 877

Constitution of India, 1950- Article 226- The newspaper reported that the shopkeepers in the lower bazaar had encroached upon the road and as against the time of five minutes, it was taking more than one hour fifteen minutes to cover the distance from one corner of the Lower Bazaar to the another - this news item was treated as a Public Interest Litigation- M.C. Shimla admitted the contents of the news item and stated that shopkeepers re-encroach soon after the removal of the encroachment- Chief Fire Officer also pointed out that it took more than 40 minutes to ply the vehicle from one corner to another, whereas, it should not take more than 6 minutes in any case- fire tenders faced difficulties in reaching at the spot where the fire had broken out due to encroachment made by shopkeepers - held, that shopkeepers did not have any right to encroach upon the public street and the Corporation is duty bound to remove all the encroachments- the Government was bringing out the policy of regularization which increases the encroachment- further, Shimla falls in a high Seismic Zone and it would be improper for the Government to regularize the deviation and to put the life of citizens in danger- therefore, direction issued to remove encroachment, to implement the provisions of law and to remove the illegal projections.

Title: Courts on its own motion Vs. State of H.P. & others (D.B.) Page-569

'H'

H.P. Panchayati Raj Act, 1994- Section 113- Election of the petitioner was assailed on the ground that he had not obtained no objection certificate from the office of BDO- his election was set aside- petitioner claimed that the election petition was barred by limitation- this plea was rejected on the ground that same was taken only at the time of argument- provision of limitation is mandatory and there is no provision to condone the delay- Court cannot proceed with the matter if the same is barred by limitation- hardship and injustice are no grounds for extending the period of limitation, therefore, the orders passed by the Court below set aside.

Title: Ramesh Kumar Vs. Rajesh Kumar and others (D.B.) Page-636

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord sought eviction on the ground that building had become unfit and unsafe for human habitation and the building is required bonafide by landlord for re-construction – landlord had entered into an agreement for reconstruction of the building- there is no requirement of approval or sanction

of building plan for seeking eviction- held, that in these circumstances, tenant is directed to handover the vacant possession to the landlord- tenant shall have a right to be re-inducted in the premises after re-construction of the building.

Title: Vinod Kumar Vs. Varinder Kumar Sood Page-404

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5)- Petitioner claimed that respondent was in arrears of rent, tenant had changed the user of premises and he was causing nuisance by testing and firing the guns in the area- tenant himself stated that he was not carrying the business after the cancellation of his licence, therefore, allegation of the landlord that tenant was causing nuisance by firing and testing gun was not acceptable- tenant pleaded that he had a franchisee of respondent No. 2 but he had failed to place on record any document appointing him as a franchisee – witnesses claiming to be employees failed to produce any document like appointment letter, salary slip etc. – record of employees was not furnished to the shop inspector- tenant was no longer residing at Solan and was not carrying the business of arms and ammunition from the premises – he was not paying any salary to the employees of respondent No. 2 nor he was paying any taxes to the authority- held, that in these circumstances, it can be held that tenant had walked out of the premises and had given possession of the property to sub-tenant who is running business of courier service from the premises.

Title: Manbir Singh Vs. Suresh Bansal and others Page-760

Hindu Marriage Act, 1955- Section 13(1) (ia) (ib)- Wife started residing in the house of her parents- a compromise was effected- husband went to bring her back but she did not return- husband was serving in the army - he suffered a stroke of paralysis but wife did not visit home to care for him- wife claimed that she and her child were forced to reside in her parental home- wife had gone to Hamirpur to get her son educated and had agreed to return to her matrimonial home after the conclusion of examination- she instead went to her parental home - she had not complied with the decision of the Panchayat – she claimed maintenance from the Army Authority- she had not visited her husband even when he had suffered paralytic stroke- all this showed that intention of the wife was to harass her husband- held, that in these circumstances, husband was rightly held entitled for divorce.

Title: Sunita Kumari Vs. Bhumi Chand Page-683

Hindu Succession Act, 1956- Section 15(2)(b)- Plaintiff pleaded that predecessor-in-interest of the plaintiff was married to 'G'- she succeeded to the property on the death of 'G'- she settled with one 'H' and plaintiff was born out of the wedlock between 'P' and 'H'- defendants claimed that they are tenants in possession on the payment of 1/4th of the produce and plaintiff has no right in the property- plaintiff admitted that he was not born out of the wedlock of 'P' and 'G' but was born to 'H'- held, that when son or daughter begotten by the deceased female not through her husband, whose property was with her during her but from someone else, such son or daughter has no right to inherit such property- such property shall devolve upon heirs of the husband or father-in-law- hence, plaintiff was not competent to file the suit.

Title: Fate Ram and others Vs. Parvati Page-388

'I'

Indian Evidence Act, 1872- Section 35- Birth certificate is issued under Registration of Birth and Death Act- similarly, family register is prepared by the Public Officer in discharge

of his official duty- therefore, both these documents are admissible under Section 35 of Indian Evidence Act.

Title: Kuldeep Thakur son of Shri Ludar Chand Vs. State of Himachal Pradesh Page-470

Indian Evidence Act, 1872- Section 90- Plaintiff claimed the ownership on the basis of sale deed dated 11.1.1962 and 19.3.1965- defendant denied the execution of the sale deed dated 19.3.1965 and pleaded that document was manipulated by predecessor-in-interest of the plaintiffs who obtained thumb impression on the pretext of getting the land demarcated- it was contended that Court was bound to draw the presumption under Section 90 of the Evidence Act- held, that the power conferred upon the Court is discretionary and the Court is not obliged to draw such presumption- further, mere proof of formal execution of a document does not lead to a presumption that recitals contained therein are also correct- plaintiff has neither pleaded nor proved as to how the consideration was paid, who was the Deed Writer, before whom the document was executed- hand-writing was not proved nor anyone was called from Sub Registrar office, therefore, in these circumstances, trial Court had rightly refused to rely upon the sale deed.

Title: Budhi Singh & another Vs. Ashok Kumar & others Page-531

Indian Evidence Act, 1872- Section 114- Defendant No. 1 did not appear in the witness box and did not offer himself for cross-examination- therefore, the presumption can be drawn that case set up by him was not correct.

Title: Rubi Sood and another Vs. Major (Retd.) Vijay Kumar Sud & others Page-771

Indian Evidence Act, 1872- Sections 3 and 65 (B)- Prosecution relied upon the conversation between the accused and 'K' to prove the acceptance of bribe- held, that before acting upon the electronic record, Court has to consider whether it is genuine or not- technology of preparing CD was not in existence in the year 1989-90 when the bribe was allegedly received by the accused – no evidence was produced to show as to what was the device used for recording the CD- whether such device was technically in order- the name of the person who recorded the conversation was also not mentioned- FSL had raised certain queries which was not answered- there were contradictions in the testimonies of the witnesses- there was no evidence against the accused except CD - therefore, acquittal of the accused in these circumstances was justified.

Title: S.M. Katwal Vs. Virbhadra Singh and others Page-486

Indian Penal Code, 1860- Section 84- Accused claimed that he had no malice against the deceased- accused was a chronic patient of epilepsy and last attack had occurred one day prior to the date of incident- accused was not in a proper state of mind at the time of incident- held, that absence of motive is no ground to discard the prosecution story and witnesses- mere lack of motive is also not sufficient to establish the unsoundness of mind- medical evidence does not establish the insanity of the accused- version of accused that he suffered from mental disorder was not believable – Doctor admitted that accused had normal behaviour and he was cooperative at the time of examination- hence, his plea of insanity was not established.

Title: Surender Singh Vs. State of Himachal Pradesh (D.B.) Page-689

Indian Penal Code, 1860- Section 84- Accused contended that he was insane- reliance was placed upon the testimony of DW-1 who deposed that accused was suffering from bipolar affective disorder and he had impaired judgment as he was suffering from psychosis- held, that accused has to prove that he was suffering from legal insanity- the burden is upon him to establish this fact- accused ran away from the spot, which shows that he knew what he was doing was wrong- PW-1 had not noticed any abnormality in the behavior of the accused- hence, his defence under Section 84 is not proved.

Title: Jeevan Rana Vs. State of Himachal Pradesh (D.B.) Page-343

Indian Penal Code, 1860- Section 302- Accused conspired with co-accused to murder the deceased- deceased was taken to nearby jungle where he was murdered- the accused and deceased had last seen travelling on the motorcycle by independent witness- police official found a motorcycle parked at an isolated place- police went to jungle to find the owner and heard the ring of mobile phone and they noticed the dead body of the deceased- Medical Officer found multiple incised wounds on the vital parts of the body which could have been caused by means of a knife- PW-1 stated that accused went alone on his motorcycle towards the main road, whereas deceased went on foot- prosecution failed to establish that after the accused left the house of the deceased, motorcycle remained in his possession or was being driven by him – police officials admitted that a Nepali had told them about hearing a telephonic ring but Nepali was not interrogated immediately- police had not seized the motorcycle- disclosure statement was not proved - clothes recovered by police were not connected to the accused- Medical Officer found injuries on the person of the accused- held, that in these circumstances, prosecution version was not proved and acquittal of the accused was justified.

Title: Takki Mohd. Vs. State of Himachal Pradesh (D.B.) Page-647

Indian Penal Code, 1860- Section 302- An altercation took place in marriage in which accused and the deceased grappled with each other - subsequently at Nerchowk, accused came near the vehicle in which deceased was sitting and asked him to come down as the accused wanted to have duel with the deceased- accused and the deceased started grappling with each other- accused took out a Khukhari and started stabbing the deceased repeatedly due to which deceased fell down and died at the spot- held, that act of the accused was not premeditated- quarrel had taken place, which resulted in subsequent fight- fight had taken place all of a sudden- accused had a knowledge that his act would result in the death of the deceased- his act falls within the preview of Section 304(II) and not Section 302 of IPC.

Title: Satish Kumar alias Bichhu Vs. State of H.P. (D.B.) Page-840

Indian Penal Code, 1860- Section 363- Prosecutrix, aged 14½ years old, did not return from the school- she was persuaded by accused 'K' to go to Rivalsar- she was taken to the house of co-accused 'H'- father of the prosecutrix specifically stated that prosecutrix had gone to school and had not returned - there was no evidence that consent of the father was taken - since prosecutrix was minor, therefore, her consent was immaterial- held, that in these circumstances, accused was rightly held liable for the commission of offence punishable under Section 363 of I.P.C.

Title: Kuldeep Thakur son of Shri Ludar Chand Vs. State of Himachal Pradesh Page-470

Indian Penal Code, 1860- Section 376- Prosecutrix, aged 14½ years old, was taken by accused 'K' to go to Rivalsar – she was taken to the house of co-accused 'H' where she was

raped – prosecutrix supported the prosecution version – her testimony is trustworthy, reliable and confidence inspiring - same is corroborated by medical evidence- held, that testimony of prosecutrix is enough to convict the person if the same is free from blemish.

Title: Kuldeep Thakur son of Shri Ludar Chand Vs. State of Himachal Pradesh Page-470

Indian Penal Code, 1860- Sections 302 and 120-B – Construction work of IPH Sub Division at Village Gharyana Brahmana, District Hamirpur was allotted to the deceased- deceased had engaged accused as a sub-contractor to execute the electrical fitting and paint work- accused was not carrying out the work to the satisfaction of the deceased and due to the deficiency, payment of the accused was withheld by the deceased- deceased visited the construction site to supervise the work where he expressed his dissatisfaction with the work done by the accused- he also refused to make the payment till the deficiency was removed- accused left the spot - he returned with the co-accused armed with a baseball bat and hit the deceased due to which the deceased became unconscious and died- witnesses duly proved the presence of the accused at the spot- accused made a disclosure statement on the basis of which baseball bat was recovered- keys of the vehicle, clothes and danda were also recovered- medical evidence proved that deceased had died due to the head injury and injury to brain leading to neurogenic shock and death- injury could have been caused by means of baseball bat- held, that in these circumstances, guilt of the accused was duly proved.

Title: Mandeep Vs. State of H.P. (D.B.) Page-604

Indian Penal Code, 1860- Sections 302 and 498-A- Deceased was married to the accused- accused were not satisfied with the dowry given to her- deceased told her parents and her sister that she was being harassed for not bringing sufficient dowry- she gave birth to a daughter but nobody came to see her and her daughter- deceased came back after compromise to her matrimonial home- she was again harassed by accused- she died due to beatings given to her with fist and kick blows and she was carrying pregnancy of 34-36 weeks- post mortem revealed that she had died due to fracture and dislocation of cervical vertebrae- dead body was found at a distance of 200 meters from the house of the accused- accused had not lodged any missing report and had not made any inquiry about his wife- Doctor admitted that fracture and dislocation of cervical vertebrae could be caused by twisting neck with great force with hands- accused had also sustained injuries- accused had made an extra-judicial confession stating that he had given beatings to the deceased- held, that act of the accused fell within the definition of cruelty- relation between accused and deceased did not improve even after convening the panchayat – accused was rightly convicted of the commission of offences punishable under Sections 302 and 498-A of IPC.

Title: Sarla Devi Vs. State of Himachal Pradesh (D.B.) Page-395

Indian Penal Code, 1860- Sections 302, 323, 324, 201, 452 and 506 (II)- Accused gave beatings to his sister who took refuge in the house of his neighbor – accused went to the house of the neighbor and again gave beating to her when another neighbor 'S' tried to intervene - she was also beaten by the accused- accused gave beatings to 'R' and 'K'- accused poured kerosene upon them and set them on fire- testimonies of the witnesses were corroborated by medical officer who stated that deceased had died due to shock caused as a result of 100% burn injuries- held that the accused was rightly convicted.

Title: Surender Singh Vs. State of Himachal Pradesh (D.B.) Page-689

Indian Penal Code, 1860- Sections 341, 506 and 376- Prosecutrix was going to her home- accused met her on the road and raped her- incident was narrated by her to her parents who reported the matter to Pardhan- Pardhan called accused and his parents- his father and brother came and expressed their regrets- even if it is assumed that accused and prosecutrix knew each other and were in love with each other that would not give a licence to the accused to sexually assault the victim- testimony of prosecutrix is sufficient to convict the accused if it inspires confidence- matter was reported to the police promptly- mere fact that victim did not resist due to fear cannot lead to the conclusion of consent.

Title: Sudesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-675

Indian Penal Code, 1860- Sections 363, 366, 376 and 120-B- Accused kidnapped the prosecutrix with an intention to force her to marry the co-accused 'B'- accused 'H' told the father of the minor prosecutrix to send her to tailoring centre- accused 'H' took the prosecutrix towards the bridge where she was pushed inside the car- accused 'H' caught the prosecutrix and threatened to kill her- minor prosecutrix was brought to the Court and her age was wrongly disclosed- the documents relating to her marriage with accused 'B' were prepared – she was kept in the house where she was raped – testimony of the prosecutrix is trustworthy, reliable and inspires confidence- it is corroborated by the medical evidence- the age of the prosecutrix was proved to be less than 16 in the certificate issued by Registrar of Birth and Death and Middle standard examination certificate- father of the prosecutrix had specifically mentioned that age of the prosecutrix was 15 years- accused 'H' had called the prosecutrix from her home and had dragged her in the vehicle- father of the prosecutrix had not consented to taking away of the prosecutrix- therefore, accused were rightly convicted- appeal dismissed.

Title: Babu Ram son of Mushu Ram Vs. State of Himachal Pradesh Page-559

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she is owner in possession of suit land on the basis of Will executed by the deceased- deceased had consumed poison- plaintiff admitted in her cross-examination that Doctor had refused to treat the petitioner, according to him, deceased had consumed strong poison- deceased had tied at about 3-4 hours- witnesses of the Will admitted that when the Will was written the sun was rising at about 6:00 A.M- one witness stated that Will was scribed at the instance of one 'K'- this casts doubt about the execution of the Will- deceased was under the influence of strong poison and could not be in a sound disposing mind- no marginal witness was associated from the vicinity- propounder and her husband had actively participated in the execution of the Will which casts doubt regarding the genesis of the Will.

Title: Parmeshwari Devi Vs. Kamlesh Devi and another Page-369

Indian Succession Act, 1925- Section 63- Will was stated to have been executed by 'D', aged more than 78 years old- it was proved on record that the contents of the Will were read over and explained to 'D' who put her thumb impression on the same- marginal witness had signed the Will thereafter- merely because the marginal witness had used different ink will not make the Will suspicious- mere non-registration of the Will is not sufficient to doubt the same.

Title: Dhameshwar Vs. Gish Pati and others Page-737

Industrial Disputes Act, 1947- Section 25- Employer contended that workman had not completed 240 days in the preceding 12 months, however, no such plea was taken before the Writ Court- it was further contended that project had come to an end and there is no

work, however, Labour Court had specifically found that management was having the work- no material was placed on record to controvert this finding - workman was terminated without any cause and the order was in breach of the principles of natural justice.

Title: The Director, Telecom Project-II Vs. Neelam Chadha and another (D.B.) Page-731

'L'

Limitation Act, 1963- Article 65- Petitioner claimed ownership as well as adverse possession- held, that both these pleas were contradictory to each other - mere long possession is not equal to adverse possession - Court has to be circumspect while adjudicating the plea of adverse possession in case of an encroacher, illegal occupant or land grabber of public property - petitioner had not mentioned the date from which his possession became adverse- hence, his plea of adverse possession was not acceptable.

Title: Manoj Singh Vs. Union of India & ors. (D.B.) Page-706

Limitation Act, 1963- Article 65- Plaintiff claimed to be a non-occupancy tenant –he also claimed to have become owner by way of adverse possession- held, that pleas taken by the plaintiff were contradictory - plaintiff had not specified the date of commencement of his possession with necessary animus – hence his plea of becoming owner by operation of law was not acceptable.

Title: Sunehru Devi (Now deceased) through LRs and others Vs. Pohlo Ram and another Page-668

Limitation Act, 1963- Section 5- Petitioner claiming himself to be a victim filing an appeal against the judgment of acquittal- appeal is barred by limitation- an application for condonation of delay was filed pleading that petitioner came to know about the judgment from the newspaper- State had not preferred any appeal against the acquittal and, therefore, petitioner had to file the appeal- explanation furnished by the petitioner is vague, cryptic and highly unbelievable – petitioner was present in the Court when judgment was announced- acquittal gained wide publicity on the next day and therefore, petitioner would come to know about the judgment, hence, application is liable to be dismissed.

Title: S.M. Katwal Vs. Virbhadra Singh and others Page-486

'M'

Motor Vehicle Act, 1988- Section 149- A cover note showed that vehicle was insured at the time of accident- insurer had failed to prove that owner had committed any breach or the driver of the offending vehicle did not have a valid and effective licence at the time of accident- held, that Insurance Company was rightly held liable to pay compensation.

Title: Oriental Insurance Company Ltd. Vs. Sharda Devi & others Page-829

Motor Vehicle Act, 1988- Section 149- Driver had a learner licence- held, that a person holding a learner licence is competent to drive motor vehicle for which the licence has been issued.

Title: New India Assurance Company Ltd.Vs. Kamla Devi & others Page-820

Motor Vehicle Act, 1988- Section 149- Insurance Company contended that driver did not have a valid driving licence and the owner had committed willful breach by employing a driver having a fake licence- held, that Insurance Company has to prove that owner knew

that licence was fake- mere evidence that licence was fake is not sufficient to absolve the Insurance Company of its liability- Insurance Company had failed to lead the evidence to prove that owner knew that licence was fake and it was rightly held liable.

Title: National Insurance Company Ltd. Vs. Kaushlaya & others Page-614

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not have a valid driving licence as he possessed a learner licence- owner had committed willful breach of terms and conditions of the policy- held, that a person having a learner licence is competent to drive the motor vehicle for which he was given the licence - therefore, Insurance Company was rightly held liable.

Title: Oriental Insurance Company Ltd. Vs. Krishan Dev and others Page-621

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that it was wrongly saddled with liability and the owner had committed willful breach- insurer had not led any evidence to prove that owner/insurer and driver of the offending vehicle had committed any willful breach- a batch of claim petitions was filed in Utarakhand where insurer was saddled with liability- this award was questioned before the Apex Court by filing SLP which was dismissed- therefore, the plea of the Insurance Company that it was wrongly saddled with liability cannot be accepted.

Title: National Insurance Company Limited Vs. Anu Devi & others Page-612

Motor Vehicle Act, 1988- Section 149- Mahindra Utility met with an accident in which five persons died- claimants pleaded that deceased were travelling in the vehicle along with goods/articles - the owner and driver did not deny this fact specifically but had denied it evasively- Insurer had not produced the copies of the registration certificate and the route permit- the risk of '1 + 3' is covered in terms of the insurance contract- therefore, insurer is to be saddled with liability to pay compensation in respect of three person- held, that in these circumstances Insurance Company was wrongly absolved of the liability and the owner was wrongly held liable to pay compensation.

Title: Hem Ram & another Vs. Krishan Chand & another Page-796

Motor Vehicle Act, 1988- Section 157- Registered owner pleaded that he had sold the vehicle to 'S' prior to the accident- reliance was placed upon the affidavit and an application made by 'S' – held, that evidence on record did not prove that registered owner had sold the vehicle to 'S'- further, owner had not questioned the award, in which liability was fastened upon him- appeal dismissed.

Title: Pawan Kumar Vs. Prabahu Lal & others Page-634

Motor Vehicle Act, 1988- Section 166- Claimant had suffered 100% disability which was permanent in nature- he has not only lost his earning capacity but his whole life has become burden for himself and his family- Court has to pass an award which is fair, just and proper and keeping in view of mind hardships, discomfort, amenities of life, pain and sufferings undergone.

Title: Sanjay Kumar Vs. Yashpal Singh Page-833

Motor Vehicle Act, 1988- Section 166- Deceased 'A' was riding the scooter while other deceased was a pillion rider - scooter was hit by a bus- deceased sustained injuries and subsequently succumbed to the injuries- Claim Petition was filed by the parents of the

deceased- Tribunal held that it was a case of contributory negligence and directed the Union of India to satisfy 50% of the award - driver of the bus was court martialled and was convicted - therefore, he cannot take the plea of contributory negligence- held, that Tribunal had wrongly recorded the findings of contributory negligence.

Title: Sudesh Bala Vs. Union of India and others Page-844

Motor Vehicle Act, 1988- Section 166- Deceased was working as a mason and his income can be taken at Rs. 6,000/- p.m.- he was aged 21 years and multiplier of '15' has to be applied- Claim Petition was filed by mother and loss of dependency has to be taken as Rs. 3,000/- p.m. - thus, claimant is entitled to compensation of Rs. 5,04,000/- + Rs. 30,000/- for loss of love and affection.

Title: Raghu Devi Vs. Dewan Chand (deceased) & others Page-831

Motor Vehicle Act, 1988- Section 166- Deceased were students of Class 11th – they would have got employment after 2-3 years or at least they would have become labourers and would have been earning not less than Rs. 5000/- per month each- loss of dependency can be taken as Rs. 2,500/- per month - multiplier of '16' has to be applied- compensation of Rs.4,80,000/- is to be paid to the claimants along with interest @ 7.5% per annum.

Title: Sudesh Bala Vs. Union of India and others Page-844

Motor Vehicle Act, 1988- Section 166- Insurance Company pleaded that brother and sister are not the legal representatives and cannot file a Claim Petition- held, that persons who were dependent upon the deceased at the time of accident can file a Claim Petition - brother & sister if dependant upon the deceased can file a Claim Petition- they were minor at the time of accident and will fall within the definition of dependent. Title: Bajaj Allianz General Insurance Company Ltd. Vs. Gohdi Devi & others Page-418

Motor Vehicle Act, 1988- Section 166- MACT treated income of the deceased as Rs. 15,000/-, deducted 50% and assessed loss of dependency as Rs. 7,500/-- applying multiplier of 11, assessed the loss of income as Rs. 9,80,000/- and awarded total compensation of Rs. 10,40,000/- which cannot be said to be excessive or meager- appeal dismissed.

Title: Joginder Singh & another Vs. Chanan Ram and others Page-595

Motor Vehicle Act, 1988- Section 166- Mere acquittal in a criminal case is not a ground to defeat the rights of the claimant- the findings recorded by Criminal Court will have no bearing whatsoever in the proceedings competent before MACT.

Title: Divisional Engineer Telecom Project (BSNL) & another Vs. Chet Ram & another Page-790

Motor Vehicle Act, 1988- Section 167- Labrourers/employees have a remedy to obtain compensation under Workmen Compensation Act, 1923- if a claim made under Workmen Compensation Act, the claimant will get compensation as per scheduled attached to the Act, however, claimants can seek higher compensation under Motor Vehicle Act- insurer pleaded that it is liable to pay compensation as per its liability- held, that insurance policy does not restrict the liability of the insurer- claimants are entitled to the compensation under law and the Insurance Company was rightly held liable to pay compensation to the claimants.

Title: Oriental Insurance Company Limited Vs. Arvind Pal and others Page-619

'N'

N.D.P.S. Act, 1985- Section 20- Accused was found to be carrying a bag which was containing 1.800 grams of charas- police officials had not gone to the residence of any person to associate him with investigation, although, houses were located at a distance of 200 meters from the place where the accused was apprehended - there was no entry regarding taking out of the case property from the Malkhana for production in the Court- it is necessary to make entry when the case property is deposited in the Malkhana or is taken out from the same - non-making of the entry makes it doubtful whether the same property was produced before the Court or not- in these circumstances, accused is entitled to be acquitted.

Title: Kamal Bahadur Rana Vs. State of Himachal Pradesh (D.B.) Page-817

N.D.P.S. Act, 1985- Section 20- An alto car being driven by accused 'R' was stopped for checking- accused 'V' was sitting on the front seat - remaining accused 'T', 'N' and 'Z' were sitting on the rear seat- police found one bag containing 1.850 kgs of charas- independent witnesses did not depose that bag from which charas was recovered belonged to appellant 'T'- PW 'H' stated that when he inquired from the occupant of the vehicle, accused 'T' told that it belonged to him- this version was made for the first time in the Court- bag was concealed underneath the driver seat and none had deposed that vehicle was hired by 'T' or that the passengers sitting on the rear seat were his relatives, friends, acquaintances or business associates- further, other persons were acquitted, it was not permissible to convict one conspirator, when others had been acquitted- held, that in these circumstances, prosecution version was not proved.

Title:Tapat Bahadur Shahi Vs. State of Himachal Pradesh (D.B.) Page-663

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 2.1 kg. of charas- driver of the bus was declared hostile- he and conductor of the bus admitted part of the prosecution version- police officials had corroborated their version- conviction can be made on the basis of testimonies of the police official if the same are found to be trustworthy, credible and reliable - minor contradictions are bound to come in the testimonies when they are recorded after a considerable period of time and are not sufficient to reject the prosecution version.

Title: Kartar Singh son of Sh Tula Ram Vs. State of H.P (D.B.) Page-848

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was carrying a rucksack on her back- she tried to throw away the rucksack and run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court.

Title: Dharma Devi Vs. State of H.P. (D.B.) Page-587

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was carrying a rucksack on her back- she tried to throw away the rucksack and run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also

proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court.

Title: Kekti Devi Vs. State of H.P. (D.B.) Page-597

N.D.P.S. Act, 1985- Section 42- I.O specifically stated that she had prepared special information report and had handed it over to H.C with a direction to take it to SP Crime- HC stated that he had deposited the special report with SP Crime- testimonies are corroborating each other – there is no reason to disbelieve their testimonies – held that the provision of Section 42 of N.D.P.S. Act was complied.

Title: Kartar Singh son of Sh Tula Ram Vs. State of H.P (D.B.) Page-848

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of a bag from which 2.1 k.g of charas was recovered- held, that Section 50 is applicable only when the contraband was found on the person of the accused - since the contraband was found from the bag and not from the person of the accused, therefore, Section 50 of N.D.P.S. Act is not applicable.

Title: Kartar Singh son of Sh Tula Ram Vs. State of H.P (D.B.) Page-848

'P'

Prevention of Corruption Act, 1947- Section 13(2)- **Indian Penal Code, 1860-** Section 409- Accused had withdrawn the money for consideration of Panchayat Ghar but had not utilized the same and in this manner he had misappropriated Rs.65,000/-- held, that in order to prove criminal breach of trust, prosecution is required to prove dishonest intent, converting the property to his own use, dishonestly using or disposing of the property in violation of law or agreement – statements of witnesses showed that some money was paid for construction of Panchayat Ghar- valuation certificate showed that more amount than withdrawn was spent for consideration of Panchayat Ghar- the mere fact that Panchayat Ghar is not habitable will not establish the guilt of the accused.

Title: Mohinder Kumar Sharma Vs. State of H.P. Page-542

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 5- Petitioner claimed that his grand-father had been in possession of land and after his death he is in possession- administrator had accorded sanction to carry out additions and alterations and re-construction- additions and alterations were carried out according to sanctioned plan- he was wrongly held to be unauthorized possession.

Title: Manoj Singh Vs. Union of India & ors. (D.B.) Page-706

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 4- Petitioner claimed that his grand-father had been in possession of land and after his death, he is in possession- administrator had accorded sanction to carry out additions, alterations and re-construction- additions and alterations were carried out according to the sanctioned plan- he was wrongly held to be unauthorized possession – petitioner had failed to prove his ownership over the land- letters permitting him to carry out the construction were not sufficient to establish the ownership - his plea of adverse possession implied that he is not the owner but some other person is owner of the land, held, that in these circumstances, he was rightly evicted.

Title: Manoj Singh Vs. Union of India & ors. (D.B.) Page-706

'R'

Registration Act, 1908- Section 17- Plaintiff had filed a civil suit in which a compromise was effected - the tenants surrendered the possession of 1-10 bighas while 3-00 bighas was gifted to the tenants- compromise did not form part of the order- plaintiffs were not shown to be the owners of the land- right was created for the first time by means of the compromise and the compromise was required to be registered, however, it was never registered, therefore, it could not have been relied upon to pass a decree.

Title: Chobe Ram Vs. Chanderkala & ors. Page-363

'S'

Specific Relief Act, 1963- Article 65- Plaintiff claimed to be the owner in possession of the suit land- he claimed that defendants have got themselves recorded as Kabazan in connivance with settlement staff- defendant claimed to be in adverse possession- held, that there is a distinction between long possession and adverse possession- mere long possession is not equivalent to adverse possession- defendants categorically admitted that he was not in hostile possession of the land- he claimed ownership and it is inherent in the plea that someone else is owner of the land.

Title: Jai Kishan and others Vs. Sardari Lal and others Page-745

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract by execution of a sale deed, cancellation of the sale deed executed by defendant No. 1 in favour of defendants No. 2 and 3 and cancellation of subsequent sale deed executed by defendants No. 2 and 3 in favour of defendant No. 4- defendant No. 1 stated that she had taken friendly loan from the plaintiff and had executed sale agreement as per past practice – this agreement was not to be acted upon and was executed towards security for securing the repayment of the loan- defendants No. 2 to 4 claimed that they were bonafide purchasers for consideration- defendant No. 1 examined only herself to prove her assertion, any custom, usage or practice is required to be established by leading cogent and convincing evidence - the plea of the defendants No. 2 and 3 that they were bonafide purchasers for consideration was not proved while the plea of the defendant No. 4 that he was bona fide purchaser for consideration was proved, therefore, plaintiff cannot be held entitled for the decree of specific performance and cancellation- plaintiff granted the relief of the refund of entire sale consideration along with interest @ 18% per annum.

Title: Vinay Bodh Vs. Dolekar & others Page-429

Specific Relief Act, 1984- Section 34- Plaintiff claimed that land measuring more than 150 bighas was being irrigated through Kuhal known as ***Nal Ka Banda*** since time immemorial openly, peacefully and continuously- defendants have no right to cause interference in the flow of water- Kuhal originates from ***Sharatu Ka Nala***- ***Pataru Ka Nala*** and ***Bagh Ka Nala*** are the tributaries of ***Sharatu Ka Nala*** - defendants threatened to tap the water from ***Sharatu Ka Nala*** and ***Bagh Ka Nala***- plaintiff relied upon a rough map in which no khasra numbers were mentioned- the points from which the pipes were installed were also not mentioned- defendants got prepared a map by an expert - the factual position shown in the map, got prepared by defendants, is in conformity with the statements of the witnesses regarding the source of water- other co-villagers were not arrayed as parties- held that in these circumstances suit was rightly dismissed.

Title: Ram Swarup and others Vs. Narinder Parkash and others Page-386

Specific Relief Act, 1963- Section 38- Plaintiff claimed that defendants/State had constructed a road in which proper drainage was not provided- flow of water from the road causes damage to the house and orchard of the plaintiff- defendant claimed that proper drainage system was provided and no damage was being caused- version of the plaintiff was proved by his evidence as well as by the inspection made by the Court- suit was decreed but the decree was reversed on the ground that suit was decreed without impleading 'B', a co-owner of the property- held, that plaintiff had sought relief against the officials of the State who were under obligation to protect the life and properties of its citizens and had failed to abide by their duties- Officers of the State are liable to compensate a person for the loss sustained by him- suit could not have been dismissed on the ground that co-owner was not impleaded in the suit- defendant directed to provide drainage system to ensure that property of the plaintiff and 'B' is not damaged from flow of water.

Title: Dev Sundri and others Vs. State of H.P. and others Page-785

Specific Relief Act, 1963- Section 38- Plaintiff sought a relief of permanent prohibitory injunction claiming that he had constructed a work shed (Reniali) for the work of Iron smith-defendant No. 1 dismantled the wall of the work shed and threw the material from the land-held, that when the plaintiff had admitted that he was dispossessed from the suit land by dismantling his work shed and his material was thrown out, he was out of possession, he could not have sought the relief of injunction as necessary requirement for granting the relief of injunction is possession which is not established.

Title: Sunehru Devi (Now deceased) through LRs and others Vs. Pohlo Ram and another Page-668

'T'

Torts - Plaintiff filed a civil suit for recovery of the compensation against the defendants on the ground that widening work of NH at point 229/0 was carried out by defendant No. 1 - heavy blast was done as a result of which heavy boulders and rocks were thrown on the temple and other buildings causing damages to them- Insurance Company pleaded that the plaintiff was a stranger to the contract- held, that work was executed by 'G' who had taken the insurance policy- insurance company had undertaken to indemnify the 'G' for any loss, hence, suit could have been filed against the Insurance Company also.

Title: National Insurance Co. Ltd. Vs. Hanogi Mata Sansthan & ors. Page-424

Transfer of Property Act, 1882- Section 123 - Plaintiff claimed that he is owner in possession of the suit land- he had executed gift deed of the suit land in favour of his wife-gift was presented for registration before Sub Registrar but Registrar asked him to come on some other day as he was busy- defendant No. 1 came to the plaintiff and told that he could get the gift deed registered- signatures of the plaintiff were obtained on some documents which were presented for registration – plaintiff was told that documents had been registered- plaintiff subsequently came to know that sale deed and Special Power of Attorney were got executed from him- it was proved that plaintiff had no other land and, therefore, he had no justification to sell the only piece of land- gift deed was executed earlier in time and the sale deed was executed subsequently- mere non-registration of the gift is not sufficient-since, plaintiff had already executed a gift in favour of his wife, therefore, he could not have intended to sell the same land to some other person.

Title: Satya Devi and another Vs. Kartar Chand and others Page-779

'W'

Workmen Compensation Act, 1923- Section 3- Deceased was a workman- he slipped near the site of work and rolled down in the Nalla- Insurance Company pleaded that it is not liable to pay interest- no such plea was taken in the reply but this plea was taken for the first time in the appeal- terms and conditions of insurance contract were also not proved- held, that Insurance Company was rightly held liable to pay compensation.

Title: New India Assurance Co. Ltd. Vs. Sommaya Shaipy and others

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TABLE OF CASES CITED

'A'

A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

Abdulla Mohammed Pagarkar Versus State (Union Territory of Goa, Daman and Diu), (1980) 3 SCC 110

Achutrao Haribhau Khodwa and others v. State of Maharashtra and others, AIR 1996 SC 2377

Aher Raja Khima Versus State of Surashtra, AIR 1956 SC 217

Ahmedabad Municipal Corporation Vs. Dilbag Singh Balwant Singh and others, 1992 Supp.(2) SCC 630,

Ajab Enterprises vs. Jayant Vegoiles and Chemicals Pvt. Ltd., AIR 1991 Bombay 35

Amar Bahadur Singh v. State of U.P., (2011) 14 SCC 671

Amar Nath Agarwalla versus Dhillon Transport Agency (2007) 4 SCC 306

Amitbhai Anilchandra Shah versus Central Bureau of Investigation and Anr., 2013 AIR SCW 2353

Amrit Bhushan Gupta v. Union of India and others, (1977) 1 SCC 180

Anant R. Kulkarni vs. Y.P. Education Society and others, (2013) 6 Supreme Court Cases 515

Anju Chaudhary versus State of U.P. and Anr., 2013 AIR SCW 245,

Anuj Sirkek versus Neelma Devi and Ors., ILR, (H.P. Series), 2014 Vol. (XLIV)-VI, Page 1145

Anvar P.V. v. P.K. Basheer and others, AIR 2015 SC 180

Appabhai and another Vs. State of Gujarat, AIR 1988 SC 696

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446

Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181

Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560

'B'

Bablu alias Mubarik Hussain v. State of Rajasthan, (2006) 13 SCC 116

Balasaheb Rangnath Khade v. State of Maharashtra and others, 2012 (2) CCR 381

Balasaheb v. The State of Maharashtra, 1994 CLJ 3044

Balkar Singh vs. State of Haryana, (2015) 2 SCC 746

Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1

Bapu alias Gujraj Singh v. State of Rajasthan, (2007) 8 SCC 66

Bhagat Ram (D) by L.Rs versus Teja Singh (D) by L.Rs., AIR 2002 Supreme Court (1)

Bhagwant Singh versus Commissioner of Police and another, AIR 1985 Supreme Court 1285

Bharpur Singh and others Versus Shamsher Singh, (2009) 3 SCC 687

Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753

Bhavuben Dineshbhai Makwana v. State of Gujarat and others, 2013 Cri.L.J. 4225

Bhop Ram Versus Dharam Das, Latest HLJ 2009(HP) 560.

Binod Bihari Singh vs. Union of India, (1993) 1 SCC 572

Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 SC 922

Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45

Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519

'C'

C.B. Muthamma, I.F.S. versus Union of India and others, (1979) 4 SCC 260

C.Muniappan and others Vs. State of Tamil Nadu, 2010 (9) SCC 765

Celina Coelho Pereira (Ms) and others versus Ulhas Mahabaleshwar Kholkar and others (2010) 1 SCC 217

Chairman, Railway Board and others v. Chandrima Dass and others, AIR 2000 SC 988

Chairman, Railway Board and others Vs. Chandrima Das (Mrs) and others (2000) 2 Supreme Court Cases 465

Chennupati Venkatasubbamma Vs. Nelluri Narayanaswami, AIR 1954 Madras 215

Chitru Devi vs. Ram Dai, AIR 2002 HP 59

Chittaranjan Mirdha versus Dulal Ghosh & Anr., 2009 AIR SCW 3873.

Chuni Lal and another vs. State of H.P, 1996 Cri.L.J.3864 (H.P.)

CIT versus Dr.Sham Lal Narula AIR 1963 Punj 411

Collector Land Acquisition Anantnag and anr. vs. Mst. Katji and others, AIR 1987 SC 1353

Collector L.A.C. Mandi vs. Karam Singh and others and connected matters, Latest HLJ 2000 (2) (HP) 694

'D'

D.S. Nakara & Others vs Union Of India, AIR 1983 SC 130

Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563

Dalip Kumar Versus Rajesh Sahani and others, Latest HLJ 2004 (HP) 1030

Damodaran Pillai and others vs. South Indian Bank Limited, (2005) 7 SCC 300

Dashrath Singh Vs. State of UP, 2004 (7) SCC 408

Deelip Singh alias Dilip Kumar v. State of Bihar, (2005) 1 SCC 88

Deepak vs. State of Haryana, (2015)4 SCC 762

Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139

Deity Pattabhiramaswamy v. S. Hanymayya and others, AIR 1959 SC 57

Delhi Development Authority vs. Skipper Construction Co. (P) Ltd. and another, (1996) 4 SCC 622

Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288

Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509

Dharampal Singh v. State of Punjab, (2010) 9 SCC 608

Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622

Dr.C.N. Malla vs. State of J&K, 1999 SLJ 366

Dr.Sham Lal Narula versus CIT, AIR 1964 SC 1878

Dwarku Devi Vs. State of Himachal Pradesh 2014 (2) Shim. LC 882

'E'

Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330

Elavarasan V. State, AIR 2011 SC 2816

Elavarasan v. State, represented by Inspector of Police, (2011) 7 SCC 110

Enviro-legal Action Vs. Union of India and others, (2011) 8 Supreme Court Cases 161

Eradu vs. State of Hyderabad, AIR 1956 SC 316]

'G'

Ganeshlal vs. State of Maharashtra, (1992) 3 SCC 106

Gangamma and others Versus Shivalingaiah, (2005) 9 SCC 359

Gayatri Devi and others Versus Shashi Pal Singh, (2005) 5 SCC 527

Gian Singh and others versus Ram Krishan Kohli and others, AIR 2002 Jammu and Kashmir 82

Girija Prasad (dead) by LRs v. State of M.P., (2007) 3 SC (Cri) 475

Girja Prasad v. State of M.P., (2007) 7 SCC 625

Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722

Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai and another, AIR 1987 Supreme Court 1690,

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

'H'

Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343

Hari Dass Sharma vs. Vikas Sood and others, (2013) 5 SCC 243,

Hari Singh Gond v. State of M.P., (2008) 16 SCC 109

Harihar Prasad Singh and another Versus Deonarain Prasad and others, AIR 1956 SC 305

Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45

Harpal Singh vs. State of H.P. (Full Bench), AIR 1981 SC 361

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

Hindustand Petroleum Corporation Limited versus Dilbahar Singh (2014) 9 SCC 78

Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99

'I'

Indian Council for Enviro-Legal-Action vs. Union of India and others (2011) 8 SCC 161

Inspector of Police, Tamil Nadu vs. John David, (2011) 5 SCC 509

'J'

Jarnail Singh Vs. State of Punjab, 2011 Crl.L.J. 1738

Jasmer Singh vs. State of Haryana and others, (2015)4 SCC 458

Jitendra Singh Vs. Bhanu Kumari and others, (2009) 1 Supreme Court Cases 130

Joginder Singh and another vrs. Smt. Jogindero and ors., AIR 1996 SC 1654

Joginder Singh v. State of Himachal Pradesh, 2013(2) RCR (Criminal) 60

'K'

K. Shrinivas Rao Vs. D.A. Deepa, (2013) 5 SCC 226

K.T. Verrappa and others versus State of Karnataka and others, (2006) 9 SCC 406

Kailash versus Nanhku and others (2005) 4 SCC 480

Kalema Tumba Vs. State of Maharashtra and another, 1999 (8) SCC 257

Kalidindi Venkata Subbaraju and others Versus Chintalapati Subbaraju and others, AIR 1968 SC 947

Kavita versus Deepak and others, 2012 AIR SCW 4771

Khujji Vs. State of Madhya Pradesh, AIR 1991 SC 1853

Krishnan alias Ramasamy & others, vs. State of Tamil Nadu, AIR 2014 SC 2548

Krushnakant B. Parmar vs. Union of India and another, 2012 AIR SCW 1633

Kuldeep K. Mahato vs. State of Bihar, AIR 1998 SC 2694

Kuriya and another Vs. State of Rajasthan, 2012 (10) SCC 433

'L'

L.N. Aswathama & anr. vs. P. Prakash (2009) 13 SCC 229

Lachhman Singh (Deceased) Through legal representatives and others Versus Hazara Singh (Deceased) Through legal representatives and others, (2008) 5 SCC 444

Lakhi Baruah and others Versus Padma Kanta Kalita and others, 1996(8) 357

Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832

Lal Mandi v. State of W.B., (1995) 3 SCC 603

Lallan Singh and others Versus State of Bihar, 1969 (3) SC 765

Lanka Venkateswarlu (dead) by LRs. v. State of Andhra Pradesh and others, (2011) 4 SCC 363

Laxman Vs. Poonam Singh and others , 2004 (10) SCC 94

Leela Ram Vs. State of Haryana, 1999 (9) SCC 525

Lella Srinivasa Rao Vs. State of Andhra Pradesh, AIR 2004 SC 1720

'M'

M.B. Ramesh (Dead) By LRs. Versus K.M. Veeraje Urs (Dead) By LRs., (2013) 7 SCC 490

M.G. Agarwal vs. State of Maharashtra, AIR 1963 Supreme Court 200

M/s Craft Centre and ors. vs. The Koncherry Coir Factories, Cherthala, AIR 1991 Kerala 83

M/s Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee, AIR 1993 SC 2313

Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015) 4 Supreme Court Cases 544

Madamanchi Ramappa and another Versus Muthaluru Bojjappa, AIR 1963 SC 1633

Madan Gopal Kakkad Vs. Naval Dubey and another, (1992) 3 SCC 204

Madan Lal and another vs. State of H.P., 2003 (7) SCC 465

Madhu Versus State of Kerala, (2012) 2 SCC 399

Maharashtra Ekta Hawkers Union and another Vs. Municipal Corporation, Greater Mumbai and another, AIR 2004 SC 416

Mahasay Ganesh Prasad Ray and another Versus Narendra Nath Sen and others, AIR 1953 SC 431

Man Kaur (dead) by LRs. Vs. Hartar Singh Sangha, (2010) 10 SCC 512

Mandal Revenue Officer vs. Goundla Venkaiah and another (2010) 2 SCC 461

Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157

Manindra Land and Building Corporation Limited vs Bhutnath Banerjee and others, AIR 1964 SC 1336

Manjuri Bera versus Oriental Insurance Company Limited, AIR 2007 Supreme Court 1474

Mohammad Ali vs. The State of Uttar Pradesh and others, AIR 1958 Allahabad 681

Mohan Lal (deceased) vs. Mira Abdul Gaffar and another (1996) 1 SCC 639

Mohd. Alam vs. State (NCT of Delhi), 2007 Cri..L.J. 803 (Delhi)

Montford Brothers of St. Gabriel and Anr. versus United India Insurance & Anr. etc., 2014 AIR SCW 1051

Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43

Municipal Board, Manglaur Vs. Mahadeoji Maharaj, AIR 1965 SC 1147

Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38

Murugan @ Settu vs. State of Tamil Nadu, AIR 2011 SC 1691

'N'

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

N.T.C. (WBAB and O) Ltd. and another vs. Anjan K. Saha, AIR 2004 SC 4255

Nagappa Gulappa Amminabhavi vs. Fakirappa Bhimappa Hanchinal and others, AIR 1970 Mysore 73

Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274

Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674

Nalini Kumari vs. K.S. Bopaiah 2007 (1) KarLJ 342

Narayan alias Naran v. State of Rajasthan, (2007) 6 SCC 465

Narender Kumar Versus State (NCT of Delhi), (2012) 7 SCC 171

Nathu Singh Vs. State of MP, AIR 1973 SC 2783

National Commission for Women v. State of Delhi and another, (2010) 12 SCC 599

National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531

National Insurance Company Limited versus Anjana Shyam & others, n 2007 AIR SCW 5237

National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others, ILR-2015 Vol. XLV-II, Page 825

New India Assurance Co. Ltd. vs. Harshadbhai Amrutbhai Modhiya & Anr., 2006 AIR SCW 2352

Nika Ram vs. State of H.P., (1972) 2 SCC 80

Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee) Vs. State of Orissa and others (1993) 2 Supreme Court Cases 746

Ningamma & another versus United India Insurance Co. Ltd., n 2009 AIR SCW 4916,

'O'

Olga Tellis and others Vs. Bombay Municipal Corporation and others, AIR 1986 SC 180,

Om Parkash & ors. vs. Gian Chand & ors. 2014(2) Him.L.R. 1071

Omprakash vs. Radhacharan, (2009) 15 Supreme Court Cases 66

Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another (2010) 5 SCC, 459

Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Oriental Insurance Company Ltd. Vs. Pratibha Devi and others, ILR, 2014 (IX) HP 1, Page-705

Oyami Ayatu v. The State of Madhya Pradesh; and Bhikari v. The state of Uttar Pradesh, AIR 1966 SC 1

'P'

P. Periasami (dead) by L.Rs. vs. P. Periathambi and others (1995) 6 SCC 523

P.K. Ramachanderan v. State of Kerala, AIR 1998 SC, 2276

P.T. Munichikkanna Reddy and others vs. Revamma and others (2007) 6 SCC 59

Palitana Sugar Mills Private Limited and another vs Vilasiniben Ramachandran and others, (2007) 15 SCC 218

Paras Ram and others v. State of Punjab, (1981) 2 SCC 508

Parkash vs. State of Haryana, (2004)1 SCC 339

Parvinder Singh versus Renu Gautam and others (2004) 4 SCC 794

Pavitri Devi and another Versus Darbari Singh and others, (1993) 4 SCC 392

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505

Pratapbhai Hamirbhai Solanki vs. State of Gujarat, 2012 (10) JT 286

Prithu Chand and another Vs. State of HP, 2009 (11) SCC 588

Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196

Pyda Subbaramayya Chetty vs. The Premier Bank of India Limited, Branch Nellore and others, AIR 1959 Andhra Pradesh 96

'R'

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Rabindra Kumar Dey Vs. State of Orissa, AIR 1977 SC 170

Radha Bhallabh & others vs. State of U.P., 1995(4) JT 206

Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450

Radha Mohan Singh Vs. State of UP, AIR 2006 SC 951

Radha Pisharassiar Amma Versus State of Kerala, (2007) 13 SCC 410

Raghuvir vs. G.M. Haryana Roadways Hissar, (2014)10 SCC 301

Rajashtan State Road Transport Corporation and another versus Bal Mukund Bairwa (2), (2009) 4 SCC 299

Rajesh Patel vs. State of Jharkhand, (2013)3 SCC 791

Rajni Tandon Versus Dulal Ranjan Ghosh Dastidar and another, (2009) 14 SCC 782

Ram Govind Upadhyay Vs. Sudarshan Singh and others, (2002) 3 SCC 598

Ram Kaur @ Jaswinder Kaur v. Jagbir Singh @ Jabi and others (2010) 3 RCR (Cri.), 391 (DB)

Ramachandran versus R. Udayakumar & Ors., 2008 AIR SCW 5469

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Ramesh & others vs. State of Rajasthan, (2011) 3 SCC 685

Ramesh Harijan Vs. State of Uttar Pradesh, 2012 (5) SCC 777

Rameshbhai Mohanbhai Koli vs. State of Gujarat, (2011) 11 SCC 111

Rammi Vs. State of M.P, AIR 1999 SC 3544

Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172

Ravindra Shantram Savant v. State of Maharashtra, (2002) 5 SCC 604

Ravirala Laxmaiah vs. State of Andhra Pradesh, (2013) 9 SCC 283

Reeta Nag versus State of West Bengal & Ors., 2010 AIR SCW 476

Remco Industries Workers House Building Co-operative Society versus Lakshmeesha M. and others, AIR 2003 Supreme Court 3167

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

Riches versus Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)

Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434

'S'

S. Partap Singh v. State of Punjab, AIR 1964 SC 72

S.F. Engineer versus Metal Box India Limited and Another (2014) 6 SCC 780

S.R.Batra & Anr. versus Taruna Batra AIR 2007 SC 1118

Saheb Khan Versus Mohd. Yosufuddin and others, (2006) 4 SCC 476

Saheli, a Women's Resources Centre through Ms. Nalini Bhanot and others v. Commissioner of Police, Delhi and others, AIR 1990 SC 513

Sait Tarajee Khimchand and others Versus Yelamarti Satyam and others, AIR 1971 SC 1865

Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427

Samaj Parivartan Samudaya & Ors. versus State of Karnataka & Ors., 2012 AIR SCW 3323

Samantra Devi & others vs. Sanjeev Kumar & others, ILR 2014 (IX) HP 1, Page-861

Sanjay Chandra Vs. Central Bureau of Investigation, 2012 Cri.L.J 702

Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

Saradamani Kandappan Versus S. Rajalakshmi and others, (2011) 12 SCC 18

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Savita versus Bindar Singh & others, n 2014 AIR SCW 2053

Savita Samvedi (Ms) and another versus Union of India and others, (1996) 2 SCC 380

Secretary, Irrigation Department, Government of Orissa and others versus G.C.Roy (1992) 1 SCC 508,

Shakir Husain vs. Chandoo Lal and others, AIR 1931 Allahabad 567

Shalimar Chemical Works Limited Versus Surendra Oil and Dal Mills (Refineries) and others, (2010) 8 SCC 423

Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116

Shashidhar Purandhar Hedge and another Vs. State of Karnataka, 2004 (12) SCC 492

Sheikh Makbul v. Union of India and another, AIR 1960 Orissa 146

Sheo Nandan Paswan v. State of Bihar and others, AIR 1987 SC 877.

Sheralli Wali Mohammed v. The Statte of Maharashtra, (1973) 4 SCC 79

Sheralli Wali Mohammed vs. State of Maharashtra, AIR 1972 SC 2443

Shiv Lal and others Versus Chet Ram and others, 1970 (2) SCC 773

Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793

Shrikant Anandrao Bhosale v. State of Maharashtra, (2002) 7 SCC 748

Shyamal Kumar Roy Versus Sushil Kumar Agarwal, AIR 2007 SC 637

Sidhapal Kamala Yadav v. State of Maharashtra, (2009) 1 SCC 124

Sital Das Versus Sant Ram and others ,AIR 1954 SC 606

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

Sohrab and another Vs. The State of Madhya Pradesh, AIR 1972 SC 2020

South Eastern Coalfields Limited vs. State of M.P. and others (2003) 8 SCC 648

State (NCT of Delhi) v. Ahmed Jaan, 2008 Cri.L.J, 4355

State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru, (2005) 11 SCC 600

State of Andhra Pradesh and others Versus Star Bone Mill and Fertiliser Company, (2013) 9 SCC 319

State of Bihar and another versus J.A.C. Saldanna and others, AIR 1980 Supreme Court 326

State of Gujarat v. Kaliashchandra Badriprasad, 2001 (1) RCR (Criminal) 162

State of Gujarat Vs. Raghunath Vamanrao Baxi, AIR 1985 SC 1092

State of H.P. v. Gian Chand, (2001) 6 SCC 71; (1974) 3 SCC 299
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
State of Haryana and another vs. Jasbir Kaur and others, AIR 2003 Supreme Court 3696
State of HP Vs. Pawan Kumar, 2005 (4) SCC 350
State of Karnataka and others versus C. Lalitha, (2006) 2 SCC 747
State of Karnataka vs. Suvarnamma & another, (2015) 1 SCC 323
State of Madhya Pradesh v. Shmadulla, AIR 1961 SC 998
State of Maharashtra vs. Chander Prakash, (1990)1 SCC 550
State of Nagaland v. Lipok A.O. and others (2005) 3, SCC, 752
State of Punjab v. Baldev Singh, (1999) 6 SCC 172
State of Punjab vs. Gurmit Singh and others, (1996)2 SCC 384
State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95
State of Rajasthan & Anr. vs. Mohammed Ayub Naz., 2006 AIR SCW 197
State of Rajasthan v. Bhawani, (2003) 7 SCC 291
State of Rajasthan Versus Babu Meena, (2013) 4 SCC 206
State of Rajasthan Vs. Bhawani, AIR 2003 SC 4230
State of Rajasthan vs. N.K. the accused, (2000)5 SCC 30
State of Rajasthan Vs. Om Parkash, AIR 2007 SC 2257
State of Tamilnadu v. N. Suresh Ranjan and others, 2014 (1) RCR (Cr.) 572.
State of U.P. v. Krishna Gopal and another, (1988) 4 SCC 302
State of U.P. vs. Chotte Lal, (2011)2 SCC 550
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
State of UP Vs. M.K.Anthony, AIR 1985 SC 48
State of UP Vs. Santosh Kumar and others, 2009 (9) SCC 626
State Vs. Saravanan and another, AIR 2009 SC 152
Subhash Chand Sharma Vs. Smt. Shakuntla Devi, ILR, HP VOL.(XLV)-I, 2015, Page, 336
Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249
Sudhakaran v. State of Kerala, (2010) 10 SCC 582
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Surender Mishra v. State of Jharkhand, (2011) 11 SCC 495
Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225
Syed Jalaluddin Hasan Quadri v. M/s. Tarapharmacy, AIR 1966 A.P. 136
Syed Jameel Abnbas and others vs. Mohd. Yamin alias Kallu Khan, (2004) 4 SCC 781

'T'

T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219
Tahir Vs. State of Delhi, AIR 1996 (3) SCC 338
Thakorlal D. Vadgama vs. State of Gujarat, AIR 1973 SC 2313
The Bombay Union of Journalists and others vs. The Hindu, Bombay and another, AIR 1963 SC 318
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Tika Ram Vs. State of MP, 2007 15 SCC 760
Tilak Chand Kureel Versus Bhim Raj, 1969(3) SCC 367

Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681

'U'

U.P. Avas Evam Vikas Parishad and another vs. Friends Coop. Housing society Limited and another, 1995 (Supp) 3 SCC 456

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

Union of India and others Versus A. Nagamalleshwar Rao, AIR 1998 SC 111

United India Insurance Co. Ltd. versus N. Appi Reddy and others, 2013 ACJ, 545

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

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

'V'

V.M. Salgaocar and Bros. vs. Board of trustees of Port of Mormugao, (2005) 4 SCC 613

Vidhyadhar Vs. Mankikrao, AIR 1999 Supreme Court 1441

Vidyadhar vs. Mohan, ILR 1978 HP 174

Vijayee Singh and others v. State of H.P., (1990) 3 SCC 190

Vinay Tyagi versus Irshad Ali alias Deepak and Ors., 2013 AIR SCW 220.

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Vinod Kumar v. State of Kerala, (2014) 5 SCC 678

Vishwanath Bapurao Sabale Versus Shalinibai Nagappa Sabale and others, (2009) 12 SCC 101

'Y'

Yoginder Lal Sharma versus Municipal Corporation, Shimla and others, 1983 (12) ILR 457

Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, 2011 (6) SCC 312

Yusufalli Esmail Nagree v. The State of Maharashtra, AIR 1968 SC 147

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

Jeevan Rana. ...Appellant.

Versus

State of Himachal Pradesh. ...Respondent.

Cr.A. No. 324/2012
Decided on: 1.5.2015

Indian Penal Code, 1860- Section 84- Accused contended that he was insane- reliance was placed upon the testimony of DW-1 who deposed that accused was suffering from bipolar affective disorder and he had impaired judgment as he was suffering from psychosis- held, that accused has to prove that he was suffering from legal insanity- the burden is upon him to establish this fact- accused ran away from the spot, which shows that he knew what he was doing was wrong- PW-1 had not noticed any abnormality in the behavior of the accused- hence, his defence under Section 84 is not proved. (Para- 22 to 29)

Cases referred:
Sheralli Wali Mohammed vs. State of Maharashtra, AIR 1972 SC 2443
Nalini Kumari vs. K.S. Bopaiah 2007 (1) KarLJ 342
Sudhakaran vs. State of Kerala 2010 (10) SCC 582
Hari Singh v. State of Madhya Pradesh 2008 (16) SCC 109
Elavarasan V. State, AIR 2011 SC 2816

For the appellant: Mr. Dibender Ghosh, Advocate.
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge (oral)**.**

This appeal is instituted against the judgment dated 29.9.2011 rendered by the Additional Sessions Judge, Mandi in Sessions Trial No. 20 of 2010, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under section 376 and 452 of the Indian Penal Code, has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 10,000/- and in default of payment of fine, he was further directed to undergo simple imprisonment for six months for the commission of offence punishable under section 376 (2) (f) of the Indian Penal Code. He was further sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs. 5,000/- and in default of payment of fine to further undergo simple imprisonment for three months for the commission of offence punishable under section 451 of the Indian Penal Code. Both the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that the grand father of the prosecutrix filed an application before the police on 5.4.2010 stating therein that he had gone towards his fields at about 4.30 P.M. His wife was present at home. The prosecutrix was present in the house with her brother. She was watching T.V. The wife of the complainant and his grandson were in the upper storey. Accused came to the room of prosecutrix and tried to rape her. She shouted for help. However, her noise could not be

heard in the din of the T.V. When the wife of the complainant opened the door, accused ran away. He was identified by the wife of the complainant as Totu alias Jiwan Ram. The incident was narrated to the complainant. He made inquiry from the prosecutrix. She revealed the incident. FIR Ext. PW-15/A was registered. The prosecutrix was medically examined. Accused was arrested. He was also examined medically by Dr. Aman Rana. He issued MLC to PW-1/A. Site Plan Ext. PW-15/A was prepared. Photographs were also taken. Bed sheet was also recovered. Case property was sent to F.S.L., Junga on 12.4.2010 vide RC No. 79/10. The result of the analysis is Ext. PW-15/D. 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 15 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He admitted that his underwear, pants and shirt were preserved by the Medical Officer. He also produced DW-1 Dr. Savinder Singh. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Dibender Ghosh, 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 dated 29.9.2011, 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. Aman Rana has medically examined the accused. He issued MLC Ext. PW-1/A. According to him, smegma was absent. He noticed small abrasion on left side of glans penis. In his cross-examination, he deposed that accused was mentally normal as per his opinion. He has not noticed any abrasion or scratch on the person of the accused except one mentioned by him in the MLC.

8. PW-2 Dr. Sarla Chand has examined the prosecutrix. She has issued MLC Ext. PW-2/A. According to her, hymen was ruptured, inflamed and swelling was present. According to her, the child was sexually exposed within 24 hours of examination.

9. Prosecutrix has appeared as PW-3. In her examination-in-chief, she has deposed that she was present in the room watching T.V. on a bed. Her grand-mother was present in the different room. Her younger brother was sleeping in the different room. The accused did a bad act (Ganda Kam). She cried and called her grand mother. She has denied the suggestion that accused behaved like a mentally unsound person and roams in the area. She has denied the suggestion that her grand mother had told her to name the accused. She has denied that no bad act was done with her.

10. PW-4 Prakash Chand is the grand father of the prosecutrix. According to him, his wife came to fields at 5.20 P.M. She informed that the prosecutrix was raped. He went to home. The prosecutrix was crying. She told him that one boy came to her room and raped her. He checked her and found that blood was oozing out of her private parts. He informed his son and told about the incident. Thereafter, he reported the matter vide application Ex.PW-4/A. In his cross-examination, he has deposed that girl was lying on the bed and crying when he reached the home.

11. PW-5 Yashoda Devi is the grand mother of the prosecutrix. She told the prosecutrix to go and watch T.V. in the ground floor. When she was returning from the room, she heard some noise of foot steps. She looked from the window but could not find any person. When she saw again, she noticed the accused. He was having his pant and

underwear upto the knees. When he looked back, she identified him. The accused was trying to put on the clothes. She went down and found that the prosecutrix was lying on the bed. She was crying. She found that cloths of prosecutrix were pulled up. There was blood on the bed sheet and the blood was coming out from the private part of the prosecutrix. She told her that one boy came, who laid upon her. She shouted. Her husband was in the fields. In her cross-examination, she has deposed that she saw the accused running on the passage towards the back side of the house.

12. PW-6 Vijay Kumar has deposed that his father told him that prosecutrix was raped. He checked and found that blood was oozing out from the private part of the prosecutrix. He, his father and his daughter went to Police Station, Sarkaghat. FIR was registered.

13. PW-7 Kishan Chand has deposed that accused came to his house at about 4/4.30 P.M. He took tea and thereafter he left. His wife gave him Rs. 15/-.

14. Statements of PW-8 Prem Singh and PW-9 Rakesh Kumar are formal in nature.

15. PW-10 HHC Shyam Lal has deposed that he brought the prosecutrix to Zonal Hospital, Mandi alongwith her grandfather on 6.4.2010.

16. Statement of PW-11 Rakesh Kumar is formal in nature.

17. PW-12 Dharam Singh has deposed that Constable Rakesh Kumar deposited the case property with him on 5.4.2010. He made the entry at Sr. No. 1316/10. He deposited the case property in Malkhana. SHO Ranjit Singh handed over to him one parcel on 6.4.2010. He made entry at Sr. No. 1317/10. He deposited the same in Malkhana. HHC Shyam Lal deposited 3 parcels with him on the same day. He deposited the same in Malkhana and made entry at Sr. No. 1318/10. He handed over all these articles to HHC Roop Singh with the direction to carry the same to F.S.L., Junga vide RC No. 70/10.

18. PW-13 HHC Roop Singh has carried out the case property to F.S.L., Junga on 12.4.2010 in safe condition.

19. PW-14 ASI Vijay Kumar moved an application Ext. PW-14/B for examination of the accused.

20. PW-15 has deposed that the application was filed on the basis of which FIR Ext. PW-15/A was registered. He prepared the site plan. The photographs were taken. Bed Sheet was recovered. Statements of the witnesses were recorded. Parcels were sent to F.S.L., Junga. Report of F.S.L., Junga Ext. PW-15/B was received.

21. According to the statement of PW-3 prosecutrix, she was watching T.V. in her room. Accused came and performed bad act 'ganda kaam' with her. Her statement inspires confidence though minor. PW-4 Prakash Chand, and PW-5 Yadhoda Devi grandfather and grandmother of the prosecutrix have corroborated the statement of PW-3. PW-4 Prakash Chand when informed by PW-5 Yashoda Devi has noticed the blood oozing from the private part of the prosecutrix. He has moved an application Ext. PW-4/A, on the basis of which FIR was registered. PW-5 Yashoda Devi has identified the accused and noticed the accused putting up his clothes. She also noticed blood on the bed sheet and blood oozing out from the private parts of the prosecutrix. PW-2 Dr. Sarla Chand has opined definitely that hymen was ruptured, inflamed and swelling was present and the prosecutrix was sexually exposed within 24 hours of examination. PW-1 Aman Rana has examined the

accused and issued MLC Ext. PW-1/A. He has noticed abrasion on left side of glans penis. The prosecutrix was born on 4.7.2004 as per Ext. PW-9/A.

22. Mr. Dibender Ghosh has vehemently argued that his client was insane. He has relied upon the statement of DW-1 Dr. Savinder Singh. DW-1 Dr. Savinder Singh has deposed that he has treated the accused. The accused had come to him on 27.7.2009. He was registered on OPD basis. He was diagnosed as suffering from bipolar affective disorder. He prescribed medicines. Patient came again on 28.8.2009. He was admitted in the hospital on the same day. He was put on suitable treatment. He was given four dosages of electric shock. He was discharged on 11.9.2009. Thereafter, patient never came. According to him, patient looked like a normal person. The patient had impaired judgment because he was suffering from psychosis. In his cross-examination, he has admitted that the pages of the indoor file were different. He has not noted pages. Volunteered that pages were not numbered in any file. He did not know the accused personally. He has also admitted that the entries were in different pen inside the red circle. He has also admitted that patient could carry out normal pursuits.

23. We have also gone through Ex.DW-1/A. These are loose papers un-numbered. The Court while taking up the plea of insanity has to see the legal insanity and not medical insanity. It is for the accused to prove that he was suffering from insanity as per section 105 of the Indian Evidence Act. The accused has not led any tangible evidence to prove that he was suffering from insanity.

24. Their Lordships of the Hon'ble Supreme Court in ***Sheralli Wali Mohammed*** vs. ***State of Maharashtra***, AIR 1972 SC 2443 have held that the law presumes every person of the age of discretion to be sane unless the contrary is proved and it would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. Their Lordships have held as under:

> "12. To establish that the acts done are not offences under S. 84 of the Indian Penal Code, it must be proved clearly that, at the time of the commission of the acts, the appellant, by reason of unsoundness of mind, was incapable of either knowing the nature of the act or that the acts were either morally wrong or contrary to law. The question to be asked is, is there evidence to show that, at the time of the commission of the offence, he was labouring under any such incapacity? On this question, the state of his mind before and after the commission of the offence is relevant. The general burden of proof that an accused person is in a sound state of mind is upon the prosecution. In Dahyabhai Chhaganbhai Thakkar v. The State of Gujarat, (1964) 7 SCR 361 at p. 367 = (AIR 1964 SC 1563), Subba Rao, J., as he then was, speaking for the Court said
>
> > "(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the

prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.''

13. With this in mind, let us consider the evidence to see whether the accused was in an unsound state of mind at the time of the commission of the acts attributed to him, P. W. 3, one of the brothers of the accused stated that the accused used to become excited and uncontrollable, that sometimes he behaved like a mad man, and that he was treated by Dr. Deshpande and Dr. Malville. P. W. 4, Hyderali, also a brother of the accused, has stated that the accused used to suffer from temporary insanity and that he was treated by Dr. Deshpande and Dr. Malville. The evidence of these two witnesses on the question of the insanity of the accused did not appeal to the trial Court and the Court did not, we think rightly, place any reliance upon it. No attempt was made by the defence to examine the two doctors. There was, therefore, no evidence to show that, at the time of the commission of the acts, the accused was not in a sound state of mind. On the other hand, P. W. 8, Rustom Mirja, has stated in his deposition that the accused has been working with him as an additional motor driver for the last 8 or 10 years and that his work and conduct were normal. He also stated that the accused worked with him on March 6, 1968, till 4 P.M. P. W. 16, Dr. Kaloorkar, who examined the accused at 7.20 A.M. on the day of the occurrence, has stated in his deposition that he found that the accused was in normal condition. His evidence has not been challenged in cross-examination.

We think that not only is there no evidence to show that the accused was insane at the time of the commission of the acts attributed to him, but that there is nothing to indicate that he had not the necessary mens rea when he committed the offence. The law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. The mere fact that no motive has been proved why the accused murdered his wife and child or, the fact that he made no attempt to run away when the door was broke open, would not indicate that he was insane or, that he did not have the necessary mens rea for the commission of the offence. We see no reason to interfere with the concurrent findings on this point either."

25. The nature and symptom of the mis bipolar disease were described by the Hon'ble High Court of Karnataka in ***Nalini Kumari*** vs. ***K.S. Bopaiah*** 2007 (1) KarLJ 342. The Court has observed as under:

"19. Now let us discuss what is mis Bipolar disease and whether it is curable/controllable and treatable disease?

20. In National Institute of Mental Health Publication No. 3679, it is stated:

Introduction:

Bipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in a person's mood, energy, and ability to function. Different from the normal ups and downs that everyone goes through, the symptoms of bipolar disorder are severe. They can result in damaged relationships, poor job or school performance, and even suicide.

But bipolar disorder can be treated, and people with this illness can lead full and productive lives.

(underlining is by us) What is the Course of Bipolar Disorder?

Episodes of mania and depression typically recur across the life span. Between episodes, most people with bipolar disorder are free of symptoms, but as many as one-third of people have some residual symptoms. A small percentage of people experience chronic unremitting symptoms despite treatment.

The classic form of the illness, which involves recurrent episodes of mania and depression, is called bipolar I disorder. Some people, however, never develop severe mania but instead experience milder episodes of hypomania that alternate with depression; this form of the illness is called bipolar II disorder. When four or more episodes of illness occur within a 12-month period, a person is said to have rapid-cycling bipolar disorder. Some people experience multiple episodes within a single week, or even within a single day. Rapid cycling tends to develop later in the course of illness and is more common among women than among men.

People with bipolar disorder can lead healthy and productive lives when the illness is effectively treated (see below - "How is Bipolar Disorder Treated"). Without treatment, however, the natural course of bipolar disorder tends to worsen. Over time a person may suffer more frequent (more rapid-cycling) and more severe manic and depressive episodes than those experienced when the illness first appeared. But in most cases, proper treatment can help reduce the frequency and severity of episodes and can help people with bipolar disorder maintain good quality of life.

21. In Health & Medical Information in Psychiatry (Australia's Central Health & Medical Information Resource), it is stated:

Bipolar Affective Disorder (BPAD) is a psychological disease.

This condition is characterised by alternating syndromes of depression and mania. Depression is a psychiatric syndrome characterised by a subjective feeling of depression, loss of enjoyment in all activities and overwhelming feelings of guilt and worthlessness.

Mania represents the opposite end of the spectrum characterised by erratic and disinhibiter, behaviour, poor tolerance or frustration, over-extension of responsibility and vegetative signs. These include raised libido, weight loss with anorexia, decreased need for sleep and excessive energy.

Incidence:

The prevalence is 1% worldwide. It is equally common in men and women. There is no variation between socioeconomic class or race. Page 0134 The average age of onset is 21. The increased frequency found in divorced people is probably a consequence of the condition.

Predisposing Factors:

The most significant risk factor for the development of BPAD is a family history of either BPAD or depression.

Natural History:

The condition of bipolar usually begins between the ages of 30 to 40 years old. There are two types of bipolar affective disorder - Type I and type II. In type I BPAD, patients will meet the criteria for a full manic episode but may never experience an episode of major depression, type II BPAD, the patient will fulfil the criteria for a major depressive episode but will never experience a full manic episode. They may experience a less form of mania called hypomania.

The patient in an episode of major depression is at increased risk of self-harm and suicidal behaviour and must be monitored closely for risk factors. The duration of depressive episode varies but usually lasts for approximately six months if left untreated. In the majority of cases, the patient experiencing an episode of mania will generally refrain from self-harm behaviour. They will, however, place their finances and social life at risk by indulging in wreckless behaviour. These episodes again last for around 3-6 months if left untreated by medication. The patient with type I BPAD will typically experience 10 episodes of mania throughout their lives.

Prognosis:

The average duration of a manic episode is 3-6 months with 95% making a full recovery in time. Recurrence is the rule is bipolar disorders, with up to 90% relapsing within 10 years. In terms of overall prognosis, 15% completely recover from the illness. 50-60% partially recover and one third will retain chronic symptoms resulting in social and occupational dysfunction.

Investigation:

Patients should be screened for thyroid function and can produce hypothyroidism. During treatment, lithium levels should be checked for 3 months, along with regular thyroid and renal function rents.

Treatment Overview:

The primary treatment for BPAD involves long-term daily medications. The most commonly used drug in the initial management of BPAD is lithium. The drug takes about 2 weeks to take effect and is effective in stabilising the patient's mood. Other drugs such as valproate and tegretol are more commonly used in the long term to help prevent the recurrence of mania and depression in patients with BPAD. They may also be combined with lithium for greater effect, if one agent proves inadequate to control the symptoms.

Psychotherapy is also helpful in the management of BPAD Group therapy, family therapy and individual psychotherapy have been shown to improve the outcome of this condition when combined with the regular use of medications.

22. In Wikipedia, the free encyclopedia, it is stated:

Bipolar disorder (previously known as Manic Depression) is a psychiatric diagnostic category describing a class of mood disorders in which the person experiences clinical depression and/or mania, hypomania, and/or mixed stated. The disorder can cause great distress among those afflicted and those living with them. Bipolar disorder can be a disabling condition, with a higher-than-average risk of death through suicide.

The difference between bipolar disorder and unipoloar disorder (also called major depression) is that bipolar disorder involves both elevated and

depressive mood states. The duration and intensity of mood states varies widely among people with the illness. Fluctuating from one mood state to the next is called "cycling". Mood swings can cause impairment or improved functioning depending on their direction (up or down) and severity (mild to severe). There can be change in one's energy level, sleep pattern, activity level, social rhythms and cognitive functioning. Some people may have difficulty functioning during these times.

Domains of the bipolar spectrum:

Bipolar disorder is often a life-long condition that must be carefully managed. Because there is so much variation in severity and nature of mood problems, it is increasingly being called bipolar spectrum disorder. The spectrum concept refers to subtypes of bipolar disorder or a continuant of mood problems, that can include sub-syndromal (below the symptom threshold for categorical diagnosis) symptoms. Nassir Ghaemi, M.D., has also contributed to the development of a bipolar spectrum questionnaire. The full bipolar spectrum includes all states or phases of the bipolar disorders.

Kraepelin's (1921) construct is useful for primary care clinicians, patients and families. It describes variations in two directions (mania and depression) and of three aspects: mood, activity and thinking.

Bipolar depression:

According to the Mayo Clinic, in the depressive phase, signs and symptoms include: persistent feelings of sadness, anxiety, guilt, anger, isolation and/or hopelessness, disturbances in sleep and appetite, fatigue and loss of interest in daily activities, problems concentrating, irritability, chronic pain without a known cause, recurring thoughts of suicide.

A 2003 study by Robert Hirschfeld, M.D., of the University of Texas Medical Branch, Galveston found bipolar patients fared worse in their depressions than unipolar patients. In terms of disability, lost years of productivity, and potential for suicide, bipolar depression, which is different (in terms of treatment), from unipolar depression, is now recognized as the most insidious aspect of the illness.

Severe depression may be accompanied by symptoms of psychosis. These symptoms include hallucinations (hearing, seeing or otherwise sensing the presence of stimuli that are not there) and delusions (false personal beliefs that are not subject to reason or contradictory evidence and are not explained by a person's cultural concepts). They may also suffer Page 0136 from paranoid thoughts of being persecuted or monitored by some powerful entity such as the government or a hostile force or become paranoid that they'll be abandoned and left by those close to them. Intense and unusual religious beliefs may also be present, such as patients' strong insistence that they have a God-given role to play in the world, a great and historic mission to accomplish, or even that they possess supernatural powers. Delusions in a depression may be far more distressing, sometimes taking the form of intense guilt for supposed wrongs that the patient believes he or she has inflicted on your others. There are a number of conflicting theories on what can be considered the cause of bipolar depression, and what may be a symptom, none of which are yet widely accepted as correct.

It is crucially important to understand that there is no blood test or brain scan that expresses distinctly that this disorder exists.

Diagnosis:

Diagnostic criteria:

Flux is the fundamental nature of bipolar disorder. Both within and between individuals with the illness, energy, mood, thought, sleep, and activity are among the continually changing biological markers of the disorder. The diagnostic subtypes of bipolar disorder are thus static descriptions - snapshots, perhaps - of an illness in continual change. Individuals may stay in one subtype, or change into another, over the course of their illness. The DSMV, to be published in 2011, will likely include further and more accurate sub-typing (Akiskal and Ghaemi, 2006).

There are currently four types of bipolar illness. The DSM-IV-TR details four categories of bipolar disorder, Bipolar I, Bipolar II, Cyclothymia, and Bipolar Disorder NOS (Not Otherwise Specified).

According to the DSM-IV-TR, a diagnosis of Bipolar I disorder requires one or more manic or mixed episodes. A depressive episode is not required for a diagnosis of BP I disorder, although the overwhelming majority of people with BP I suffer from them as well.

Bipolar II, the more common but by no means less severe type of the disorder, is usually characterized by one or more episodes of hypomania and one or more severe depressions. A diagnosis of bipolar II disorder requires only one hypomanic episode. This stipulation is used mainly to differentiate it from unipolar depression. Although a patient may be depressed, it is very important to find out from the patient or the patient's family or friends if hypomania has ever been present, using careful questioning. This, again, avoids the antidepressant problem. Recent screening tools such as the Hypomanic Check List Questionnaire (HCL-32) have been developed to assist the quite often difficult detection of Bipolar II disorders.

A diagnosis of Cyclothymic Disorder requires the presence of numerous hypomanic episodes, intermingled with depressive episodes that do not meet full criteria for major depressive episodes. The main idea here is that there is a low-grade cycling of mood which appears to the observer as a personality trait, but interferes with functioning.

Page 0137 If an individual clearly seems to be suffering from some type of bipolar disorder but does not meet the criteria for one of the subtypes above, he or she receives a diagnosis of Bipolar Disorder NOS (Not Otherwise Specified).

Misdiagnosis:

There are many problems with symptom accuracy, relevance, and reliability in making a diagnosis of bipolar disorder using the DSM-IV-TR. These problems all too often lead to misdiagnosis.

Infact, University of California at San Diego's Hagop Akiskal M.D., believes that the way the bipolar disorders in the DSM are conceptualized and presented routinely lead many primary care doctors and mental health professionals to misdiagnose bipolar patients with unipolar depression, when

a careful history from patient, family, and/or friends would yield the correct diagnosis.

If misdiagnosed with depression, patients are usually prescribed antidepressants, and the person with bipolar depression can become agitated, angry, hostile, suicidal, and even homicidal (these are all symptoms of hypomania, mania, and mixed states).

Treatment:

Currently, bipolar disorder cannot be cured, though psychiatrists and psychologists believe that it can be managed.

The emphasis of treatment is on effective management of the long-term course of the illness, which usually involves treatment of emergent symptoms. Treatment methods include pharmacological and psychotherapeutic techniques. Leading bipolar specialist, Gillian Townley, has researched the effect of the Ferret Rabbit process.

Prognosis and the goals of long-term treatment:

A good prognosis results from good treatment which, in turn, results, from an accurate diagnosis. Because bipolar disorder continues to have a high rate of both under-diagnosis and misdiagnosis, it is often difficult for individuals with the illness to receive timely and competent treatment.

Bipolar disorder is a severely disabling medical condition. In fact, it is the 6th leading cause of disability in the world, according to the World Health Organization. However, with appropriate treatment, many individuals with bipolar disorder can live full and satisfying lives. Persons with bipolar disorder are likely to have periods of normal or near normal functioning between episodes.

Ultimately one's prognosis depends on many factors, which are, infact, under the individual's control; the right medicines; the right does of each; a very informed patient; a good working relationship with a competent medical doctor; a competent, supportive and warm therapist; a supportive family or significant other; and a balanced lifestyle including a regulated stress level, regular exercise and regular sleep and wake times.

There are obviously other factors that lead to a good prognosis, as well, such as being very aware of small changes in one's energy, mood, sleep Page 0138 and eating behaviors, as well as having a plan in conjunction with one's doctor for how to manage subtle changes that might indicate the beginning of a mood swing. Some people find that keeping a log of their moods can help them in predicting changes.

The goals of long-term optimal treatment are to help the individual achieve the highest level of functioning while avoiding lapse.

23. The following is a quote from a successfully treated individual with bipolar disorder (from the U.S. National Institute of Mental Health):

Manic-depression distorts moods and thoughts, incites dreadful behaviors, destroys the basis of rational thought, and too often erodes the desire and will to live. It is an illness which is biological yet looks and feels psychological, one that is unique in conferring advantage and pleasure, yet one that brings in its wake almost unendurable suffering and, not infrequently, suicide. I am fortunate that I have not died from my illness,

fortunate in having received the best medical care available, and fortunate of having the friends, colleagues, and family that I do.

Bipolar disorder and creativity Bipolar disorder is found in disproportionate numbers in people with creative talent such as artists, musicians, authors, performers, poets and scientists, and some credit the condition for their creativity. Many famous historical figures gifted with creative talents commonly are believed to have been affected by bipolar disorder, and were "diagnosed" after their deaths based on letters, correspondence, contemporaneous accounts, or other material.

It has been speculated that the mechanisms, which cause the disorder may also spur creativity.

Kay Redfield Jamison, who herself has bipolar disorder and is considered a leading expert on the disease, has written several books that explore this idea, including Touched with Fire. Research indicates that while mania may contribute to creativity (See Andreasen, 1988), hypomanic phases experienced in bipolar I, II, and in cyclothymia appear to have the greatest contribution in creativity (See Richarges, 1988). This is perhaps due to the distress and impairment associated with full-blown mania, which may be preceded by symptoms of hypomania (i.e. increased energy, confidence, activity), but soon spirals into a state much too debilitating to allow creative endeavour.

Hypomanic phases of the illness allow for heightened concentration on activities, and the manic phases allow for around-the-clock work with minimal need for sleep.

Another theory is that the rapid thinking associated with mania generates a higher volume of ideas and as well associations drawn between a wide range of seemingly unrelated information.

The increased energy also allows for grater volume of production."

26. Their Lordships of the Hon'ble Supreme Court in ***Sudhakaran*** vs. ***State of Kerala*** 2010 (10) SCC 582 have distinguished the legal insanity with medical insanity as under:

"26. The defence of insanity has been well known in the English Legal System for many centuries. In the earlier times, it was usually advanced as a justification for seeking pardon. Over a period of time, it was used as a complete defence to criminal liability in offences involving mens rea. It is also accepted that insanity in medical terms is distinguishable from legal insanity. In most cases, in India, the defence of insanity seems to be pleaded where the offender is said to be suffering from the disease of Schizophrenia.

27. The plea taken in the present case was also that the appellant was suffering from "paranoid schizophrenia". The term has been defined in Modi's Medical Jurisprudence and Toxicology1 as follows:

"Paranoia is now regarded as a mild form of paranoid schizophrenia. It occurs more in males than in females. The main characteristic of this illness is a well-elaborated delusional system in a personality that is otherwise well preserved. The delusions are of persecutory type. The true nature of this illness may go unrecognized for a long time because the personality is well preserved, and some of these paranoiacs may pass off as a social reformers or founders of queer

> pseudo- religious sects. The classical picture is rare and generally takes a chronic course.
>
> Paranoid Schizophrenia, in the vast majority of case, starts in the fourth decade and develops insidiously. Suspiciousness is the characteristic symptom of the early stage. Ideas of reference occur, which gradually develop into delusions of persecution. Auditory hallucinations follow which in the beginning, start as sound or noises in the ears, but later change into abuses or insults. Delusions are at first indefinite, but gradually they become fixed and definite, to lead the patient to believe that he is persecuted by some unknown person or 1 [23rd Ed. Page 1077] some superhuman agency. He believes that his food is being poisoned, some noxious gases are blown into his room and people are plotting against him to ruin him. Disturbances of general sensation give rise to hallucinations which are attributed to the effects of hypnotism, electricity, wireless telegraphy or atomic agencies. The patient gets very irritated and excited owing to these painful and disagreeable hallucinations and delusions. "
>
> 28. The medical profession would undoubtedly treat the appellant herein as a mentally sick person. However, for the purposes of claiming the benefit of the defence of insanity in law, the appellant would have to prove that his cognitive faculties were so impaired, at the time when the crime was committed, as not to know the nature of the act.
>
> 29. Section 84 of the Indian Penal Code recognizes the defence of insanity. It is defined as under:-
>
> > "Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."
> >
> > 30. A bare perusal of the aforesaid section would show that in order to succeed, the appellant would have to prove that by reason of unsoundness of mind, he was incapable of knowing the nature of the act committed by him. In the alternate case, he would have to prove that he was incapable of knowing that he was doing what is either wrong or contrary to law."

27. Their Lordships of the Hon'ble Supreme Court in ***Hari Singh*** v. ***State of Madhya Pradesh*** 2008 (16) SCC 109 have held that section 84 of the Indian Penal Code lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of unsoundness of mind in the Indian Penal Code. Courts have, however, mainly treated this expression as equivalent to insanity. Their Lordships have further held that every person, who is mentally diseased, is not *ipso facto* exempted from criminal responsibility. Their Lordships have held as under:

> "5. Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There, is no definition of "unsoundness of mind" in the IPC. Courts have, however, mainly treated this expression as equivalent to insanity. But the term "insanity" itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A Court is concerned with legal insanity, and not with medical

insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Indian Evidence Act, 1972 (in short the `Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See Dahyabhai v. State of Gujarat AIR 1964 SC 1563). In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations have to be borne in mind. Mayne summarises them as follows:

> "Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment ; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detections whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case : Would the prisoner have committed the act if there had been a policeman at his elbow ? It is to be remembered that these tests are good for cases in which previous insanity is more or less established. These tests are not always reliable where there is, what Mayne calls, "inferential insanity".

6. Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

7. There are four kinds of persons who may be said to be non compos mentis (not of sound mind), i.e., (1) an idiot; (2) one made non compos by illness (3) a lunatic or a mad man and (4.) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without

lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and Misdemeanors, 12th Edn. Vol., p.105; 1 Hala's Pleas of the Grown 34). A person made non compos mentis by illness is excused in criminal cases from such acts as are- committed while under the influence of his disorder, (See 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

8. Section 84 embodies the fundamental maxim of criminal law, i.e., actus non reum facit nisi mens sit rea" (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (furios is nulla voluntas est).

9. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of: exemption from criminal responsibility. Stephen in `History of the Criminal Law of England, Vo. II, page 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in Sherall Walli Mohammed v. State of Maharashtra: (1972 Cr.LJ 1523 (SC)), held that the mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated Naughton rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in M Naughton's case (1843) 4 St. Tr. (NS) 847. Behaviour, antecedent, attendant and

subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or prefect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act ; but merely a cessation of the violent symptoms of the disorder is not sufficient.

10. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."

28. Their Lordships of the Hon'ble Supreme Court in ***Elavarasan*** V. ***State***, AIR 2011 SC 2816 have held that while determining whether the accused is entitled to the benefit of Section 84 I.P.C. the Court has to consider the circumstances that proceeded, attended or followed the crime but it is equally true that such circumstances must be established by credible evidence. Their Lordships have held as under:

"21. From the deposition of the above two witnesses who happen to be the close family members of the appellant it is not possible to infer that the appellant was of unsound mind at the time of the incident or at any time before that. The fact that the appellant was working as a government servant and was posted as a Watchman with no history of any complaint as to his mental health from anyone supervising his duties, is significant. Equally important is the fact that his spouse Smt. Dhanalakshim who was living with him under the same roof also did not suggest any ailment afflicting the appellant except sleeplessness which was diagnosed by the doctor to be the effect of excessive drinking. The deposition of PW3, Valli that her son was getting treatment for mental disorder is also much too vague and deficient for this Court to record a finding of unsoundness of mind especially when the witness had turned hostile at the trial despite multiple injuries sustained by her which she tried to attribute to a fall inside her house. The statement of the witness that her son was getting treatment for some mental disorder cannot in the circumstances be accepted on its face value, to rest an order of acquittal in favour of the appellant on the basis thereof. It is obvious that the mother has switched sides to save her son from the consequences flowing from his criminal act.

25. What is important is that the depositions of the two doctors examined as court witnesses during the trial deal with the mental health condition of the appellant at the time of the examination by the doctors and

not the commission of the offence which is the relevant point of time for claiming the benefit of Section 84 I.P.C. The medical opinion available on record simply deals with the question whether the appellant is suffering from any disease, mental or otherwise that could prevent him from making his defence at the trial. It is true that while determining whether the accused is entitled to the benefit of Section 84 I.P.C. the Court has to consider the circumstances that proceeded, attended or followed the crime but it is equally true that such circumstances must be established by credible evidence. No such evidence has been led in this case. On the contrary expert evidence comprising the deposition and certificates of Dr. Chandrashekhar of JIPMER unequivocally establish that the appellant did not suffer from any medical symptoms that could interfere with his capability of making his defence. There is no evidence suggesting any mental derangement of the appellant at the time of the commission of the crime for neither the wife nor even his mother have in so many words suggested any unsoundness of mind leave alone a mental debility that would prevent him from understanding the nature and consequences of his actions. The doctor, who is alleged to have treated him for insomnia, has also not been examined nor has anyone familiar with the state of his mental health stepped into the witness box to support the plea of insanity. There is no gainsaying that insanity is a medical condition that cannot for long be concealed from friends and relatives of the person concerned. Non- production of anyone who noticed any irrational or eccentric behaviour on the part of the appellant in that view is noteworthy. Suffice it to say that the plea of insanity taken by the appellant was neither substantiated nor probablised.

26. Mr. Mani, as a last ditch attempt relied upon certain observations made in Mahazar Ex.P3 in support of the argument that the appellant was indeed insane at the time of commission of the offences. He submitted that the Mahazar referred to certain writings on the inner walls of the appellant's house which suggested that the appellant was insane. A similar argument was advanced even before the Courts below and was rejected for reasons which we find to be fairly sound and acceptable especially when evidence on record establishes that the appellant was an alcoholic, who could scribble any message or request on the walls of his house while under the influence of alcohol. The Courts below were, therefore, justified in holding that the plea of insanity had not been proved and the burden of proof cast upon the appellant under Section 105 of the Evidence Act remained undischarged. The High Court has also correctly held that the mere fact that the appellant had assaulted his wife, mother and child was not ipso facto suggestive of his being an insane person."

29. In the instant case, the plea of insanity is not available to the accused under section 84 of the Indian Penal Code, as he knew what he was doing since he ran away from the spot and he was noticed by PW-5 Yashoda Devi putting up his cloths. Even PW-1 Dr. Aman Rana has not noticed any abnormality in his behaviour. The medical evidence produced is not sufficient to prove that at the time of commission of rape, accused was medically insane and incapable of understanding the nature of act performed by him. Hence, his defence under section 84 of the Indian Penal Code is not proved.

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

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

Chobe Ram .....Appellant.
Versus
Chander Kala & ors. .....Respondents.

RSA No. 347 of 2003.
Reserved on: 28.4.2015.
Decided on: 6.5.2015.

Code of Civil Procedure, 1908- Order 19- Plaintiff relied upon an affidavit - however, he had not made specific averment in the plaint regarding the execution of affidavit- he had not examined the Executive Magistrate who had attested the affidavit- compromise was already arrived at and there was no question of executing the affidavit – held, that in these circumstances, affidavit was not admissible in evidence. (Para-21 and 22)

For the appellant(s): Mr. Jagan Nath, Advocate, vice Mr. Anand Sharma, Advocate.
For the respondent: Mr. T.S.Chauhan, Advocate, for respondent No. 1(d).
None for respondents No. 1(a) to 1(c) & respondent No.2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kullu, H.P. dated 6.6.2003, passed in Civil Appeal No.09 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of the plaintiffs, namely, Sh. Poshu Ram, has filed suit for possession of house shown in the site plan attached with the Plaint and for recovery of Rs. 500/- per month by way of *mesne* profit for the use and occupation of the house in suit and also for permanent prohibitory injunction. According to the plaintiffs, the land measuring 9 biswas comprising in khata khatauni No. 428 min/503 min, Kh. No. 555, situated in Phati Mohal, Kothi Khokhan, Tehsil and District Kullu, is recorded as Phati Abadi which was owned and possessed by the plaintiff as shown in the copy of jamabandi for the year 1993-94 and on the portion of this land a house of plaintiff measuring 27 x 14 *Haath* is also standing and that adjoining to the said land and house of the plaintiff abuts land comprising Kh. No. 551 and 552 which was also owned and possessed by the plaintiff over which the fruit bearing orchard of the plaintiff is also standing. An agreement was entered into between the plaintiff and defendant No. 1 to sell the fruit crop of the orchard comprising Kh. No. 551 and 552 for the fruit seasons from 1997 to 2001 for consideration of Rs. 50,000/- and Rs. 40,000/- was payable by the defendant No. 1 to the plaintiff on or before 10.7.1997. The defendant has committed breach of the agreement. The defendant No. 1 has requested the plaintiff to allow him to keep some bardana in suit house and to allow defendant No. 2 to keep him as his Chowkidar, namely Sh. Purkhu. The plaintiff granted licence and permission to defendant No. 1 to use and occupy the house for two months w.e.f. 10.4.1997 to 9.6.1997. He was also entitled to recover Rs. 500/- towards mesne profits.

3. The suit was contested by the defendants. According to them, the original plaintiff was neither owner nor in possession of the property in suit and the site plan was

not correct. The house did not exist on the abadi comprising Kh. No. 555. It is also denied that on the request of defendant No. 1, the original plaintiff allowed defendant No. 1 to use and occupy the house as licensee for two months. It is also contended that since the original plaintiff has no right, title or interest over the suit land nor was owner-in-possession of the property in suit. Infact, the plaintiff was not residing or right holder of Phati Mohal. He was resident of Phati Balh. The defendant No. 1 was resident and right holder of Phati Mohal from the time immemorial. The father of defendant No. 1 has constructed house 22 years back on the portion of abadi in suit land comprising Kh. No. 555.

4. The replication was filed by the plaintiff. The learned Senior Sub Judge, Kullu, H.P. framed the issues on 17.1.1998. The learned Senior Sub Judge, Kullu, H.P., dismissed the suit on 19.12.2001. Sh. Chobe Ram, feeling aggrieved, preferred an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu, partly allowed the same on 6.6.2003. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 25.5.2004:

> "1. Whether document/affidavit Ext. PW-7/A could not have been read in evidence by the learned first appellate Court as the same was not pleaded and proved in accordance with law which vitiated the findings arrived at by the learned first appellate Court?"

6. Mr. Jagan Nath, Advocate, for the appellant has supported the judgment and decree passed by the learned Senior Sub Judge, Kullu. He then contended that the affidavit Ext. PW-7/A dated 17.5.1995 could not be read in evidence by the learned first appellate Court since the same was neither pleaded in the plaint nor proved in accordance with law. On the other hand, Mr. T.S.Chauhan, Advocate, has supported the judgment rendered by the first appellate Court dated 6.6.2003.

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

8. PW-1 Sh. Poshu Ram has testified that he was owner of the land in the suit over which 1 ½ storyed slate posh house and apple plants of 28 years old were raised. He constructed the house in the suit land about 14 years ago. He was having his orchard of 14/15 bighas abutting to the suit land. Out of 14/15 bighas of his land, 4 ½ bighas of land was given to the tenants and the tenants sold the land to Chobe Ram in the year 1993. He inherited the land in suit from his mother in the year 1956 and since then he has been possessing the same. He filed a suit in the Court. The suit was compromised between the parties. The defendant No. 1 has sworn in an affidavit which was attested by the Executive Magistrate wherein the defendant has agreed to give two karam wide passage through Kh. No. 553 to give access to Kh. Nos. 551, 552 and 555 and after purchasing the land from his tenants, Brestu and others Chobe Ram resold the same and made colony. Defendant No. 1 requested him to give the house in suit for two months to keep his bardana therein which request was accepted by him and after two months, when he demanded the possession of his house from Chobe Ram, the defendant asserted the same to be his Phati abadi having possession over it. The defendant has removed six apple plants. Police came to the spot. Chobe Ram has installed electricity meter over it and rented out the same to Pukhru Ram. He submitted an application for appointment of L.C. The site plan of the house was prepared by Nidhi Singh. He proved shajra nasab Ext. PW-1/F. He proved Ext. PW-1/G shajra nasab of phati abadi of Fulnu Devi. He proved shajra nasab Ext. PW-1/H and copy of abadi Ext. PW-1/I. He also proved copy of musabi Ext. PW-1/J, copy of mutations Ext. PW-1/K to PW-1/M alongwith the copies of jamabandi Ext. PW-1/N and PW-1/O.

9. PW-2 Madan Lal deposed that Poshu Ram was having orchard and 1 ½ storyed house. The house was constructed in the year 1975.

10. PW-3 Beli Ram testified that the suit land was owned by Poshu Ram. There was apple orchard1 ½ storyed house over the same. It was in possession of Chobe Ram since 1997. Chobe Ram has also cut apple trees.

11. PW-4 Prem Dass Bhatia, deposed that Poshu Ram is owner of the land in suit over which 1 ½ storyed house and fruit orchard are standing. The house of Phulma Devi Ward Panch and Dev Raj abuts the land in suit. Chobe Ram had taken the orchard of Poshu on contract and then took the possession of the same. Chobe Ram had white washed the house in suit and installed the electricity meter and also raised retaining wall. Chobe Ram is not having any land abutting land in suit. Chobe Ram's father was having 2 bighas five biswas of land and a house which was dismantled.

12. According to PW-5 Sh. Narender Sharma, affidavit of Chobe Ram dated 17.5.1995 was entered at Sr. No. 303 in his register. He has not brought the photocopy of the original affidavit as it was destroyed as per rules.

13. PW-6 Nidhi Singh has proved site plan Ext. PW-1/A.

14. PW-7 Chuni Lal Sharma, Advocate, Kullu, has stated that he knows Chobe Ram. In affidavit Ext. PW-7/A, he identified Chobe Ram, but this affidavit was not attested by the Executive Magistrate in his presence nor any person put signatures in his presence. The signature of defendant was already there on the affidavit. He identified Chobe Ram in the precincts of the Court. He never went to the Executive Magistrate and Ext. PW-7/A was brought to him by Chobe Ram.

15. PW-8 Dr. R.Sharma, Asstt. Government Examiner of Questioned Documents has testified that he examined several documents and gave his opinion. He received the documents from the Court of Senior Sub Judge, Kullu vide letter No. 2237 dated 21.12.2000 alongwith Q-1 to Q-3, Ext. PW-7/A and admitted signatures A-1 to A-3 which are Vakalatnama and written statement and after examining these documents he came to the conclusion that Q-1 to Q-3 and A-1 to A-3 were written by the same person. He proved his reports Ext. PW-8/A and PW-8/B.

16. Sh. Chobe Ram has appeared as DW-1. He testified that he was owner-in-possession of the house in suit which has been constructed on the abadi land at the time of his fore fathers which is 23' x 23'. He also constructed a shed. He pays the house tax of the house and proved receipts Ext. D-1 to D-5. He has also installed electricity meter and proved the bills alongwith receipts thereof which are Ext. D-6 to Ext. D-8. According to him, the plaintiff was resident of Phati Balh, Kothi Majara having no house in Phati Mohal. Purkhu, defendant No. 2 was his tenant and the plaintiff filed the suit just to harass him.

17. DW-2 Hari Chand has supported the version of DW-1 Chobe Ram.

18. The case of the plaintiff, precisely, is that Chobe Ram has sworn in an affidavit Ext. PW-7/A, before the Executive Magistrate, Kullu vide which he agreed to give two karam wide passage through Kh. No. 553 to give access to Kh. Nos. 551, 552 and 555 to Poshu Ram.

19. Ext. PW-7/A is dated 17.5.1995 and the compromise is dated 16.5.1995. If the matter had already been compromised on 16.5.1995, there was no occasion to Chobe Ram to sworn in an affidavit dated 17.5.1995. PW-7 Chuni Lal Sharma, Advocate, as noticed above, has admitted that he identified Chobe Ram, but this affidavit was not

attested by the Executive Magistrate in his presence nor any person put signatures in his presence. The signature of defendant was already there on the affidavit. He identified Chobe Ram in the precincts of the Court. He never went to the Executive Magistrate and Ext. PW-7/A was brought to him by Chobe Ram.

20. The plaintiff has moved an application under Order 18 Rule 17A and under Order 18 Rule 2(4) read with Section 151 CPC. It was allowed on 12.11.1998. Thereafter, the plaintiff again moved an application under Order 18 Rule 17 and under Order 18 Rule 2(4) read with Section 151 CPC. According to the averments contained in the application, the plaintiff at the time of examination of PW-7 Sh. Chuni Lal, Advocate, he could not put specific suggestions. The learned Sr. Sub Judge, Kullu, has rightly come to the conclusion while deciding the application on 25.6.1999 that it was for the plaintiff to have taken all care and caution to have put all the suggestions to said PW-7 Sh. Chuni Lal when he appeared in the witness box. Rather, PW-7 Chuni Lal has not supported the case of the plaintiff. Thus, Chuni Lal, PW-7 could not be recalled for putting further suggestions to him. It was for the plaintiff to prove the affidavit Ext. PW-7/A dated 17.5.1995. Thus, the learned Sr. Sub Judge, Kullu, has rejected the application on 25.6.1999. The plaintiff filed another application under Order 18 Rule 17A and Order 18 Rule 2(4) read with Section 151 CPC for comparison of signatures of defendant on the affidavit and Sh. N.C.Sood, Dy. Government Examiner, office of the Government Examiner of Questioned Douments, Ministry of Home Affairs, was ordered to be summoned for 11.7.2001 vide order dated 16.5.2001. The plaintiff filed yet another application under Order 18 Rule 17A and order 18 Rule 2(4) for placing on record copy of Order dated 17.5.1995 passed by the Sr. Sub Judge, Kullu in Civil Suit No. 87/94 and application dated 16.5.1995 for preponment and taking case on that date and also to prove certified copy of compromise dated 16.5.1995 in Civil Suit No. 87 of 1994. The application was dismissed by the learned Sr. Sub Judge, Kullu on 20.8.2001. The learned trial Court has noticed that the plaintiff wanted to place on record documents dated 17.5.1995 and 16.5.1995 but no reason was assigned why those were withheld by the plaintiff for such a long period and it was not the case of the plaintiff that after exercising due diligence he could not produce the same at the time when he was leading his evidence. The application was rejected on 20.8.2001.

21. Mr. Jagan Nath, Advocate, has taken the Court through the plaint. There is no averment with regard to Ext. PW-7/A. In view of this, the plaintiff ought to have made a specific averment in the plaint and then could lead the evidence to prove the affidavit. The plaintiff has not examined the Executive Magistrate who has attested the affidavit on 17.5.1995. The Court, as noticed above, that the compromise is dated 16.5.1995 and the affidavit was sworn in on 17.5.1995. There was no occasion for the Chobe Ram to sworn in an affidavit after the compromise had already been arrived at on 16.5.1995.

22. The learned first appellate court has failed to take into consideration the repeated filing of application by plaintiff under Order 18 Rule 17 and under Order 18 Rule 2(4) read with Section 151 CPC to prove the affidavit Ext. PW-7/A in order also to wriggle out of the statement made by PW-7 Chuni Lal Advocate. The trial Court has correctly appreciated the oral as well as documentary evidence, more particularly, Ext. PW-7/A while dismissing the case of the plaintiff but the first appellate Court has erred in law by placing reliance on Ext. PW-7/A, which has not been proved in accordance with law. It was not pleaded in the plaint that defendant No. 1 has sworn in an affidavit on 17.5.1995. The defendant No. 1 has proved on record the copies of house rent payable by him vide Ext. D-1 to D-5 and also the electricity bills. The first appellate Court has wrongly treated the affidavit as admissible on behalf of defendant Chobe Ram to come to the conclusion that the

plaintiff was owner of the land comprised in Kh. No. 555. The substantial question of law is answered accordingly.

23. Consequently, the Regular Second Appeal is allowed. The judgment of the trial Court dated 19.12.2006 is restored. The judgment of the first appellate Court dated 6.6.2003 is set aside.

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

Chobe Ram .....Appellant.
Versus
Chanderkala & ors. .....Respondents.

RSA No. 483 of 2005.
Reserved on: 28.4.2015.
Decided on: 7.5.2015.

Registration Act, 1908- Section 17- Plaintiff had filed a civil suit in which a compromise was effected - the tenants surrendered the possession of 1-10 bighas while 3-00 bighas was gifted to the tenants- compromise did not form part of the order- plaintiffs were not shown to be the owners of the land- right was created for the first time by means of the compromise and the compromise was required to be registered, however, it was never registered, therefore, it could not have been relied upon to pass a decree. (Para-20 to 24)

For the appellant(s): Mr. Karan Singh Kanwar, Advocate,
For the respondent: Mr. T.S.Chauhan, Advocate, for respondent Nos. 1(a), 1(b) and 1(d).
None for respondent Nos. 1(c), to 1(e) & respondent Nos.2 to 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kullu, H.P. dated 30.6.2005, passed in Civil Appeal No.49 of 2004.

2. Key facts, necessary for the adjudication of this regular second appeal are that respondents-plaintiffs (hereinafter referred to as the plaintiffs) instituted a suit for permanent prohibitory injunction against the appellant-defendant No. 1 (hereinafter referred to as the defendant) and Sh. Hukam Ram, defendant No. 2. The plaintiff Poshu died during the pendency of this regular second appeal. His legal heirs were brought on record vide order dated 3.1.2012. The suit was filed for permanent prohibitory injunction restraining the defendant from causing any sort of interference or obstruction in two karams wide path shown in photo copy of aks musabi by points A and B passing through the portion of Kh. No. 553, connecting common village path running along the side of western boundary of Kh. No. 553 which touches eastern boundary of said Kh. number and connecting khasra Nos. 552 and 555, with the aforesaid village path, situated in Phati Mohal, Kothi Khokhan, Tehsil and District Kullu, and for mandatory injunction that in case it is found that defendant had succeeded in causing any obstruction, the same be ordered to be removed. According to the averments made in the plaint, the plaintiff, predecessor-in-interest of the present

respondents No. 1(a) to 1(e) Sh. Poshu Ram, had filed suit bearing No. 87 of 1994. In the said litigation, Chobe Ram entered into amicable settlement and compromise was effected i.e. Ext. PW-1/B on 16.5.1995. It was further stated in the plaint that the land situated in Kh. No. 553 measuring 4-10-0 in Phati Mohal, Kothi Khokhan was earlier owned and possessed by the plaintiff Poshu and there were tenants who failed to pay the rent and Poshu had to file a suit for possession. The compromise was effected, as stated hereinabove, and the tenants surrendered the possession of 1-10-0 bigha in favour of plaintiff Poshu Ram and land 3-0-0 was gifted to the tenants by the plaintiff Poshu Ram. He became owner of land qua 1-10-0 bighas.

3. The suit was contested by the defendant. He denied the right, title and interest of the plaintiffs over Kh. No. 553. He purchased 10 biswas of land in Kh. No. 553 from Trilok Nath and 1/9 share from Brestu and 4/90 share from Shukari. The execution of compromise dated 16.5.1995 was denied. Defendant No. 2 filed a separate written statement and supported the version of the plaintiffs.

4. The replication was filed by the plaintiffs. The learned Civil Judge (Senior Divn.), Kullu, H.P. framed the issues on 16.5.2002. The learned Civil Judge (Senior Divn.), Kullu, H.P, decreed the suit on 31.5.2004. Sh. Chobe Ram, defendant No. 1 feeling aggrieved, preferred an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu, dismissed the same on 30.6.2005. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 20.9.2005:

> "1. Whether the Courts below in decreeing the suit have erred in considering and relying inadmissible evidence by way of compromise Ext. PW-1/B in Civil Suit No. 87/94, which was not recorded in that Civil Suit by the Court and that suit was dismissed as withdrawn, the compromise otherwise was not registered.?"

6. Mr. Karan Singh Kanwar, Advocate, for the appellant, on the basis of the substantial question of law, has argued that the Courts below have wrongly relied upon the compromise Ext. PW-1/B in Civil Suit No. 87 of 1994. He also contended that the defendant was not party to Civil Suit No. 87 of 1994. On the other hand, Mr. T.S.Chauhan, Advocate, has supported the judgments and decrees rendered by both the Courts below.

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

8. PW-1 Umavati, brought the record of Civil Suit No. 87/94. She proved the copy of plaint Ext. PW-1/A, copy of compromise dated 16.5.1995 vide Ext. PW-1/B, copy of application dated 16.5.1995 vide Ext. PW-1/C, order dated 17.5.1995 Ext. PW-1/D and order dated 30.5.1995 vide Ext. PW-1/E.

9. PW-2 Bhagat Ram, proved affidavit dated 17.5.1995 vide Ext. PW-2/A.

10. PW-3 Radha Devi deposed that the affidavit was attested by the Executive Magistrate on 17.5.1995 and was entered at Sr. No. 303. She admitted in her cross-examination that entries made at Sr. Nos. 301, 302 and 303 were not in her hand writing and she was not in a position to disclose as to who has made these entries. She was not in a position to state as to who had signed it. She could not identify the signatures of the Executive Magistrate. The name of the person who has sworn in the affidavit was not mentioned in the register, including his permanent address.

11. The plaintiff has appeared as PW-4. He stated that the property at Mohal was inherited by him from his mother. His mother inherited the same from her father Bali Ram. He was owner of Kh. No. 553 measuring 4 bighas 10 biswas. He proved copy of jamabandi Ext. PW-4/A. He had kept Brestu, Piaru and Shobha Ram as tenants over the suit land. They did not pay any rent to him. He filed civil suit and the matter was compromised. The land measuring 1 ½ bigha was left for him and he was also put in possession. He has given them 3 bighas of land by way of gift. He further stated that he entered into an agreement on 16.5.1995 with Brestu, Shukri, Mangri, Tarlok Nath and Chobe Ram. It was scribed by Bhoj Chander, Advocate. The contents were read over and explained. He put his signatures over the same and thereafter other persons also signed the same. He proved affidavit Ext. PW-1/B. The map of the path was prepared by Nidhi Singh.

12. PW-5 Vidya Sagar, deposed that he was Vice President of Panchayat Sayogi. An agreement was entered into on 16.5.1995 in his presence and other witnesses Kurbu Ram, Bhoj Chander Thakur, Advocate and Prem Chander Thakur, Advocate. It was scribed by Bhoj Chander Thakur, Advocate. The contents were read over in Hindi to the parties. They have signed the same. He along with Kurbu Ram singed as marginal witnesses.

13. PW-9 C.L.Sharma, Advocate, deposed that he was practicing since 1979 in District Courts Kullu. The affidavit was brought to him by Chobe Ram. He has identified him. He also put his signatures on Ext. PW-7/A. The copy of the same is Ext. PW-2/A. In his cross-examination, he admitted that the affidavit dated 17.5.1995 was not typed in his presence. On the affidavit, the name of the person who has drafted/typed it is not mentioned. He did not know where it was typed. It was not attested in his presence before the Executive Magistrate on 17.5.1995. The signatures were already put on the affidavit before he put his signatures. In his presence, neither Chobe Ram nor Executive Magistrate put their signatures. In his further cross-examination, he stated that the affidavit was not got prepared by Chobe Ram. Volunteered that Chobe Ram had brought it to him.

14. PW-11 B.C.Thakur, deposed that he was an Advocate of Poshu in Civil Suit No. 87/94. The agreement was scribed by him and P.C.Thakur. The contents of the same were read over to the parties. They, after admitting the contents to be correct had put their signatures. The marginal witnesses Kurbu and Vidya Sagar singed the same. The rest of the marginal witnesses also signed the same. He has moved the application on 16.5.1995 vide Ext. PW-1/C before the Senior Sub Judge, Kullu. He has signed the same.

15. PW-12 Karam Singh deposed that he has seen the disputed path. It was at a distance of 100-150 meters from his house. The width of the path is 9 ft. 4 inch and 105 ft. in length.

16. PW-13 Nidhi Singh has prepared Ext. PW-13/A. He admitted in his cross-examination that he has not signed Ext. PW-13/A nor any date was mentioned.

17. PW-14 Jai Singh has produced the record of Civil Suit No. 120/97.

18. PW-15 Ghaman Singh deposed that the defendant has purchased Rs. 5 stamp on 17.5.1995.

19. The defendant has appeared as DW-1. He testified that the plaintiff was not owner of Kh. No. 533. Kh. No. 555 was abadi. The house 1 ½ storyed existed on this khasra number. He was owner of the abadi and house. He has not sworn in any affidavit on 17.5.1995.

20. The plaintiff Poshu Ram has filed Civil Suit No. 87/1994 for declaration and injunction against Sh. Brestu, Shukri, Mangri, Trilok Nath and Chobe Ram. According to the plaintiff, compromise-deed was prepared vide Ext. PW-1/B. It was scribed by the

learned Advocates and signed by marginal witnesses. It was also signed by Poshu Ram. An application for preponment and taking the case for hearing on 16.5.1995 was filed vide Ext. PW-1/C. The learned trial Court on 17.5.1995 has examined the parties and they were granted time to understand the implication of compromise. The matter was ordered to be put up on 30.5.1995. The statement of the plaintiff was recorded and as per his statement, the suit was withdrawn on 30.5.1995. The statement made by the plaintiff is not on record.

21. The defendant Chobe Ram was not party in the Civil Suit bearing No. 87 of 1994. The compromise dated 16.5.1995 was not even registered. There is no reference in order dated 30.5.1995 about the compromise Ext. PW-1/B. In case the compromise had been effected, the same ought to have been reflected in the order dated 30.5.1995, whereby the suit was withdrawn.

22. The case of the plaintiffs is also that the affidavit Ext. PW-2/A was also sworn in by defendant Chobe Ram. PW-9 C.L.Sharma, has not supported the case of the plaintiff. In his cross-examination, has admitted that the affidavit dated 17.5.1995 was not typed in his presence. He did not know as to where it was typed. It was not attested in his presence before the Executive Magistrate on 17.5.1995. The signatures were already put on the affidavit before he put his signatures. In his presence, neither Chobe Ram nor Executive Magistrate put their signatures. Even if hypothetically presumed that the compromise Ext. PW-1/B was entered into, the same has never formed an integral part of Civil Suit No. 87 of 1994. The Court has already noticed that there is no reference to the compromise even in orders dated 17.5.1995 and 30.5.1995 when the suit was withdrawn.

23. The learned first appellate Court has observed that there was no bar for the parties to enter into compromise even if they were not parties to the suit. However, in the instant case, it is reiterated that the compromise never formed part of the order dated 30.5.1995, whereby the civil suit No. 87 of 1994 was withdrawn.

24. Mr. Karan Singh Kanwar, Advocate, has drawn the attention of the Court to jamabandi Ext. PW-4/A. The plaintiffs have not been shown as owners of the land comprised in Kh. No. 553 in Ext. PW-4/A. Sh. Tirlok Nath Magri and defendant No. 1 Chobe Ram, have been shown as owners-in-possession of the suit land. No tangible evidence has been led by the plaintiffs to rebut jamabandi Ext. PW-4/A. The first appellate Court has come to the wrong conclusion that no new right was created vide compromise Ext. PW-1/B. The right was created for the first time vide Ext. PW-1/B. Thus, the same was required to be registered and admittedly, Ext. PW-1/B was never registered. Both the Courts below have erred in relying upon Ext. PW-1/B, while decreeing the suit of the plaintiffs. The substantial question of law is answered accordingly.

22. Consequently, the Regular Second Appeal is allowed. The judgments and decrees passed by both the Courts below are set aside. Civil Suit No. 71 of 2000 is dismissed.

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

Smt. Jagdishwari Devi .....Appellant.

Versus

Subhash Chand .....Respondent.

RSA No. 121 of 2004.
Reserved on: 6.5.2015.
Decided on: 7.5.2015.

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff had obtained demarcation from the revenue authorities- report was not accepted by trial Court- plaintiff moved an application for appointment of local commissioner, which was allowed- defendant raised objections to the report which were decided along with main appeal- report was supported by Aks Tatima Shajra as well as the copy of Field Book- it was in accordance with the instructions issued by Financial Commissioner - when a fresh local commissioner was appointed, the earlier report would be of no consequences. (Para-10 to 13)

For the appellant(s): Mr. Suneet Goel, Advocate,
For the respondent: Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Hamirpur, H.P. dated 24.11.2003, passed in Civil Appeal No.72 of 1998.

2. Key facts, necessary for the adjudication of this regular second appeal are that respondent-plaintiff (hereinafter referred to as the plaintiff) instituted a suit for permanent prohibitory injunction and in the alternative for possession, against the appellant-defendant (hereinafter referred to as the defendant). According to the plaintiff, the land comprised in Khata No. 183, Khatoni No. 272, Kh. No. 2755/1/1571/3, measuring 9 marlas, situate in Tika Sujanpur, Tappa Bhaleth, Tehsil Sujanpur, Distt. Hamirpur, H.P., was owned by him and other co-sharers. The defendant was stranger and she has got no right, title or interest over the suit land. The defendant has started illegal and unauthorized interference over the suit land by digging the same for the purpose of raising construction of the septic tank over it and has started collecting construction material over the same.

3. The suit was contested by the defendant. According to the defendant, the septic tank was constructed in her own land and when it was being dug and constructed, the plaintiff raised no objection. The septic tank was ready by 1.10.1993.

4. The replication was filed by the plaintiff. The learned Sub Judge-II, Hamirpur, H.P. framed the issues on 22.4.1994. The learned Sub Judge-II, Hamirpur, H.P, dismissed the suit on 6.3.1998. The plaintiff, feeling aggrieved, preferred an appeal before the learned District Judge, Hamirpur. The learned District Judge, Hamirpur, allowed the same on 24.11.2003. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 24.3.2004:

> "1. Whether the appellate court in this case could have relied upon the report of the Local Commissioner appointed by it without setting aside the report of the earlier Local Commissioner whose report was already on record on questions of facts already gone into by the trial court?"

6. Mr. Suneet Goel, Advocate, for the appellant, on the basis of the substantial question of law framed, has argued that the report of the Local Commissioner appointed by the first appellate Court could not be relied upon without rejecting the report submitted by earlier Local Commissioner. On the other hand, Mr. Deepak Kaushal, Advocate, has supported the judgment and decree rendered by the learned first appellate Court.

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

8. The plaintiff has examined General Power of Attorney Sh. Fateh Chand as PW-1 and Amar Nath as PW-2. He has also examined PW-3 Baldev Ram and PW-4 Bidhi Chand. In rebuttal, the defendant has appeared as DW-1 and examined Swarup Chand as DW-2.

9. It is the admitted case of the parties that plaintiff is owner-in-possession of land comprised in Kh. No. 2755/1/1571/3, measuring 9 marlas, situate in Tika Sujanpur, Tappa Bhaleth, Tehsil Sujanpur, Distt. Hamirpur, H.P., as per jamabandi for the year 1987-88, Ext. PD. The plaintiff had obtained demarcation report from the revenue authorizes, qua Kh. No. 2755/1/1571/3, from PW-4 Sh. Bidhi Chand, the then Field Kanungo, vide his report Ext. PA. The report Ext. PA was not accepted by the trial Court, the same being not in accordance with law and instructions laid down by the Financial Commissioner and by the High Court Rules and Orders. Accordingly, the suit was dismissed.

10. The plaintiff has moved an application under Order 26 Rule 9 CPC for appointment of the Local Commissioner before the first appellate Court. The same was allowed. Sh. Dila Ram, retired Tehsildar was appointed as Local Commissioner to demarcate the suit land afresh on the spot. He visited the spot on 24.2.1999. He prepared the report and placed the same on record alongwith the tatima and statements of the parties. The defendant had raised the objections to the report. These objections were decided alongwith the decision of the appeal. The learned first appellate Court has considered the objections raised by the defendant at length. The Local Commissioner, has conducted the demarcation on the spot in the presence of the parties besides Halqua Patwari and S/Sh. Fateh Chand, Suresh Kumar, Ramesh Kumar, Vijay Kumar and Krishan Sarup etc. The plaintiff had produced Musabi as well as Aks Musabi before him containing sikmi khasra numbers. The Patwari had also produced the mutations pertaining to partition of the land between the parties. The pucca points A, B, C & D were fixed in the presence of the parties. The report was also supported by Aks Tatima Shajra as well as the copy of Field Book. The report was strictly in conformity with the instructions issued by the Financial Commissioner governing the demarcation.

11. PW-1 Fateh Chand has deposed that the defendant has raised the construction of septic tank in the month of October, 1993. Thereafter, they obtained the demarcation in the month of November, 1993 and that they did not raise any objection thereto. According to PW-2 Amar Nath, the defendant had raised the construction of septic tank in October, 1993 and has encroached upon 3 marlas of the suit land. PW-4 Bidhi Chand, has earlier demarcated the suit land and submitted the report to the Court Ext. PA.

12. Defendant, DW-1 has admitted that the construction of the septic tank was completed on 15.9.1993 initially and later on stated that the construction work was commenced on 15.9.1993 and the same was completed within 10-15 days. DW-2 Swarup Chand deposed that the latrine was constructed by the defendant in September, 1993 and later on stated that the construction work commenced on 10-11 September and completed within 15-20 days.

13. The plaintiff has conclusively proved that the defendant has encroached upon the suit land to the extent of 3 marlas. Since the earlier report was not at all in accordance with law, the learned first appellate Court has allowed the application preferred by the plaintiff under Order 26 Rule 9 CPC for the appointment of the Local Commissioner to demarcate the suit land. Since the learned first appellate Court has appointed the Local

Commissioner afresh, the earlier report would be deemed to be of no consequence. The substantial question of law is answered accordingly.

14. Consequently, the Regular Second Appeal is dismissed. The judgment and decree passed by the learned first appellate Court is upheld.

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

Parmeshwari Devi. ...Appellant.

Versus

Kamlesh Devi and another. ...Respondents.

RSA No. 505 of 2003
Reserved on: 29.4.2015
Decided on: 7.5.2015

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she is owner in possession of suit land on the basis of Will executed by the deceased- deceased had consumed poison- plaintiff admitted in her cross-examination that Doctor had refused to treat the petitioner, according to him, deceased had consumed strong poison- deceased had tied at about 3-4 hours- witnesses of the Will admitted that when the Will was written the sun was rising at about 6:00 A.M- one witness stated that Will was scribed at the instance of one 'K'- this casts doubt about the execution of the Will- deceased was under the influence of strong poison and could not be in a sound disposing mind- no marginal witness was associated from the vicinity- propounder and her husband had actively participated in the execution of the Will which casts doubt regarding the genesis of the Will. (Para-16 and 17)

For the Appellant : Mr. Bhupinder Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.

For the Respondents : Mr. N.K. Thakur, Sr. Advocate with Mr. Rahul Verma, 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 31.10.2003 rendered by the Addl. District Judge, Una in Civil Appeal (RBT) No. 123/2000/97

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 against the respondents-defendants (hereinafter referred to as the "defendants" for convenience sake) for declaration to the effect that plaintiff was owner in possession of the land measuring 15 kanals 10 marlas out of the land measuring 61 kanals 17 marlas as detailed in the head note of the plaint on the basis of "will" executed by Darshan Lal on 5.4.1984 and the defendants have no right, title and interest of any kind in the suit land and the alleged mutation dated 25.6.1988 in favour of the defendants was wrong, incorrect and contrary to law. Consequential relief was also sought restraining the defendants to interfere with the possession of the plaintiff over the suit land and also restraining them

from taking possession of the suit land. Darshan Lal (deceased) was married to defendant No.1 Kamlesh Devi on 22.6.1983. Defendant No.1 used to live with her parents. On 4.4.1984 due to some heated arguments between deceased Darshan Lal and defendant No.1, Darshan Lal consumed poison. The parents of Darshan Lal tried their best to save his life. However, Darshan Lal died on 5.4.1984. He executed valid "will" regarding his estate in favour of the plaintiff. Thereafter, defendant No.1 gave birth to defendant No.2, namely, Parmila Devi.

3. The suit was contested by the defendants by filing written statement. According to them, Darshan Lal had differences with his parents also. He was not admitted in civil hospital. Darshan Lal became unconscious and remained as such till his death.

4. Plaintiff filed replication to the written statement. Issues were framed by the Sub Judge, Una on 9.11.1989. He decreed the suit on 31.1.1997. Defendants preferred an appeal before the Additional District Judge, Una. He allowed the same on 31.10.2003. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law:

1. When the defendant-respondent did not challenge the "will" on any specific ground except that the executant died after consuming poison, could the lower appellate court on its own assume suspicious circumstances enumerated in the impugned judgment and decree and proceed to determine the same in holding the "will" Ex.P-1 to be a sham document, shrouded by suspicious circumstances?
2. Whether the lower appellate court has acted in excess of its jurisdiction in not taking into consideration the pronouncements of this Hon'ble Court as well as the apex court to be considered while determining the due execution and the validity of the will, Ex.P-1? Are not the findings of the lower appellate court illegal, erroneous and perverse being a result of misreading the material evidence and wrong appreciation of the correct law?
3. Whether the impugned judgment and decree passed by the lower appellate court is a result of misreading of oral and documentary evidence and rendering illegal, erroneous and perverse findings by assuming and presuming the facts extraneous to record?

5. Mr. Bhupender Gupta, learned Senior Advocate, for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that the first appellate court has come to a wrong conclusion that the "will" dated 5.4.1984 was shrouded with mystery. According to him, "will" was valid. He has lastly contended that the first appellate court has misread and mis-appreciated the oral as well as documentary evidence.

6. Mr. N.K. Thakur, learned Senior Advocate, 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 all substantial questions of law are interlinked, they are being discussed together to avoid repetition of discussion of evidence.

9. Plaintiff Parmeshwari has appeared as PW-1. She has deposed that her son used to quarrel with his wife. Kamlesh Devi used to live in village Basal and she used to tell her son that she would not reside in Pandoga and would reside in Basal. Six years ago, in

the evening, her son was irrigating the land. She and her husband were also undertaking agriculture pursuits. Husband and wife picked up a quarrel and her son told Kamlesh Devi that if she does not want to stay with him, he would commit suicide. He went to his house and consumed poison and told the parents that he has ended the controversy once for all. He told that his property should go to his mother. He was taken to hospital Panjawar. He was treated by the doctor and brought back 3-4 A.M. in the morning and her son told her that his chances of survival were bleak and he wanted to execute the "will". The entire family was on the spot. She has admitted in her cross-examination that there is a regular bus service after 15 minutes between Pandoga and Una. She has also admitted that her husband and her son had told her that Doctor at Panjawar told that he could not treat Darshan Lal since he has taken a very strong poison. They were sad. There was no use of taking him to the hospital. She has also admitted that when Darshan Lal was brought from Panjawar, all of them sat with him and he died. She has also admitted that Darshan Lal wanted to construct his own house at Pandoga. Darshan Lal used to threaten them that if they won't permit him to construct house at Pandoga, he would reside at Basal. She has also admitted that there used to be quarrel between them and Darshan Lal. She initially stated that Darshan Lal has written the "will" and then stated it was scribed.

10. PW-2 Ranbir Singh has scribed the "will". He has deposed that Darshan Lal wanted to execute the "will". He was in sound state of mind. He was normal. Marginal witnesses Thakar Dass and Devi Dass were also present. He identified "will" Ex.P-1. He has read the contents of "will" to Darshan Lal and he after admitting the contents of the same to be correct signed the same followed by marginal witnesses Thakar Dass and Devi Dass. In his cross-examination, he has admitted that his house was situated at a distance of 2 KMs from the house of Darshan Lal.

11. PW-3 Thakar Dass is the marginal witness. He went to the house of Darshan Lal at 5-6 A.M. Darshan Lal was sitting on the cot. Darshan Lal told Kartar Chand that there were very bleak chances of his survival and they should get the "will" executed. The "will" was scribed by Ranbir Singh. In his cross-examination, he has admitted that he left the house at 6.00 A.M. He has also admitted in his cross-examination that when he reached at 5.00 A.M., Darshan Lal was telling that his chances of survival were bleak. He has denied the suggestion that Darshan Lal could not speak, volunteered that his voice was feeble. He has also admitted that there were about 7 houses at a distance of 100 meters.

12. PW-4 Devi Dass is another marginal witness. In his cross-examination, he has deposed that when the "will" was scribed, the sun was rising. Darshan Lal was sitting on the cot. He left for his house within one hour.

13. PW-5 Kartar Chand is the father of Darshan Lal. He has deposed that his son was irrigating the land. He heard that his son and Kamlesh were quarreling. They took him to Dr. Verma at Panjawar. Darshan Lal was administered glucose and he recovered. He was not in a position to state that why Darshan Lal was not taken to Government Hospital. Post-mortem was not got conducted.

14. PW-6 Mohan Lal has deposed that Darshan Lal had consumed poison. They came with the patient in the morning at 3.00 A.M. from Panjawar on 5.4.1984. He has also admitted that Darshan Lal died on 5.4.1984 at 3.45 A.M.

15. Defendant No.1 Kamlesh Devi has appeared as DW-1. In her examination-in-chief, she has testified that Darshan Lal died within 2-3 hours after consuming poison.

He became unconscious after consuming poison. Her husband was taken to Panjawar. She remained at home.

16. Darshan Lal had consumed poison in the evening of 4.4.1984. He was brought back at 3.00/4.00 A.M. on 5.4.1984, as per the statement of PW-1 Parmeshwari Devi. PW-1 Parmeshwari Devi has admitted in her cross-examination that doctor had refused to treat Darshan Lal since according to him, he had consumed strong poison. She has also admitted that Darshan Lal wanted to construct a house at Pandoga and used to threaten that if he was not permitted to construct a house at Pandoga, he would settle at Basal. PW-2 Ranbir Singh has scribed the "will" Ex.P-1. His residence was at a distance of 2 KMs from the house of Darshan Lal. PW-3 Thakar Dass is the marginal witness. He went to the house of Darshan Lal at 5-6 A.M. He signed the "will" as a marginal witness and left the house at 6.00 A.M. However, PW-4 Devi Dass has deposed that when the "will" was scribed, the sun was rising. The first appellate court has taken judicial notice that in the month of April, sun rises after 6.00 A.M. PW-6 Mohan Lal has categorically admitted in his cross-examination that Darshan Lal died in the morning of 5.4.1984 at 3.45 A.M. Darshan Lal had consumed aluminium phosphide (Celphos). Learned first appellate court has referred to Modi Medical Jurisprudence and Toxicology Twenty Second Edition and according to it, the fatal period after consuming aluminium phosphide (celphos) is about 24 hours. Darshan Lal had consumed poison in the evening and his health was bound to deteriorate instead of improving. PW-1 has stated, as noticed hereinabove, that doctor told that Darshan Lal could not survive since he has taken very strong poison. In case Darshan Lal has died at 3.45 A.M., there was no possibility of execution of "will" Ex.P-1. There is also variance when the "will" was scribed and signed by the marginal witnesses. It was for the propounder to dispel the suspicious circumstances qua the "will". Plaintiff has failed to remove the suspicious circumstances. The mutation No.5084 was attested on 25.6.1988. The copy of mutation is Ex.P-5. There is a reference of the statement made by PW-3 Thakar Dass, the marginal witness of will Ex.P-1 in the mutation Ex.P-5. According to him, the "will" was scribed by Darshan Lal at the instance of Kartar Chand. It further casts doubt about the validity of the "will". There was a regular bus service after 15 minutes between Pandoga and Una and despite that Darshan Lal was not taken to hospital. The reason assigned by the plaintiff was that doctor at Panjawar had told her that chances of survival were bleak. In fact, he was brought back at 3.00/3.30 A.M. and he died at 3.45 A.M. The deceased after consuming strong poison could not be in a sound disposing mind to execute the "will". PW-3 Thakar Dass, in his cross-examination, has admitted that the voice of Darshan Lal was feeble. PW-3 Thakar Dass and PW-4 Devi Dass did not belong to the same village and no marginal witnesses were associated from the neighbourhood at the time of execution of "will" though there were 7-8 houses at a distance of 100 meters. The propounder and her husband have actively participated at the time of execution of the "will". It further casts doubt about the validity of the "will".

17. 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. All the substantial questions of law are answered accordingly.

18. No other point was urged.

19. In view of the analysis and discussion made hereinabove, there is no merit in the 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 TARLOK SINGH CHAUHAN, J.

Rakesh Kumar & Anr. ....Petitioners.
Versus
Sh. Pratap Chand & Others. ...Respondents.

Civil Revision No. 155 of 2014
Decided on: 07.05.2015.

Code of Civil Procedure, 1908- Section 24- A Petition for transfer was filed by the tenant stating that no Lawyer was ready to take up his case as the respondent had a great influence in the society- held, that a petition for transfer is not to be dealt with in a light hearted manner – transfer of a case from one Court to another should not be granted readily as a matter of course - power has to be exercised with extreme care, caution and circumspection- petitioners had failed to mention the name of Lawyer who had refused to accept the brief under the influence of respondent- petitioners are adopting delaying tactics to prolong the trial by filing such application- petition is a gross abuse of the process of the Court, hence, same is dismissed with cost of Rs. 50,000/-. (Para-7 to 15)

Cases referred:
Jitendra Singh Vs. Bhanu Kumari and others, (2009) 1 Supreme Court Cases 130
Subhash Chand Sharma Vs. Smt. Shakuntla Devi, ILR, HP VOL.(XLV)-I, 2015, Page, 336
Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249
South Eastern Coalfields Ltd. Vs. State of M.P (2003) 8 SCC 648
Enviro-legal Action Vs. Union of India and others, (2011) 8 Supreme Court Cases 161

For the petitioners. : Mr. Dushyant Dadwal, Advocate.
For respondent No.1. :Mr. R.L. Sood, Sr.Advocate with Mr. Sanjeev Kumar, Advocate.
For remaining respondents. : None.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge *(Oral)*

This petition under Section 28 of the Himachal Pradesh Rent Control Act, 1987 (for short the 'Act') at the behest of the tenants seeks quashing of order passed by the learned Appellate Authority whereby their application for transfer of the case has been rejected.

2. In the application filed for transfer of case before the learned Appellate Authority, it has contended that the petitioners wanted to engage the services of some lawyers at Rohru, but none was ready to take up the case for the reason that the respondent was local person and had great influence in the locality, as he had retired as a District & Sessions Judge. Not only this, before joining the H.P. Judicial Service he had been practicing Advocate at Rohru and therefore, this was the additional ground that none of the lawyers were ready to accept their brief.

3. The respondent No.1 filed reply wherein it was contended that the allegations made in the application were vague and indefinite to the extreme, besides being incorrect. The petitioners had failed to disclose the names of the lawyers who were allegedly approached by them and who allegedly refused to take up their brief. It is further contended that on 19.3.2014 when the Rent Controller required the petitioners to disclose the name of the lawyers who had refused to accept their brief, the petitioners on 3.4.2014 were able to disclose the name of only one lawyer. Whereas,

there were more than 40 lawyers practicing at the Rohru Bar. The allegations regarding influence in the locality or at Rohru was denied and it was contended that the respondent had commenced his practice at Rohru only for a short stint in the year 1973 and thereafter had immediately joined service but was now a senior citizen aged about 65 years leading a retired life.

4. The learned Appellate Court dismissed the application by holding that the allegations contained therein were vague, general in nature and it was fairly settled that the proceedings in the civil cases could not be transferred on the mere asking of a party. It was further held that since the respondent had retired as a District & Sessions Judge long back, it did not mean that none of the lawyers would be ready to accept his brief.

5. It is this order passed by the learned District & Sessions Judge which has been challenged by the petitioners.

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

7. The basic principle governing the grant of petition for transfer which are required to be borne in mind are that these petition are not to be dealt with in a light hearted manner and transfer of the case from one court to another should not be granted readily for any fancied notion and unless a sufficiently cogent ground is disclosed, transfer should not be allowed as a mater of course. Exercising powers for transfer is discretionary and therefore, have to be exercised with extreme care, caution and circumspection. The petitioner cannot be stopped from going on with his petition in a chosen forum where he has a right of action against the respondent. As a general rule, the courts will not interfere unless the expenses and the difficulty of the trial would be so great as to lead to injustice or the petition has been filed in a particular court only for the purpose of causing injustice.

8. The nature and scope as also the discretion of the court to order transfer civil cases was the subject matter of decision by the Hon'ble Supreme Court in ***Jitendra Singh Vs. Bhanu Kumari and others, (2009) 1 Supreme Court Cases 130*** wherein it was held:-

> "The purpose of Section 24 CPC is merely to confer on the court a discretionary power. A court acting under Section 24 CPC may or may not in its judicial discretion transfer a particular case. Section 24 does not prescribe any ground for ordering the transfer of a case. In certain cases it may be ordered suo motu and it may be done for administrative reasons. But when an application for transfer is made by a party, the court is required to issue notice to the other side and hear the party before directing transfer. To put it differently, the court must act judicially in ordering a transfer on the application of a party. In the instant case the reason which has weighed with the High Court for directing transfer does not really make out a case for transfer."

9. The petitioners even before this court have failed to name even a single Advocate who when contacted had refused to accept the brief only because of the so-called 'influence' of the respondent. The learned counsel for the petitioners was not in a position to deny that the respondent had joined the services more than 35 years back and had now retired more than 5 years back. Therefore, in such circumstances to allege that the respondent was exercising influence is not only too far fetched but factually incorrect.

10. The proceedings in the instant case were commenced in 2012 and the case is still at the service stage. This in itself shows that the petitioners have left no stone unturned to drag the proceedings by adopting different and delaying tactics. Such practice in my considered view should

never be encouraged by the courts. To say the least, the conduct of the petitioners is far from being fair and the application is nothing but a sheer abuse of the process of the court.

11. It is the bounden duty of the court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the courts must further ensure that there is no wrongful, unauthorized or unjust gain to anyone as a result of abuse of process of court. This court while adjudicating upon ***RSA No. 481 of 2002, titled Subhash Chand Sharma Vs. Smt. Shakuntla Devi*** decided on 9.1.2015 observed :-

> "20. The Hon'ble Supreme Court has repeatedly pointed out that rent acts have not been enacted only to protect the tenants from unjust eviction but have been enacted to equally enforce the lawful right of the landlords to obtain a possession of their own property in the event of satisfying the grounds prescribed for eviction. In this case the appellant is not even tenant and yet he has succeeded in retaining the premises by not residing but putting a lock on the same.
>
> 21. It is proved on record that the defence set up by the appellant was absolutely false. In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370, the Supreme Court held that false claims and defences are serious problems with the litigation. The Supreme Court held as under:-
>
> > *"False claims and false defences*
> >
> > *84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."*
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> ***In Dalip Singh v. State of U.P., (2010) 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-***
>
> > *"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.*
> >
> > *2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."*

In Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. (supra) observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts" time for a wrong cause."

The observations of Court are as under:-

> *"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."*

In Sky Land International Pvt. Ltd. v. Kavita P. Lalwani, (2012) 191 DLT 594, Delhi High Court held as under:-

> *"26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.*
>
> *xxx xxx xxx*
>
> *26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts" scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."*

22. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the defendant/appellant in this case. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants. The defendant/appellant has abused the process of the Court. What is 'abuse of the process of the Court' has been dealt with in detail by this Court in Amar Singh vs. Shiv Dutt and others, RFA No. 646 of 2012 decided on 30.7.2014 wherein it was held:

> *"9. .....Therefore, the question at this stage, would than arise as to whether a party can be permitted to indulge in filing frivolous and vexatious proceedings and whether the same amount to abuse of process of Court.*

10. The Hon'ble Supreme Court in K.K.Modi vrs. K.N.Modi and others, reported in (1998) 3 SCC 573 has dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:

> *43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus: "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . . .*
>
> *The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."*
>
> *44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.*
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> *45. In the case of Greenhalgh v. Mallard (1947) 2 All ER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.*
>
> *46. In Mcllkenny v. Chief Constable of West Midlands Police Force (1980) 2 All ER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs ' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a*

question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.

11. Similarly, the Hon'ble Supreme Court in ***Kishore Samrite vs. State of Uttar Pradesh and others, reported in (2013(2) SCC 398****, has dealt in detail with "abuse of process of Court" in the following terms:*

Abuse of the process of Court :

"31. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision.

32. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest

involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R.Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> *"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:*
>
> > *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."*
> >
> > *16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."*

34. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

35. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their

working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

36. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer : Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Pari palanai Sangam & Anr. [(2012) 6 SCC 430]; Chandra Shashi v. Anil Kumar Verma [(1995) SCC 1, 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639]; Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)].

37. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

38. No litigant can play 'hide and seek with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. [K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481].

> *39. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530)."*

12. Now, it is to be seen as to whether the conduct of the respondents was in fact in abuse of the process of the Court. What is "abuse of process of Court" of course has not been defined or given any meaning in the Code of Civil Procedure. However, a party to a litigation can be said to be guilty of abuse of process of the Court in any of the following cases as held by the Hon'ble Madras High Court in Ranipet Municipality Rep. by its.... Vs. M. Shamsheerkhan, reported in 1998 (1) CTC 66 at paragraph 9. To quote:

> *" 9. It is this conduct of the respondent that is attacked by the petitioner as abuse of process of Court. What is 'abuse of the process of the Court'? Of course, for the term 'abuse of the process of the Court' the Code of Civil Procedure has not given any definition. A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-*
>
> *(1) Gaining an unfair advantage by the use of a rule of procedure.*
>
> *(2) Contempt of the authority of the Court by a party or stranger.*
>
> *(3) Fraud or collusion in Court proceedings as between parties.*
>
> *(4) Retention of a benefit wrongly received.*
>
> *(5) Resorting to and encouraging multiplicity of proceedings.*
>
> *(6) Circumventing of the law by indirect means.*
>
> *(7) Presence of witness during examination of previous witness.*
>
> *(8) Institution vexatious, obstructive or dilatory actions.*
>
> *(9) Introduction of Scandalous or objectionable matter in proceedings.*
>
> *(10) Executing a decree manifestly at variance with its purpose and intent.*
>
> *(11) Institution of a suit by a puppet plaintiff.*
>
> *(12) Institution of a suit in the name of the firm by one partner against the majority opinion of other partners etc."*

The above are only some of the instances where a party may be said to be guilty of committing of "abuse of process of the Court".

23. The appellant by keeping these proceedings alive has gained an undeserved and unfair advantage. The appellant has successful in dragging the proceedings for a very long time on one count or the other and because of his wrongful possession he has drawn delight in delay in disposal of the cases by taking undue advantage of procedural complications. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. One has only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. The Court has been used as a tool by the defendant/appellant to perpetuate illegalities and has perpetuated an illegal possession. It is on account of such frivolous litigation that the court dockets are overflowing. Here it is apt to reproduce the observations made by the

Hon'ble Supreme Court in paras 174, 175 and 197 of the judgment in Indian Council for Enviro-Legal Action vs. Union of India and others (2011) 8 SCC 161 which are as under:

174. In Padmawati vs Harijan Sewak Sangh, (2008) 154 DLT 411 (Del) decided by the Delhi high Court on 6.11.2008, the court held as under: (DLT p.413, para 6)

> *"6.The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."*

We approve the findings of the High Court of Delhi in the aforementioned case.

175. The Court also stated: (Padmawati case, DLT pp. 414-15, para 9)

> *"Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."*

197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

12. The further question which now arises is as to how to curb this tendency of abuse of process of court. As suggested in Kishore Samrita (supra), one of the ways to curb this tendency is to impose realistic or punitive costs. The Hon'ble Supreme Court in ***Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249*** took judicial notice of the fact that the courts are flooded with these kinds of cases because there is an inherent profit for the wrongdoers and stressed for imposition of actual, realistic or proper costs and it was held:-

"52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.

C. <u>Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may</u>

consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. *The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.*

E. *The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.*

F. *Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.*

G. *The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.*

H. *Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.*

I. *If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.*

J. *At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right form filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearing fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."*

13. Prior to this the Hon'ble Supreme Court in ***South Eastern Coalfields Ltd. Vs. State of M.P (2003) 8 SCC 648*** had held that the litigation should not turn into a fruitful industry and observed as under :-

"28. …… Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

14. The Hon'ble Supreme Court in Indian Council for ***Enviro-legal Action Vs. Union of India and others, (2011) 8 Supreme Court Cases 161*** observed:-

> *"191. In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legl process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.*
>
> *192. The court's constant endeavour must be ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.*
>
> *193. This Court in a very recent case Ramrameshwari Devi v. Nirmala Devi had an occasion to deal with similar questions of law regarding imposition of realistic costs and restitution. One of us (Bhandari, J.) was the author of the judgment. It was observed in that case as under: (SCC pp. 268-69, paras 54-55)*
>
> > ***"54. While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.***
> >
> > ***55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years."***

15. In view of the aforesaid discussion not only is there any merit in this petition but the same is also a gross abuse of the process of court and is accordingly dismissed with costs of Rs. 50,000/-.

****

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

Ram Swarup and others. ...Appellants.

Versus

Narinder Parkash and others. ...Respondents.

RSA No. 263 of 2013
Reserved on: 4.5.2015
Decided on: 7.5.2015

Specific Relief Act, 1984- Section 34- Plaintiff claimed that land measuring more than 150 bighas was being irrigated through Kuhal known as ***Nal Ka Banda*** since time immemorial openly, peacefully and continuously- defendants have no right to cause interference in the flow of water- Kuhal originates from ***Sharatu Ka Nala***- ***Pataru Ka Nala*** and ***Bagh Ka Nala*** are the tributaries of ***Sharatu Ka Nala*** - defendants threatened to tap the water from ***Sharatu Ka Nala*** and ***Bagh Ka Nala***- plaintiff relied upon a rough map in which no khasra numbers were mentioned- the points from which the pipes were installed were also not mentioned- defendants got prepared a map by an expert - the factual position shown in the map, got prepared by defendants, is in conformity with the statements of the witnesses regarding the source of water- other co-villagers were not arrayed as parties- held that in these circumstances suit was rightly dismissed. (Para-16)

For the Appellants : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondents : Mr. Neeraj Gupta, Advocate for respondent No.2.
None for other respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 5.1.2013 rendered by the Addl. District Judge, Fast Track Court, Solan in Civil Appeal No. 10 FTC/13 of 2010.

2. "Key facts" necessary for the adjudication of this appeal are that the appellants-plaintiffs (herein after referred to as 'plaintiffs' for convenience sake) have stated that they are owners-in-possession of the land situated in village Dangheel and Bhuira pargana Pashgaon, Tehsil Kandaghat, District Solan. These villages are adjacent to each other. It is stated that out of land located in village Dangheel and Bhuira, land measuring more than 150 bighas was being irrigated through Kuhal No.5 known as "***Nal Ka Banda***" since time immemorial openly, peacefully, continuously and uninterruptedly. Respondents-defendants (herein after referred to as 'defendants' for convenience sake) have no right to cause any kind of interference in the flow of water from Kuhal No.5 known as "***Nal Ka Banda"*** in any manner. The Kuhal originates from "***Sharatu Ka Nala*** at point 'A' as shown in rough site plan. Besides "***Pataru Ka Nala***" and ***Bagh Ka Nala*** are the tributaries of ***Sharatu Ka Nala***. ***Pataru Ka Nala*** merges in the ***Sharatu Ka Nala*** at point 'B' and ***Bagh Ka Nala*** joins the ***Sharatu Ka Nala*** at point 'C'. It is stated that the defendants who are inhabitants of the villages Sayola and Kharanji threatened to tap the water from ***Sharatu Ka Nala*** and ***Bagh Ka Nala*** with the help of Alkathene pipe to their houses.

3. The suit was contested by defendants No. 3, 4, 6 and 7. Defendant No.2 has filed separate written statement. According to the defendants, plaintiffs have not disclosed Khasra numbers and area which were irrigated by them from different water sources. It was denied that the land of the plaintiffs was being irrigated from Kuhal No.5 since time immemorial. It was also denied that the defendants were interfering with the flow of water of Kuhal No.5. The source of Kuhal No.5 ***Nal Ka Banda*** was also denied. It was denied by defendant No.2 that he was causing interference in the Kuhal. After the death of Sant Ram, he was using the water peacefully, continuously and without any interruption. Defendant No.5 has also stated that the lands were being irrigated as per ***Riwazat Ab Pashi***.

4. Issues were framed by the Civil Judge (Junior Division) on 28.9.1999. She dismissed the suit on 30.3.2010. Plaintiffs filed an appeal before the Additional District Judge, Fast Track Court, Solan. He dismissed the same on 5.1.2013. Hence, the present appeal.

5. Mr. G.D. Verma, learned Senior Advocate, for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misconstrued and misread the oral as well as documentary evidence. He then contended that in order to ascertain the exact position at the spot, local commissioner ought to have been appointed. He has further contended that the suit was maintainable on behalf of the plaintiffs.

6. Mr. Neeraj Gupta, Advocate, has supported the judgments passed by both the Courts below.

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

8. Since all substantial questions of law are interlinked, they are being discussed together to avoid repetition of discussion of evidence.

9. PW-1 Ram Swaroop has proved site plant Ext. PW-1/A. According to him, the original source of water of ***Nal Ka Banda*** was from ***Sharatu Ka Nala***, ***Patru Ka Nala*** and ***Bagh Ka Nala***. According to him, defendants have no right to interfere in ***Sharatu Ka Nala*** and ***Pataru Ka Nala***. According to him, if the water is used by the defendants, the supply of water to their lands would be drastically reduced. The sketch PW-1/A was prepared by his son namely Susheel, who was student of +2 in Chail. However, Ext. DW-4/C relied upon by the defendants has been prepared by DW-4 Dharmender Verma, who was qualified draughtsman. He has prepared Ext. DW-4/A after visiting the spot in the presence of 6-7 villagers. PW-1 has admitted that below Nal Ka Banda, there is ***Bagh Ka Nala*** and there are houses of Kartar and Phulma Devi. There are 3 flour mills, one run by Bhagat Ram second by Phulma Devi and third one by Shiv Ram.

10. PW-2 Sant Ram has placed on record Hindi translation of documents Ext. PW-2/A to Ext. PW-2/C.

11. DW-1 Narender Parkash has led his evidence by filing affidavit Ext. DW-1/A. In his cross-examination, he has denied that ***Sharatu Ka Nala*** emerges into ***Pataru Ka Nala***.

12. DW-2 Hari Krishan has led his evidence by filing his affidavit Ext. DW-2/A. He has denied the suggestion that ***Bagh Ka Nala*** emerges into ***Sharatu Ka Nala***.

13. DW-3 Dharam Dutt has corroborated the statements of DW-1 Narender Parkash and DW-2 Hari Krishan, respectively. He has proved map Ext. DW-4/C. He has placed on record, copy of diploma certificate Ext. DW-4/B.

14. DW-5 Hardev has deposed that they wanted to take water forcibly from ***Sharatu Ka Nala***.

15. There is no specific reference to Khasra numbers in the pleadings of the plaintiffs. The map Ext. PW-1/A is a rough map. The map placed on record by defendants is Ext. DW-4/C. The plaintiffs have also not mentioned Khasra numbers, which are being irrigated through Kuhal No. 5. It is not mentioned from which point, the pipes have been installed by the defendants. The plea of Mr. G.D. Verma, learned Senior Advocate that the local commissioner has not been appointed merits rejection. The plaintiffs, as noticed hereinabove, have not given even the Khasra numbers, which were alleged to have been irrigated from Kuhal No.5. Ext. P1 to Ex. P4 ***Riwazat Ab Pashi*** do not support the case of the plaintiffs. The factual position as shown in Ext. DW-4/C is in conformity with the statements of the witnesses with regard to the source of water. Ext. DW-4/C has been prepared by an expert and PW-1/A has been prepared by the plaintiff and his son. The son of the plaintiff has not appeared in the Court. The plaintiffs have also not added other co-villagers as party.

16. Both the learned Courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by the Courts below.

17. In view of the analysis and discussion made hereinabove, no question of law, much less to say substantial question of law, involved 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 DHARAM CHAND CHAUDHARY, J.

Fate Ram and others .....Appellants.

Versus

Smt. Parvati .....Respondent.

RSA No. 156 of 2004
Reserved on 30th March, 2015
Decided on: 8th May, 2015

Hindu Succession Act, 1956- Section 15(2)(b)- Plaintiff pleaded that predecessor-in-interest of the plaintiff was married to 'G'- she succeeded to the property on the death of 'G'- she settled with one 'H' and plaintiff was born out of the wedlock between 'P' and 'H'- defendants claimed that they are tenants in possession on the payment of 1/4th of the produce and plaintiff has no right in the property- plaintiff admitted that he was not born out of the wedlock of 'P' and 'G' but was born to 'H'- held, that when son or daughter begotten by the deceased female not through her husband, whose property was with her during her but from someone else, such son or daughter has no right to inherit such property- such property shall devolve upon heirs of the husband or father-in-law- hence, plaintiff was not competent to file the suit. (Para-14 to 16)

Cases referred:
Omprakash vs. Radhacharan, (2009) 15 Supreme Court Cases 66
Bhagat Ram (D) by L.Rs versus Teja Singh (D) by L.Rs., AIR 2002 Supreme Court (1)
Remco Industries Workers House Building Co-operative Society versus Lakshmeesha M. and others, AIR 2003 Supreme Court 3167

For the appellants: Mr. B.K. Malhotra, Advocate.
For the respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Challenge herein is to the judgment dated 17.12.2003 passed by learned Additional District Judge, Mandi in Civil Appeal No. 16 of 1999 affirming thereby the judgment and decree passed by learned Sub Judge, 1st Class, Court No.1, Mandi in Civil Suit No. 103/98 (92) on the dismissal of the first appeal.

2. It is the defendants, who are in second appeal before this Court. The complaint is that the judgment and decree passed by both Courts below is against the law and also the facts of the case. Learned lower appellate Court while deciding the appeal has fell into error in not appreciating the facts relating to the status of the defendants as tenants and failure to draw appropriate inferences from the proved facts has vitiated the judgment and decree under challenge. The Courts below allegedly fell into a grave error giving undue weightage to the factum of the non-production of rent receipts of the defendants, because in view of the evidence brought on record by the plaintiff herself, the rent receipts were not being issued by the land-lord hence the non-production thereof should not have been given much importance. The factum of the plaintiff and her mother both are residing for the last more than 40 years at Bajaora, District Kullu has not been taken into consideration. The plea of the defendants that the rent used to be deposited with one Smt. Charan Dassi, maternal aunt of plaintiff is duly proved from the evidence produced by the plaintiff herself. Said Charan Dassi has not been produced to deny this fact, had the rent been not deposited with her. The judgment and decree on account of non-appreciation of the evidence as has come on record by way of own statement of the plaintiff that she is not the daughter of Smt. Padmu born to her from the lions of Sh. Gholu her previous husband, from whom the property in dispute had come to her. The plaintiff, therefore, not born to Smt. Padmu from lions of Sh. Gholu, the previous owner of the suit land is not entitled to claim the same in any manner whatsoever nor has any locus-standi to file the suit. The revenue entries qua the suit land stood duly rebutted were wrongly relied upon. On account of clubbing of the main issues for decision, the judgment and decree under challenge is vitiated and has been sought to be quashed and set aside.

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

a) Whether the courts below erred in law in decreeing the suit for permanent injunction?

b) Whether the succession to the property inherited by a female from her previous husband could not have devolved upon the legal heirs of second husband?

4. If coming to the factual matrix, the suit land is measuring 17-14-8 bighas entered in Khewat No. 10, Khatauni No. 11, Khasra Nos. 266, 313, 316, 337, 381, 383, 390,

427, 428, 474, 488, 514, 518, 525, 581, 586, 589, 592 and 607 Kitas 20 situated at village Tundla/443, Ilaqua Badar, Tehsil Sadar, District Mandi. Its previous owner was one Sh. Gholu. Smt. Padmu, mother of the respondent-plaintiff was married to said Shri Gholu. The suit property came in the hands of Smt. Padmu on the death of her previous husband through Gholu. Said Smt. Padmu settled with one Hukme Ram at village Bajaora, District Kullu. The respondent-plaintiff was born to her from the lions of said Shri Hukme Ram. Smt. Padmu, mother of the plaintiff also died and mutation No. 121 of the suit land came to be sanctioned and attested in favour of the plaintiff on 9.10.1992, as is apparent from the copy of Jamabandi for the year 1990-91, Ext. P-A. The respondent-plaintiff filed the suit for the decree of permanent prohibitory injunction and also for possession of the suit land as a consequential relief on the ground that though it is she who is owner in possession of the suit land, however, the defendants are threatening to take forcible possession thereof form her. Subsequently, by way of amendment, it is pleaded that she was dispossessed forcibly by them from the suit land in November, 1995.

5. In the written statement, the defendants raised the question of maintainability of the suit and locus of the plaintiff to file the same. On merits, they claim themselves to be in possession of the suit land in the capacity of tenant on payment of ¼ of the produce as rent. Smt. Padmu though might be recorded as owner of the suit land, however, it is they who are in possession thereof in the capacity of tenant. The entries to the contrary regarding possession of the suit land have been said to be wrong and against the facts. It is denied that plaintiff is in possession of the suit land, therefore, no question of any interference at their instance does arise. As regards the claim of the plaintiff that she is owner in possession of the suit land, it is specifically averred as under:

> "....In addition to it, it may be added that the plaintiff is claiming herself to be the successor of late. Smt. Padmu wife of Gholu, but as a matter of fact she had left the house of Gholu much earlier during the life time of Gholu and settled in the house of one Sh. Hukme Ram who is her father and as such she has no right in the estate of late Sh. Gholu earlier husband of said Smt. Padmu, Photocopy of Parivar Register, Shajra Nasab, Copy of affidavit, copy of death register, copy of Jamabandi Istemal of Mauja Tundhla and Niul, "report of Kanungo" are attached herewith in proof thereof."

6. It is denied that the plaintiff was dispossessed by them forcibly in the month of November, 1995. Such assertions in the plaint have been claimed to be malafidely raised with the motive to maintain the suit.

7. The plaintiff in replication filed to the written statement has denied the contents of the preliminary objections being wrong and on merits while reasserting the case as set out in the plaint denied the contentions to the contrary in the written statement.

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

1. Whether the plaintiff is owner in possession of the suit land, as alleged OPP
2. Whether the defendants are threatening to dispossess the plaintiff over the suit land, as alleged? OPP
3. If issues No. 1 and 2 proved in affirmative, whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP

3a. Whether the defendant has dispossessed the plaintiff during the pendency of the suit, if so, its effect? OPP

3b. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, if so, what is the correct valuation? OPD
4. Whether the plaintiff has no locus-standi to file the present suit? OPD
5. Whether the suit is bad for non-joinder of necessary parties? OPD
5a. Whether the defendants are tenant in possession of the suit land? OPD.
6. Relief.

9. After taking on record the evidence produced by the parties on both sides and hearing arguments, learned trial Court has decreed the suit. Learned lower appellate Court has dismissed the appeal and affirmed the judgment and decree passed by the trial Court.

10. Shri B.K. Malhotra, learned counsel representing the appellants-defendants has strenuously contended that it was deceased Gholu admittedly was the owner of the suit land. No doubt, Padmu was his wife, however, she left him during his life time and settled with one Hukme Ram at village Bajaora in District Kullu. Also that, the plaintiff who has been born to Smt. Padmu from the lions of said Shri Hukme Ram in terms of Section 15(2) (b) of the Hindu Succession Act is not entitled to claim any right, title or interest in the suit land being not the daughter of said Shri Gholu. The plea to this effect duly raised in the written statement has been ignored by both Courts below, as neither any issue framed to this effect nor any findings recorded. Mr. Malhotra, has, therefore, canvassed that after framing of an additional issue to this effect and quashing the judgment and decree under challenge, the suit deserves to be remanded as a whole.

11. On merits, it is urged that said Smt. Padmu and for that matter the respondent-plaintiff are residing at village Bajaura in District Kullu, whereas, the suit land is situated in District Mandi, there is no question of the plaintiff in possession of the suit land. The defendants rather have been proved to be in settled possession thereof in the capacity of tenant. When the respondent-plaintiff was not in possession of the suit land, decree for permanent prohibitory injunction could have not been passed.

12. Mr. G.R. Palsra, learned counsel representing the respondent-plaintiff has urged that the plea of tenancy raised by the defendants in the written statement is itself sufficient to arrive at a conclusion that they admit the plaintiff to be owner of the suit land. They, rather throughout admitted her mother late Smt. Padmu owner of the suit land and after her death, they admit her to be the owner thereof. Therefore, it is urged that the judgment and decree under challenge being legally and factually sustainable calls for no interference.

13. As noticed hereinabove, interesting questions of law arise for determination in the present appeal. It is to be seen that in the given facts and circumstances, decree for perpetual injunction should have been granted by both Courts below, particularly when the issue of the competency of the respondent-plaintiff to succeed to her mother late Smt. Padmu so far as the suit land is concerned, being not born to her from the lions of late Sh. Gholu, admittedly the previous owner of the suit land is neither discussed nor any issue in this regard framed. As a matter of fact, the issue qua competency of the plaintiff to inherit the suit land being vital one, should have been considered and decided. The Courts below should have not swayed merely by the entries in the revenue record showing the plaintiff to be owner in possession of the suit land. What is important in the given facts and

circumstances was to ascertain the source, whether lawful resulted in sanction and attestation of mutation No. 121 qua the suit land in the name of the plaintiff, without going into such question the decree for permanent prohibitory injunction and as a consequential relief for possession of the suit land could have not been granted.

14. Plaintiff not born to Smt. Padmu from the lions of Gholu stands proved from her own statement while in the witness box as PW-1, because when cross-examined she tells us that her mother Padmu when settled with Hukme Ram, she born to her from the lions of said Shri Hukme Ram. The plaintiff is born from the lions of Hukme Ram is, therefore, proved from her own statement and no other and further evidence is required in this regard. It takes us to Section 15(2) (b) of the Hindu Succession Act, which read as follows:

> "(2) Notwithstanding anything contained in sub-section (1),-
>
> (a).....
>
> (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section(1) in the order specified therein, but upon the heirs of the husband."

15. It is crystal clear from the bare perusal of the Section ibid that the son or daughter begotten by the deceased female not through her husband, whose property was with her during her lifetime but from someone else, such son or daughter have no right to inherit such property on her death. Object of Section 15(2) is to ensure that the property left by a Hindu female does not loose its real source. If it was the property she had inherited from her parents, the same on her death should go to legal heirs of her father. In case the property was inherited by her from her husband or her father-in-law the same on her death shall devolve upon the heirs of the husband or her father-in-law i.e. the source from which the property was inherited by her. The **Apex Court in (2009) 15 Supreme Court Cases 66** has held that when the property is devolved upon the deceased Hindu female from the parent's side, on her death, the same would go to her parents family and not to her husband's family. Similarly, in case where she had inherited some property from her husband or from her husband's family, on her death, the same would revert back to her husband's family and not to her own heirs. The **Apex Court in Bhagat Ram (D) by L.Rs** versus **Teja Singh (D) by L.Rs., AIR 2002 Supreme Court (1)** has held that the factum of a Hindu female originally had a limited right and later acquired full right, in any way would not alter the rules of Successions given in sub-Section (2) of Section 15 of the Act.

16. As noticed supra, the plaintiff admittedly is born to Padmu from the lions of Sh. Hukme Ram, therefore, she is not the heir of Gholu, the previous husband of said Smt. Padmu. The question of competency of the plaintiff to inherit the suit land on the death of Smt. Padmu was raised in the written statement. Learned trial Court, however, has ignored this vital aspect of the matter because neither any issue has been framed nor is there any adjudication in this regard. Mr. Malhotra, learned counsel has relied upon the judgment of the **Apex Court in Remco Industries Workers House Building Co-operative Society** versus **Lakshmeesha M. and others, AIR 2003 Supreme Court 3167** and on the strength of the ratio thereof has argued that when an issue arises from the pleadings of the parties is not redressed by the trial Court, the appellate Court can remand the suit as a whole. This judgment read as follows:

> "18. From the above resume of facts and the nature of orders of grants of Occupancy rights to the contesting parties, we find that the basic issue of the effect of earlier grant dated 28-5-

> 1965 (Ex. D-3) in favour of the tenant – Muniyappa on the subsequent granted dated 9-12-1969 (Ex. P-1) in favour of plaintiff/respondent was neither addressed to by any of the Courts below nor a decision has been rendered on the same. The issue of effect f Ext. D-3 on Ex. P1 and the identity of the land under the two grants is vital to the just decision of the case. The powers of the appellate Court are not inhibited by the acts or omissions of the parties. Rule 25 of Order 41 of the Code of Civil Procedure empowers the appellate court to frame an issue and remit it for trial which has been omitted to be framed and tried by the trial Court and which appears to the appellate Court essential to the right decision of the case, Rule 23-A. Order 41 introduced by CPC Amendment Act No. 104 of 1976 w.e.f. 1-2-1977 confers powers on the appellate Court to remand whole suit for re-trial. In our considered opinion, this is a fit case where this Court should exercise powers of remand under Order 21, Rule 25 read with Rule 23-A of CPC."

17. On the strength of the ratio of the judgment supra, Mr. Malhotra has urged that after framing of an issue qua competency of the plaintiff to inherit the suit land on the death of her mother Smt. Padmu, the suit as a whole be remanded to the trial Court.

18. It is to be seen from the above quoted plea specifically raised by the defendants in the written statement that mother of the plaintiff had settled with Sh. Hukme Ram perhaps after the death of her previous husband, Gholu, whose property is the subject matter of dispute in the present lis. Also that the plaintiff is born to her mother Smt. Padmu aforesaid from the lions of Hukme Ram. Therefore, she is not entitled to inherit the suit property. The plea so raised being vital one, should have been considered and duly redressed. The trial Court, however, has failed to frame any issue and also to decide the same after affording the parties due opportunity of being heard. This being a vital issue raised by the defendants should have not been ignored. As a matter of fact, without deciding the question of entitlement of the plaintiff to inherit the suit land, a decree for permanent prohibitory injunction or for possession of the suit land could have not at all been granted. No grounds seem to have been raised in this regard in learned lower appellate Court, however, may be that in the lower Courts', the pleadings are notoriously drafted. Before this Court one of the grounds raised for setting aside the impugned judgment and decree pertains to this aspect of the matter. Any how, a specific plea was raised in the written statement, therefore, the trial Court was under an obligation to have framed an issue and decide the same in accordance with law. The parties having not agitated the point raised in the pleadings is hardly of any consequence, as in view of the ratio of the judgment of the Apex Court in ***Remco Industries Worker's*** case supra, the powers of the appellate Court are not inhibited by the acts or omission of parties. Therefore, when in the considered opinion of this Court, a very vital issue having arisen in view of the pleadings on record stand ignored and redressal thereof is essentially required for the just and effective decision of the suit, an additional issue needs to be carved out and the suit remanded as a whole to the trial Court.

19. Consequently, it is deemed appropriate to frame an additional issue, which reads as follows:

> Whether the suit property inherited by Smt. Padmu from her previous husband late Gholu, could have not been devolved upon the plaintiff not born to said Padmu from the lions of

Gholu, the owner thereof but from the lions of one Hukme Ram and if so to what effect? OPD.

20. The judgment and decree under challenge, which does not decide the controversy under the additional issue so framed is, therefore, perverse and not legally and factually sustainable. Consequently, leaving all questions of law open to be considered and decided on merits, the same deserves to be quashed and set aside and the suit remanded as a whole to learned trial Court for fresh disposal in accordance with law.

21. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. The judgment and decree impugned in the present appeal is quashed and set aside. The suit is remanded to the trial Court for fresh disposal after taking on record the evidence, if any, sought to be produced by the parties on the additional issue carved-out hereinabove in this judgment and also affording them due opportunity of being heard.

22. In view of the suit pertains to the year 1992, it is expected from learned trial Court to decide the same expeditiously, however, not later then 30th September, 2015. The parties through learned counsel representing them are directed to appear in the trial Court on 23rd May, 2015. The Registry to ensure that the record is received in the trial Court well before the date fixed.

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

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

Suraj Bahadur .....Petitioner.

Versus

H.P. State Forest Development Corporation Ltd. and ors. .....Respondents.

CWP No. 4575 of 2012.
Decided on: 08.5.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as a cleaner on daily wages on 1.10.1986- he was subsequently regularized on 6.11.1997- respondents were shown senior – although they were appointed later- held, that seniority list should have been drawn on the basis of length of service- respondents directed to re-draw the seniority list and to promote the petitioner if otherwise found eligible. (Para-2 to 5)

For the petitioner: Mr. P.D.Nanda, Advocate.
For the respondents: Mr. Pranay Pratap Singh, Advocate, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was appointed on daily waged basis as Cleaner against the vacancy on 1.10.1986. He was regularized as Cleaner on 6.11.1997. The post of cleaner is in the feeder category for promotion to the post of Driver, as per the R & P Rules, framed vide Annexure P-1. According to bye laws 3.4, the *inter-se* seniority of the employees of the respondent-Corporation is to be determined based on the length of service in the grade.

2. The tentative seniority list of Cleaners as it stood on 25.3.2011, was notified on 2.4.2011. The respondent-Corporation has drawn two seniority lists of Cleaners, one is at page 26 and the second is at page 27 of the paper book. The petitioner, as per the seniority list at page 26 of the paper book, is at Sr. No. 1. Respondents No. 3 & 4 are at Sr. Nos. 8 and 9 of seniority list at page 27 of the paper book. Their date of appointment is 3.5.2003 and 14.6.2004, respectively. The date of regularization of the petitioner is 6.11.1997 and his date of appointment as daily waged Cleaner is 1.10.1986. The respondent-Corporation has promoted respondent No. 3 as Driver on 21.11.2011 as per Annexure P-5. Respondent No. 4 has been promoted as Driver on 20.6.2012, vide Annexure P-7.

3. The seniority was to be determined on the basis of the length of service of those persons, who were in the same grade. The petitioner and respondents No. 3 & 4 were in the same grade. However, surprisingly, the respondent-Corporation in defiance of service jurisprudence has drawn two seniority lists, as noticed hereinabove. The explanation given in the reply filed is that the petitioner has been regularized in his personal post and the respondents No. 3 & 4 were appointed in the regular cadre. There is fallacy in the averments contained in the reply. The classification made on the basis of "personal post" and "cadre post" is violative of Articles 14 and 16 of the Constitution of India. All the Cleaners form homogeneous class.

4. The petitioner was working on daily wage basis since 1.10.1986 and regularized on 6.11.1997. He would be deemed to be regularized in the regular cadre. The respondent No. 3 was appointed on compassionate basis, as per seniority list only on 3.5.2003 and respondent No. 4 on 14.6.2004, but they stood promoted to the post of Driver by ignoring the petitioners. The action of the respondents, ignoring the petitioner for promotion and considering respondents No. 3 & 4 as Drivers, is illegal and arbitrary and thus violative of Articles 14 & 16 of the Constitution of India. The petitioner was also in feeder category for promotion to the post of Driver and has a better right vis-à-vis respondents No. 3 & 4, since the post of Driver is a non-selection post. The seniority list should have been drawn, as per the bye laws, on the basis of the length of service. The petitioner has a fundamental right to be considered for promotion in accordance with law.

5. Accordingly, the Writ Petition is allowed. Annexure P-5 dated 21.11.2011 and Annexure P-7 dated 20.6.2012, are quashed and set aside. The respondents are directed to re-draw the seniority list Annexure P-4 on the basis of length of service and to consider the case of the petitioner for promotion to the post of Driver. Needful be done within a period of ten weeks from today. Pending application(s), if any, shall stand disposed of.

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

Cr. Appeal No. 735/2008
With Cr. Appeal No. 31/2009
Reserved on: 8.5.2015
Decided on: 12.5.2015

1. Cr. Appeal No. 735/2008

Sarla Devi ...Appellant

Versus

State of Himachal Pradesh ...Respondent

2. Cr. Appeal No. 31/2009

Yashpal ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Indian Penal Code, 1860- Sections 302 and 498-A- Deceased was married to the accused- accused were not satisfied with the dowry given to her- deceased told her parents and her sister that she was being harassed for not bringing sufficient dowry- she gave birth to a daughter but nobody came to see her and her daughter- deceased came back after compromise to her matrimonial home- she was again harassed by accused- she died due to beatings given to her with fist and kick blows and she was carrying pregnancy of 34-36 weeks- post mortem revealed that she had died due to fracture and dislocation of cervical vertebrae- dead body was found at a distance of 200 meters from the house of the accused- accused had not lodged any missing report and had not made any inquiry about his wife- Doctor admitted that fracture and dislocation of cervical vertebrae could be caused by twisting neck with great force with hands- accused had also sustained injuries- accused had made an extra-judicial confession stating that he had given beatings to the deceased- held, that act of the accused fell within the definition of cruelty- relation between accused and deceased did not improve even after convening the panchayat – accused was rightly convicted of the commission of offences punishable under Sections 302 and 498-A of IPC.

(Para-21 to 25)

For the Appellant(s) : Mr. N.S. Chandel, Advocate, in both the appeals.

For the Respondent : Mr. M.A. Khan, Additional Advocate General

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

These appeals are instituted against Judgment dated 10.11.2008 passed by learned Additional Sessions Judge, Fast Track Court, Una, District Una, Himachal Pradesh in Sessions Case No. 25/99 RBT 11/2004, whereby appellant-accused namely Yashpal (hereinafter referred to as 'accused' for convenience sake), was convicted and sentenced under Sections 302 and 498A IPC and acquitted of offences punishable under Section 304-B and 315 IPC. He was sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of fine, to further under go simple imprisonment for one year under Section 302 IPC. He was also sentenced to undergo imprisonment for two years and to pay a fine of Rs.2,000/- for offence under Section 498-A IPC and in default of payment of fine, to further undergo imprisonment for two months. Appellant-accused Sarla Devi (hereinafter referred to as 'accused' for convenience sake) was convicted and sentenced to undergo imprisonment for two years and to pay a fine of Rs.2,000/- for the offence punishable under Section 498-A Indian Penal Code In default of payment of fine, she is to further undergo simple imprisonment for two months.

2. Since common questions of law and facts are involved in both the appeals, they were taken up together and are being disposed of vide this common judgment.

3. Case of the prosecution, in a nutshell, is that on 17.1.1999 at about 10.15 PM a telephonic information was received in the Police Station Gagret from Kashmir Singh Up Pradhan Gram Panchayat Oel regarding death of Meena Kumari wife of Yashpal. Thereafter, police from police station Gagret went to the spot. Dead body was found with the help of torch, lying in the bushes at a distance of 200 meters from the house of the accused.

Shri Onkar Singh, PW-4 inspected the body of Meena Kumari. He noticed scars on the face and other parts of the body. Parents of the deceased also came there. PW-14 Onkar Singh recorded the statement of Darshan Singh, brother of the deceased under Section 154 CrPC. He disclosed that Meena Kumari was his younger sister and was married to accused in November 1995. They had given dowry in the marriage according to their capacity but accused were not satisfied. After 3-4 months of marriage when deceased Meena Kumari came to her parental house, she told the complainant and her parents that she was being harassed by her husband Yashpal and her mother-in-law Sarla Devi used to taunt her for not bringing sufficient dowry. On the complaint of Meena Kumari, complainant and parents visited the house of accused many times and requested not to harass her. Thereafter, accused shunted Meena Kumari out of their house. She came to the house of her parents at village Nagnoli and remained there for about 3-4 months where she gave birth to a daughter. Nobody came to look after Meena Kumari and her daughter. Meena Kumari was sent back after convening a Khangi Panchayat, to her matrimonial house. Accused kept on harassing her. On 18.1.1999 a message was received by the complainant through one Jamal Deen of his village that Meena Kumari had died in village Oel. Compromise Ext. PF was taken into possession. Viscera of the deceased was sent to FSL Junga for chemical examination. According to the post-mortem report, deceased died due to fracture and dislocation of cervical vertebrae at level C-1-2 and C-2-3. Death was caused by beatings given to her with fist and kick blows. She was carrying pregnancy of 34-36 weeks. Matter was investigated and challan was put up in the Court after completing all codal formalities.

4. Prosecution has examined as many as 17 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. Accused were convicted and sentenced as notice by us above. Hence, these two appeals.

5. Mr. N.S. Chandel, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General, has supported the judgment of trial court dated 10.11.2008.

7. We have heard the learned counsel for the parties and gone through the judgment and record very carefully.

8. PW-1 Dr. Satinder Chauhan deposed that he alongwith Dr. Umesh Gautam and Dr. Vipan Chaudhary conducted post-mortem on the dead body of Meena Kumari. According to the post-mortem report, there were multiple contusions and abrasions on the face of deceased. Upper part of neck which was reddish in colour with defused swelling on both sides of neck just below angles of mandible corresponding to haemorrahge present subcutaneous. There was no ligature marks on the neck. Rigor mortis was present. There was fracture of cervical vertebrae at C1-2 and C2-3. Post-mortem report is Ext. PB. According to Satinder Chauhan, PW-1, deceased was pregnant and there was no evidence of rape, as per post-mortem report. He did not take swab since rape was not suspected.

9. PW-2 Shri Darshan Kumar is brother of deceased. According to him, Meena was married to Yashpal, accused in the month of November 1995 as per Hindu rites. She was harassed by her in-laws. They used to give beatings to Meena Kumari for bringing insufficient dowry. Accused also demanded money from his sister for the purpose of colour TV, fridge, Scooter etc. 3-4 months after marriage Meena came to their house and told that she was being maltreated and given beatings for bringing insufficient dowry. His sister gave birth to a daughter, however, nobody came from the side of in-laws of Meena to enquire about her well-being. A Khangi Panchayat was convened. He admitted that his sister has

also consumed poison due to maltreatment by the accused. He came to know about death of his sister on 18.1.1999. He went to the spot. Dead body of his sister was also lying there. He noticed scratches and injuries on the face and neck. Blood was oozing from nose and mouth. Neck was swollen.

10. PW-3 Kashmir Singh deposed that he was Up Pradhan of village Oel. On 17.1.1999, at about 7.30-7.45 Pawan Kumar Ward Panch came to him and told that wife of Yashpal had died. Body was in the bushes. He informed the police. He noticed injury on the face of the deceased. Police came to the spot. They took into possession the tooth, Ext. P1, Shawl Ext. P2, pair of Chappal Ext. P3 and broken bangles Ext. P4. House of the accused was also searched. He was declared hostile and cross-examined by the learned Public Prosecutor.

11. PW-4 Amrit Lal deposed that Meena Kumari was his daughter and married in 1995. Her in-laws used to harass her for bringing insufficient dowry including fridge, TV Scooter etc. Accused also gave beatings and tortured his daughter by calling her names. She gave birth to a daughter about 3 years back in their house. No one from the family of her in-laws came at that time to enquire about the welfare of Meena Kumari and her child. His daughter remained in the house only for 4-5 months. He took Jaswant and Jagan Nath with him to the house of accused where a Khangi Panchayat was held. In the Khangi Panchayat, a compromise was effected. He proved Ext. PF, the compromise. It was signed by Meena Kumari and Yashpal. Even after the compromise, she was harassed. In his cross-examination, he has admitted that earlier also, his daughter had taken poison and was saved by her husband Yashpal and his brother by calling his daughter and giving timely treatment.

12. PW-5 Bhagat Singh deposed that he attended the marriage ceremony of Yashpal and Meena Kumari. After marriage Meena Kumari met him many times. She complained to him that her husband and mother-in-law used to demand dowry articles like fridge, TV, Scooter etc. he went to the spot where body of Meena Kumari was lying. There were signs of throttling the neck, injuries on face and blood was oozing out from the nose and mouth.

13. PW-6 Shri Ram deposed that before death of Meena Kumari, a Khangi Panchayat was held in the village in the house of the accused. Father of Meena Kumari alongwith 2-3 persons was present in the Khangi Panchayat on the complaint of the girl.

14. PW-7 Jaswant Singh deposed that the after marriage, Meena Kumari used to meet him in the village. She used to tell him that her husband and mother-in-law used to torture her for touching household articles by saying that these were not brought by her.

15. PW-8 Kamla Devi is mother of deceased. She also deposed the manner in which her daughter was tortured by the accused for bringing insufficient dowry. First child was born to Meena in their house but accused never came to enquire about the wellbeing of Meena or her child. A compromise was also arrived at. Meena was brought back to their house and again wept and told that accused were demanding more dowry and her life was in danger.

16. PW-9, PW-10, PW-11 and PW-12 are all formal witnesses.

17. PW-13 Yog Raj deposed that Onkar Singh SI deposited one sealed parcel containing viscera of Meena Kumari which he kept in the Malkhana. It was sent to FSL Junga through Constable Pardeep on 3.2.1999.

18. PW-14 Onkar Singh has deposed that he received a telephonic information on 17.1.1999. It was recorded in Rojnamcha. He went to the spot and with the help of torch, dead body was inspected by him. He found swelling on the neck of dead body of Meena. He also noticed blood oozing from nose and mouth of deceased. There were blue scars on face and other parts of the body. Statement of brother of the deceased was recorded vide Ext. PC under Section 154 CrPC. Inquest report Ext. PD was prepared. Post-mortem report was obtained.

19. PW-15 Kashmir Singh DSP Vigilance deposed that a compromise Ext. PF was produced by Shashi Pal, which was taken into possession vide memo Ext. PJ. He got accused medically examined on 21.1.1999. He could not get accused examined on 19.1.1999.

20. PW-17 N.K. Bhardwaj has examined the accused and found following injuries on the body of accused:-

> "1. Brown coloured abrasion 1.5 cm x 0.2 cm on right cheek 2cm away from right lower id.
>
> 2. another brownish coloured abrasion present 1cm away from angle or mandible on left side neck."

21. What emerges from the statements of witnesses is that the marriage between Yashpal and deceased Meena Kumari was solemnised in 1995. She was maltreated for bringing insufficient dowry. She was administered beatings by the accused. A Khangi Panchayat was also convened. A compromise Ext. PF was arrived at. Despite that she was tortured and harassed by the accused. Deceased gave birth to a daughter in her parental house. No member from the family of accused came to enquire about welfare of the deceased or her child. Accused used to demand fridge, TV, Scooter etc. as per statement of PW-2 Darshan Kumar, PW-4 Amrit Lal and PW-8 Kamla Devi.

22. Dead body was found at a distance of 200 metres from the house of accused. He has not lodged any missing report with the police or made any enquiry of whereabouts of his wife. According to PW-1, deceased died due to fracture /dislocation of cervical vertebrae at C-1-2 and C-2-3. Deceased was pregnant and was carrying pregnancy of 34-36 weeks. In his cross-examination, he stated that fracture and dislocation of cervical vertebrae could be caused by twisting neck with great force with hands. Accused Yashpal has also received injuries as per statement of Dr. NK Bhardwaj (PW-17). He also opined that injuries were possible in a scuffle.

23. Mr. NS Chandel argued that accused was not medically examined immediately. Merely that the accused was not medically examined immediately would not rule out the injuries received by the accused. PW-5 Bhagat Singh has deposed that the accused has made extra-judicial confession before him. Yashpal said that an altercation between him and Meena. There was a scuffle in the kitchen of the accused. Broken bangles of Meena Kumari were in the kitchen. Yashpal told that he was not given food by Meena Kumari. He further told that at 5.00 pm Meena had gone out to ease herself. He followed her and gave her beatings severely out of anger. She died due to beatings. Deceased has taken poison earlier. It further strengthens the prosecution case that the deceased was tortured and harassed by accused. Otherwise there was no occasion for a young lady like Meena Kumari to consume poison or to convene a Khangi Panchayat as Ext. PF. Ext. PF also suggests that the deceased was maltreated and harassed and tortured by the accused.

24. Mr. NS Chandel also argued that in fact somebody has tried to rape her since her string was found loose. PW-1 Dr. Satinder Chauhan has categorically opined that there

was no evidence of rape as per post-mortem report. Deceased has died due to fist and kick blows given by the accused. Police has taken into possession tooth Ext. P1, blood stained Shawl Ext. P2, a pair of Chappals Ext. P-3 and broken bangles Ext. P4. Mr. N.S. Chandel has lastly argued that prosecution has attributed no motive to the accused. It is true that in a case based on circumstantial evidence, motive plays an important role. However, when the chain of events is complete, motive is not very important. In this case, though there is no eye-witness but the prosecution has completed the entire chain of events pointing exclusively to the guilt of the accused. There is sufficient material on record to prove that deceased was tortured and harassed by both the accused for bringing insufficient dowry. Neither Yashpal nor his mother have visited the house of deceased at the time of child birth. Meena Kumari was also forced to consume poison earlier. PW-5 Bhagat Singh, PW-7 Jaswant have deposed categorically that as and when Meena Kumai used to meet them, she used to complain about being harassed by her in-laws for bringing insufficient dowry. Acts of the accused fall under the ambit of 'cruelty'. Relation between accused and deceased did not improve even after convening the Khangi Panchayat. Depositions have been made by witnesses only against accused and not against other family members of the accused.

25. Accordingly, the prosecution has fully proved its case against the accused Yashpal under Section 302 and 498-A IPC and accused Sarla Devi under Section 498-A. There is no occasion for us to interfere in the well-reasoned judgment of the trial Court. Consequently, both the appeals fail and are dismissed, so also the pending applications, if any, in both the appeals. Bail bonds are cancelled.

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

The Presiding Officer, Motor Accident Claims Tribunal. ... Appellant.

Versus

Jitwar Singh deceased through his LRs Sadhna Devi and others ... Respondents.

RSA No. 351 of 2011.
Decided on: 12th May, 2015.

Code of Civil Procedure, 1908- Section 79- An award was passed for the sum of Rs.1,78,000/- as compensation- awarded amount was partly ordered to be released to the plaintiffs, however, a sum of Rs. 1,25,000/- was ordered to be invested in Kisan Vikas Patra- this amount was not deposited by the employee of the Court- this fact came to the notice when an application for release of the amount was filed- FIR was registered and the employee was convicted – Civil Writ Petition was filed for the recovery of the amount which was disposed of with the liberty to the plaintiffs to seek appropriate remedy in accordance with law- plaintiff filed a civil suit for recovery of Rs. 3,57,500/-- held, that employee was a government servant and the State and the employer are liable for the acts of the employees - therefore, defendant No. 1 and 2 were rightly held liable to pay amount - however, they are at liberty to recover the amount from the employee in accordance with law. (Para-15 to 18)

Cases referred:

Chairman, Railway Board and others v. Chandrima Dass and others, AIR 2000 SC 988

Achutrao Haribhau Khodwa and others v. State of Maharashtra and others, AIR 1996 SC 2377

Saheli, a Women's Resources Centre through Ms. Nalini Bhanot and others v. Commissioner of Police, Delhi and others, AIR 1990 SC 513

For the appellant : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For respondents: Mr. V.D. Khidtta, Advocate, for respondents No.1(a), 1(b), 2 and 3.
Mr.D.S. Nainta, Additional Advocate General, with Mr. Pushpinder Jaswal, Deputy Advocate General, for respondent No.4.
Mr. Satyen Vaidya, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (Oral)

Defendant No.2, the Presiding Officer of Motor Accident Claims Tribunal, Kinnaur Civil and Sessions Division at Rampur Bushahr, is in second appeal before this Court.

2. Facts in brief giving rise to file the present appeal, in a nutshell, are that one Ravi Kant son of respondent No.1 Jitwar Singh Negi (since dead) and respondent No.2 Smt. Dolma, (hereinafter to be referred to as 'the plaintiffs'), was travelling in a jeep bearing registration No.HP02-4716, on 24th July, 1995. The vehicle met with an accident near Sanarsa (Jhakari) and said Shri Ravi Kant died in the said accident.

3. The plaintiffs filed a petition under Section 166 of the Motor Vehicles Act before learned Motor Accident Claims Tribunal at Rampur Bushahr. Appellant herein, defendant No.2 passed an award and awarded a sum of Rs.1,78,000/- as compensation together with interest to the plaintiffs. The insurer, National Insurance Company subsequently deposited the awarded amount before learned Motor Accident Claims Tribunal. The awarded amount was partly ordered to be released to the plaintiffs, however, a sum of Rs.1,25,000/- was ordered to be invested in Kisan Vikas Patras.

4. Defendant No.3, who was holding the post of Daftri in the office of appellant-defendant No.2 and looking after the work of Naib Nazir under the authority of defendant No.2, had withdrawn a sum of Rs.1,25,000/- from State Bank of India, Rampur on 22nd May, 1998. Defendant No.3, however, did not invest the amount in question in the post-office in the form of Kisan Vikas Patra. This fact came to notice on 19th April, 2004, when the plaintiffs filed an application for release of the amount so invested in Kisan Vikas Patra. The matter was brought to the notice of the High Court. On the direction of the High Court, a criminal case came to be registered against defendant No.3. He was tried by learned Sub Divisional Judicial Magistrate, Rampur Bushahr and convicted.

5. In a Civil Writ Petition filed by the plaintiffs seeking the relief of recovery of the amount in question, the High Court ordered to initiate disciplinary proceedings against defendant No.3. Liberty was also reserved in favour of the plaintiffs to seek appropriate remedy available to them in accordance with law. This has led in filing Civil Suit No.75-1 of 2009 in the Court of learned Civil Judge (Senior Division), Rampur, District Shimla, for the recovery of Rs.3,57,500/- against the defendants jointly and severally.

6. Learned trial Court has decreed the suit vide judgment dated 1st May, 2009, for the recovery of Rs.2,50,000/- together with interest at the rate of 9% per annum against defendant No.3 alone. Defendants No.1 and 2 were not held liable to pay the decretal amount with the following observations:

> "Further-more, it is expressly made clear that since defendants No.1 and 2 have no active role in the present suit. More-so-over, it is no where pleaded from the side of plaintiffs that defendants are jointly and severally liable to pay the suit amount to the plaintiffs. It is

> expressly admitted by PW-1 as well as DW-1 that Government of Himachal Pradesh through Secretary Home or learned MACT Tribunal is not involved in the present suit. It is proved to the satisfaction of this Court rather from the Criminal Court that has been convicted for commission of offence punishable under Sections 409 and 420 of IPC. He had misappropriated a sum of Rs.1,25,000/- after embezzling a sum being government servant, therefore, this Court is of the considered opinion that it is the defendant No.3 who is himself liable and responsible to re-pay the suit amount to the plaintiffs. As a sequent effect, issue No.1 is answered affirmative in favour of the plaintiffs and against the defendants."

7. The plaintiffs aggrieved by that part of the judgment and decree whereby defendants No.1 and 2 were exempted from liability to pay the decretal amount, have preferred Civil Appeal No.1-AR/13 of 2009/10 in District Courts at Rampur Bushahr, which came to be decided by learned Additional District Judge, Kinnaur at Rampur vide judgment and decree dated 30th April, 2011, under challenge in the present appeal. Learned lower appellate Court while reversing findings on issue No.1 to the extent of defendants No.1 and 2 discharged from the liability, has held that defendants are jointly and severally liable to pay the decretal amount and has partly allowed the appeal and modified the judgment and decree of the trial Court to the extent that the suit stands decreed against defendants No.1 to 3 jointly and severally.

8. Defendants No.1 and 3 have not preferred any appeal against the judgment and decree passed by learned lower appellate Court. The judgment and decree passed by learned lower appellate Court qua them have thus attained finality.

9. It is, however, defendant No.2, who has assailed the judgment and decree passed by learned lower appellate Court in the present appeal on the grounds *inter alia* that, learned lower appellate Court has not appreciated the evidence available on record in its right perspective and to the contrary based its findings on the surmises and conjectures. It is defendant No.3, who allegedly was liable to pay the decretal amount because this amount was entrusted to him with a direction to purchase the Kisan Vikas Patra. He, however, failed to do so and to the contrary embezzled the amount in question. He was convicted for the offence so committed. It is contended that the appellant was not supposed to accompany defendant No.3 to post-office for deposit of the amount in question and to purchase Kisan Vikas Patra.

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

1. Whether the learned lower appellate court has erred by ignoring the finding rendered as Ex.PW-1/J whereby the respondent No.5 was convicted on account of misappropriation of Rs.1,25,000/-?
2. Whether the learned lower appellate Court has been wrong in applying the principle of Master and Servant under the given facts and circumstances of the present case?

11. Mr. G.D. Verma, learned Senior Advocate has argued that no liability could have been fastened upon appellant-defendant No.2, as according to Mr. Verma, appellant-defendant No.2 has no role to play in embezzlement of the amount in question. It is rather defendant No.3, who is liable to pay the decretal amount. Learned trial Court has rightly saddled him with the said liability and the findings so recorded could have not been quashed by learned lower appellate Court.

12. On the other hand, Mr. V.D. Khidtta, learned Counsel representing the respondents-plaintiffs, has urged that learned lower Court has rightly held all the defendants jointly and severally liable to pay the decretal amount in view of there being Master-Servant relationship in existence. Similar are the arguments on behalf of defendant No.3.

13. The questions of law need adjudication are that in view of the conviction of defendant No.3, he alone is liable to satisfy the decree and that Master-Servant relationship has nothing to do in this case and as such appellant should have not been saddled with liability.

14. Keeping in view questions so raised in this appeal, elaboration of the facts and evidence available on record is not required, as it is only the legal questions, having been raised, need to be redressed.

15. Section 79 of the code of Civil Procedure deals with the suits by or against the Government or public Officer in connection with any act done in their official capacity. Law on the issue is no more *res-integra*, as the Apex Court in such cases of omission of employees has held the Master, i.e., the State liable. Reference can be made to a judgment of the Apex Court in ***Chairman, Railway Board and others*** v. ***Chandrima Dass and others, AIR 2000 SC 988***. In this case some railway employees subjected a woman to sexual intercourse in Yatri Niwas at railway-station. The Apex Court, while holding that the employees, who were deputed to manage the establishment including the railway-station and Yatri Niwas, were essential components of the government machinery. Carrying commercial activity, if any, such employee committed an act of tort the Union Government of which they are employees on satisfaction of other legal requirement can be held vicariously liable for damages to the persons wronged.

16. In ***Achutrao Haribhau Khodwa and others*** v. ***State of Maharashtra and others, AIR 1996 SC 2377***, a case where the staff of Government Medical Hospital while operating upon a patient left mop in the body of the patient resulting in formation of pus and ultimately death of the patient, held the State liable by applying the doctrine of *res* ipsa loquitur.

17. In ***Saheli, a Women's Resources Centre through Ms. Nalini Bhanot and others*** v. ***Commissioner of Police, Delhi and others, AIR 1990 SC 513***, where a nine years old child died on account of beatings given by the police officer, the State was held liable for tortuous acts of its employees, i.e., police officer and to pay the compensation to the dependents of the child.

18. Applying the above principles in the present case, defendant No.3 was an employee of defendants No.1 and 2. He was entrusted a sum of Rs.1,25,000/- to deposit the same in post-office and purchase the Kisan Vikas Patra in the names of the plaintiffs. He neither deposited the amount in the post-office nor purchased the Kisan Vikas Patra and rather embezzled the amount in question. In a criminal case he has been held guilty and convicted under Sections 409 and 420 of the Indian Penal Code, vide judgment dated 14th May, 2007, Ext.PW-1/J. Defendants No.1 and 2 being the Masters of defendant No.3 have, therefore, been rightly held jointly and severally liable to pay the decretal amount. Learned lower appellate Court has, therefore, not committed any illegality or irregularity while decreeing the suit against all the defendants. Defendants No.1 and 2, if so advised, may recover the amount in question from defendant No.3 in accordance with law.

19. In view of above, no legal questions muchless to speak of substantial questions of law as formulated, arise for determination in the present appeal. The judgment

and decree passed by learned lower appellate Court is legally and factually sustainable and as such deserves to be upheld.

20. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. No order as to costs.

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

Vinod Kumar. ...Petitioner.

Versus

Varinder Kumar Sood. ...Respondent.

Civil Revision No.60/2013
Reserved on : 30.4.2015
Decided on: 13.5.2015

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord sought eviction on the ground that building had become unfit and unsafe for human habitation and the building is required bonafide by landlord for re-construction – landlord had entered into an agreement for reconstruction of the building- there is no requirement of approval or sanction of building plan for seeking eviction- held, that in these circumstances, tenant is directed to handover the vacant possession to the landlord- tenant shall have a right to be re-inducted in the premises after re-construction of the building. (Para-16 to 22)

Cases referred:
Hari Dass Sharma vs. Vikas Sood and others, (2013) 5 SCC 243,
Joginder Singh and another vrs. Smt. Jogindero and ors., AIR 1996 SC 1654
Syed Jameel Abnbas and others vs. Mohd. Yamin alias Kallu Khan, (2004) 4 SCC 781

For the Petitioner: Mr. Bharat Bhushan Vaid, Advocate.
For the Respondent: Mr. Ashok Kumar Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral**).**

This revision petition is directed against the order dated 9.1.2013 passed by the learned Appellate Authority, Shimla in Rent Appeal No. 54-S/14 of 2012.

2. "Key facts" necessary for the adjudication of this petition are that respondent-landlord (hereinafter referred to as the "landlord" for convenience sake) filed eviction petition under section 14 of the H.P. Urban Rent Control Act, 1987 against the petitioner-tenant (hereinafter referred to as the 'tenant' for convenience sake). The landlord has sought the eviction of the tenant from the demised premises firstly on the ground that the building in question has become unsafe and unfit for human habitation; the building is more than 100 years old, it was constructed of Dhajji wall and with the passage of time the construction material has decayed rendering the building unsafe and unfit for human habitation and secondly the building is required bona fide by the landlord for building and rebuilding.

3. Petition was contested by the tenant. According to the tenant, the building was owned by two different persons, namely, Varinder and Keshav Ram. The ground floor and first floor of the building were owned by Keshav Ram since 1993. The building could not be reconstructed without sanction accorded by the Municipal Corporation, Shimla. The building is not in a dilapidated condition. The construction could be carried without eviction of premises by the tenant.

4. Issues were framed by the Rent Controller. He allowed the petition on 16.5.2012 by ordering the eviction of the tenant. However, according to the Rent Controller the eviction would become available to the landlord only when the building plans are sanctioned by the competent authority. Tenant feeling aggrieved by the order dated 16.5.2012 filed an appeal bearing Rent Appeal No.54-S/14 of 2012 before the Appellate Authority. Landlord preferred an appeal against the order dated 16.5.2012 bearing Rent Appeal No.55-S/14 of 2012 before the Appellate Authority. The appeal filed by the tenant bearing Rent Appeal No.54-S/14 of 2012 was partly accepted by the appellate authority on 9.1.2013 by ordering re-entry of the tenant after the completion of rebuilding equivalent to the area to original premises. The appeal bearing Rent Appeal No.55-S/14 of 2012 filed by the landlord was dismissed. Hence, the present petition.

5. Mr. Bharat Bhushan Vaid, learned counsel for the petitioner, has vehemently argued that the landlord has failed to prove that the building has become unsafe and unfit for human habitation. He has further argued that the courts below have come to a wrong conclusion that the building in question was required bona fide for the purpose of building and rebuilding. He has also contended that there are two owners of the building and in these circumstances, the building cannot be reconstructed. He has lastly contended that till the maps are not approved, eviction order would not become effective.

6. Mr. Ashok Kumar Sood, learned counsel for the respondent, has supported the order dated 9.1.2013.

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

8. Firstly, the Court will advert to the question whether the building has become unsafe and unfit for human habitation. Landlord Varinder Kumar has appeared as AW-1. According to him, the building is 100 years old. He intends to reconstruct building on the basis of RCC structure after demolishing building on old lines. Reconstruction was not possible without eviction of tenant. He is owner of ground floor. He has further stated that Keshav Ram is owner of basement floor and sub-basement floor. The agreement was executed *inter se* the parties jointly vide Ext.AW-1/B. The Building plan was approved by Municipal Corporation, Shimla vide Ext.AW-1/C. He has proved sanction order Ext.AW-1/D and AW-1/E. According to him, floors have developed cracks and foundation of the building was weak. He has sufficient funds for the purpose of building and re-building. He wanted to reconstruct the building for better economic use.

9. AW-2 Keshav Ram has testified that he has purchased two floors from the landlord in the year 1993. He intends to reconstruct building alongwith landlord Varinder Kumar. He executed agreement for the purpose of reconstruction Ext. AW-1/A. The building is in dilapidated condition.

10. AW-3 B.C. Sharma is most material witness. He has proved report Ext. AW-3/A. He has proved photographs Ext. AW-3/A-1 to Ext. AW-3/A-4. He has visited the spot on 25.6.2008. He has found the condition of the building dilapidated. According to him, the building was made of Dhajji walls. The building has developed cracks. The main load

bearing wall has developed cracks. He has proved that the building has become unsafe and unfit for human habitation and the same is required to be reconstructed. Reconstruction was not possible without evicting the tenant.

11. AW-4 Gurvir has proved sanction letter Ext. AW-1/D. According to him, the extension was granted on 19.7.2000 vide Ext. AW-4/A. The construction of two storeys was sanctioned from road level and two storeys were sanctioned below road level.

12. AW-5 Pardeep Gupta has proved Ext.AW-1/C. According to him, sanction letter Ext. AW-1/D was correct as per original record.

13. Tenant Vinod Kumar has appeared as RW-1. According to him, towards eastern side there is a building of Rajesh Khanna and towards eastern side there is a building of Kulbhushan Sood. The landlord has instituted eviction petition with intention to enhance rent. Reconstruction was possible without his eviction. Some other person was owner of the basement portion. He has denied the suggestion that wood used in the premises was damaged completely. He has denied the suggestion that the building is 100 years old.

14. RW-2 Rajesh Khanna has deposed that his father Dharam Pal was owner of building and after his death in the year 2005, he and his brother have become owners. The wall of the building was common. Half portion of common stairs was owned by him and other half was owned by Varinder Kumar.

15. What emerges from the statements of the witnesses is that the building is 100 years old. It has out lived its life. It has become unsafe and unfit for human habitation as per report Ext. AW-3/A prepared by AW-3 B.C. Sharma. AW-3 B.C. Sharma has visited the spot on 25.6.2008. According to him, the main load bearing wall has developed cracks. According to him, rebuilding was not possible without evicting the tenant. The landlord has proved that he has sufficient funds for reconstruction of the building since he wanted to put the building for better use after reconstruction. He has proved the sanction letter/AW-1/D. Though the same has expired but it was extended vide Ext. AW-4/A dated 19.7.2000. The building is situated in the core area. The construction in core area can also be carried out after getting sanction from the competent authority.

16. Mr. Bharat Bhushan Vaid has argued that the building is owned by two owners and rebuilding can not be carried out. Suffice it to say that landlord has entered into an agreement with AW-2 Keshav Ram, for reconstruction of the building vide Ext. AW-1/A. Agreement Ext. AW-1/A has been proved by AW-1 Varinder Kumar and AW-2 Keshav Ram. The tenant has not produced any witness to prove the condition of the building.

17. Now, as far as approval of sanction of building plan is concerned, their lordships of Hon'ble Supreme Court have held while interpreting section 14 of the HP Urban Rent Control Act that the approval of sanction of building plan is not *sine qua non* seeking eviction of the tenant.

18. Their Lordships of the Hon'ble Supreme Court in ***Hari Dass Sharma*** vs. ***Vikas Sood and others***, (2013) 5 SCC 243, have held that under section 14 (3) (c) of the H.P. Urban Rent Control Act, 1987 duly sanctioned building plan is not a condition precedent for entitlement of landlord for eviction of tenant. Their Lordships have held as under:

> 17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High

> Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani & Anr. (supra) and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.
>
> 18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."

19. Mr. Bharat Bhushan Vaid has also contended that there are two common walls and thus reconstruction is not possible. Whether the construction is possible on common wall is to be seen when the building is to be reconstructed and it is between the neighbours and landlord to resolve this issue at the time of building and rebuilding. The tenant is estopped from disputing title of the landlord as per section 116 of the Indian Evidence Act, 1872.

20. In the case of ***Joginder Singh and another*** vrs. ***Smt. Jogindero and ors***., reported in AIR 1996 SC 1654, their lordships of the Hon'ble Supreme Court have held that tenant cannot deny the title of land lord. It has been held as follows:

> "6. Late Surain Singh and Respondent Bur Singh did not seriously dispute that they were not tenants under Smt. Soman in respect of the land in dispute and adduced no evidence in that behalf. On the contrary Khasra Girdawari Ext.P.6 clearly indicated that the deceased Surain Singh (who is

represented by his legal representatives in this appeal) and Bur Singh were tenants under Smt. Soman with regard to the land in suit. This being the position the tenants could not be permitted to deny or dispute the title of the owner. This is a settled view that having regard to the provisions of Section 116 of the Evidence Act no tenant of immovable property or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny the title of the owner of such property. In this connection it would be relevant to make a reference to the decision of this Court in Veerraju Vs. Venkanna [1966 (1) SCR 831 (839) = AIR 1966 SC 629] wherein this Court, with reference to the decision of Privy Council took the view as under:-

"A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord"

21. The Appellate authority has rightly come to the conclusion that the tenant has a right to re-entry after building is reconstructed and rent would be as agreed between the parties after taking into consideration the rent prevalent in the area.

22. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Tenant is now directed to handover the vacant possession to the landlord within a period of three months from today. Tenant shall be re-inducted in the demised premises after one month of the construction of the building in the same place, location and area equivalent to the area which was in occupation of the tenants before the orders were passed by the Rent Controller. The rate of rent after the induction of the tenant by the landlord would be determined as per the law laid down by their Lordships of the Hon'ble Supreme Court in ***Syed Jameel Abnbas and others*** vs. ***Mohd. Yamin alias Kallu Khan***, (2004) 4 SCC 781. Pending application(s), if any, also stands disposed of. No costs.

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

Jagdish Chand .....Petitioner.
Versus
State of H.P. & another .....Respondents.

CWP No. 10568 of 2012.
Decided on: 14.5.2015.

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages on 22.3.1983- he was regularized as electrician on 1.4.1995- he was re-designated as Technician Grade-I and his pay was fixed at Rs. 4,550/-- he was informed subsequently that Rs. 4,68,300/- was wrongly released to him- his pay was re-fixed as per audit para- held, that it was not permissible for the respondent to recover the amount or to re-fix his pay after a long time - respondent had not taken into consideration the representation filed by the petitioner assailing the combined seniority list- petition allowed and the order re-fixing the salary set aside. (Para-4 to 8)

Cases referred:
State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95

For the petitioner: Mr. Narender Singh Thakur, vice counsel Sh. R.R.Rahi, Advocate.

For the respondents: Mr. Parmod Thakur, Addl. AG, with Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was initially engaged in the department of Agriculture on daily wage basis on 22.3.1983. He was regularized w.e.f. 1.4.1995 as Electrician. In sequel to the notification dated 1.9.1998 issued by the Government of Himachal Pradesh, the petitioner was re-designated as Technician Grade-I (Electrician) w.e.f. 1.1.1996 and put in the pay scale of Rs.4020-7220/- vide a letter dated 20.6.2003. The petitioner's pay was fixed at Rs.4550/- (at the minimum of the scale) with date of next increment as 1.1.1997, vide office order dated 23.6.2003. The petitioner was served with notice dated 12.10.2012 whereby he was informed that an amount of Rs.4,68,300/- was wrongly released to him w.e.f. 1.1.1996 to 1.1.2012. On the basis of audit para, his pay was re-fixed as per his entitlement in accordance with the Rules. The petitioner was informed and requested to settle audit para No.3. He was granted merely 3 days' time to file the reply. The petitioner was served with notice dated 9.11.2012 whereby he was granted opportunity to explain his position before the withdrawal of office order dated 20.6.2003. The petitioner submitted reply vide Annexure P-14 on 24.11.2012 informing that since Sh. Gita Ram did not possess qualification of ITI, he was not qualified and he also belonged to a different category, though petitioner was possessing qualification of ITI. However, the fact of the matter is that vide office order dated 29.11.2012, the petitioner's placement order made on 20.6.2003 was withdrawn and his pay was re-fixed vide office order dated 6.12.2012. Hence, this petition.

2. The petitioner was re-designated as Technician Gr-I (Electrician) and placed in the pay scale of Rs. 4020-7220 w.e.f. 1.1.1996. His pay was fixed at Rs. 4550/- with date of next increment as 1.1.1997. He was also allowed higher pay scale on the recommendation of the DPC and put in pay scale of Rs. 5000-8100 w.e.f. 1.1.2004. The petitioner was informed, as noticed hereinabove, of the audit para No.3 and he was requested to settle the same vide Annexure P-11 dated 12.10.2012. The petitioner was granted only three days' time to file the reply. According to the averments contained in notice dated 9.11.2012, the petitioner was not eligible to be re-designated as Technician Gr-I (Electrician), whereas his name was at Sr. No. 3 of the seniority list. In the placement orders, it was mentioned that placement along with the scale was subject to the decision of any representation made in that behalf/verification by audit and in case any over-payment was paid, the same would be recovered from the official concerned. It is also stated that the case of the petitioner did not fall in 20% category. The fact of the matter is that the petitioner has neither misrepresented nor concealed any relevant facts at the time of his placement in cadre of Technician on 20.6.2003, which led to fixation of his pay at Rs. 4550/- as per Annexure P-4, dated 23.6.2003. The petitioner has also been put in the higher pay scale of Rs. 5000-8100 w.e.f. 1.1.2004 on the basis of the recommendation made by the DPC.

3. Mr. Parmod Thakur, learned Additional AG has vehemently argued that one Sh. Dila Ram has filed CWP No. 5479 of 2012 in this Court. It is specifically averred in the present petition that Sh. Dila Ram has not challenged the placement of the petitioner as Electrician Gr-I. He has only sought his promotion as Technician Gr-II.

4. Now as far as Sh. Dila Ram is concerned, he does not fulfill even the basic qualification of ITI. The Court has gone through order dated 29.11.2012 with reference to

CWP No. 5479 of 2012. It is evident that the CWP filed is still pending and despite that the placement of the petitioner has been withdrawn. There is no final adjudication on the writ petition filed by his senior. There is no tangible material placed on record that the petitioner was heard before the matter was looked into by the Deputy Controller (F&A). If the petitioner had been given an opportunity, he would have narrated the circumstances before the Deputy Controller, the manner in which he was put in the higher pay scale and that too on 20.6.2003. The respondents have further reduced the pay of the petitioner vide Annexure P-16 dated 6.12.2012 on the basis of order dated 29.11.2012. It is not that the petitioner's salary has been reduced but recovery amounting to Rs. 4,68,300/- has also been ordered.

5. Their lordships of the Hon'ble Supreme Court, in a recent judgment, in the case of ***State of Punjab and others etc. versus Rafiq Masih (White Washer) etc.,*** reported in ***JT 2015 (1) SC 95,*** have laid down the following principles governing the situation where recovery by the employers would be impermissible in law. It has been held as follows:

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

6. In the instant case also, the respondents cannot be permitted, at this belated stage, to re-fix the petitioner's pay on the basis of office order dated 29.11.2012 as well as to recover an amount of Rs. 4,68,300/- from the petitioner.

7. The respondents have also not taken into consideration the representation which has already been filed by the petitioner assailing the combined seniority list. The respondents have also overlooked Annexure P-5 whereby the petitioner was granted higher pay scale of Rs. 5000-8100 on the basis of Annexures P-3 and P4 dated 20.6.2003 and 23.6.2003, respectively.

8. Accordingly, the Writ Petition is allowed. Annexure P-11 dated 12.10.2012, Annexure P-13 dated 9.11.2012, Annexure P-15 dated 29.11.2012 and Office Order Annexure P-16, dated 6.12.2012 are quashed and set aside. Pending application(s), if any, shall stand disposed of.

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

CWP No. 160/2011 alongwith CWPs No. 161, 162, 164, 166, 167, 168, 169, 170, 171 and 172 of 2011
Reserved on: 13.5.2014
Decided on: 14.5.2015

1. CWP No. 160/2011

Raj Bala Gaur. ...Petitioner.

Versus

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

2. CWP No. 161/2011

Veena Bhadwal. ...Petitioner.

Versus

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

3. CWP No. 162/2011

Bandna Kumari. ...Petitioner.

Versus

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

4. CWP No. 164/2011

Hans Raj Sharma. ...Petitioner.

Versus

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

5. CWP No. 166/2011

Neeta Ahluwalia. ...Petitioner.

Versus

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

6. CWP No. 167/2011

Sunita Gupta. ...Petitioner.

Versus

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

7. CWP No. 168/2011

Suresh Verma. ...Petitioner.

Versus

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

8. CWP No. 169/2011

Reena Dhawan. ...Petitioner.

Versus

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

9.CWP No. 170/2011

Sunita Sharma. ...Petitioner.

Versus

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

10.CWP No. 171/2011

Rakesh Kumar Sharma. ...Petitioner.

Versus

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

11.CWP No. 172/2011

Avneeta Vaid. ...Petitioner.

Versus

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

Constitution of India, 1950- Article 226- Petitioner was appointed on adhoc basis on a consolidated salary of Rs. 1500/- per month in H.P.U. Model School on 31.5.1997 – a committee recommended creation of regular posts of Headmaster and teachers in the regular pay scale- these recommendations were accepted subject to the approval of Executive Council- petitioners were put in a regular pay scale but the increment was not released to them- held, that petitioners were appointed after completing all the codal formalities – therefore, they should have been granted annual increments from the initial date of appointment - Vice Chancellor had created posts subject to the approval by Executive Council and appointment on such post is valid until set aside- since, appointments were regularized by Executive Council- therefore, the appointee are entitled to annual increment as well as GPF at par with regular employees. (Para-2 to 15)

Cases referred:

Shakir Husain vs. Chandoo Lal and others, AIR 1931 Allahabad 567

Mohammad Ali vs. The State of Uttar Pradesh and others, AIR 1958 Allahabad 681

U.P. Avas Evam Vikas Parishad and another vs. Friends Coop. Housing society Limited and another, 1995 (Supp) 3 SCC 456

(In all the petitions)

For the Petitioners: Mr. Anil God, Advocate.

For the Respondents: Mr. J.L. Bhardwaj, Advocate for respondents No.1 and 2.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge

Since common questions of law and facts are involved in all these petitions, the same were taken up together and are being disposed of by a common judgment. However, in order to maintain clarity, facts of CWP No. 160/2011 have been taken into consideration.

2. Petitioner was appointed on ad hoc/tenure basis on a consolidated salary of Rs. 1500/- per month in H.P.U. Model School on 31.5.1997. A meeting comprising of Prof. Suresh Kapoor, Dean of Studies, Dr. S.K. Garg, Dean, CDC and Prof. J.B. Nadda, Registrar was conveyed on 1.8.2002 in the Chambers of Registrar was held on 1.8.2002 at 3.00 P.M. The Committee made the following recommendations:

> 1. The post of Head Master be got created in the regular pay scale of Rs.7000-22-8100-275-10,300-340-10980 and against which Mr. Umesh Modgil who fulfils the requisite qualification maybe considered for his regularization after he completes 4 years service as such with prospective effect.
>
> 2. The posts of the following teachers may be got created in the regular pay scale of Rs.4550-150-5000-160-5800-200-7000-220-7280 and against which the mentioned below teachers who have completed 4 years or more service as such may be considered for their regularization with prospective effect.

	NAME & DESIGNATION TEACHERS	ACADEMIC QUALIFICATION	DATE OF JOINING
1.	Mrs. Avneeta Vaid	MA B.Ed. Prabhakar	10.7.1992
2.	Mrs. Neeta Ahluwalia	BA B.Ed. NTT	26.10.1992
3.	Mrs. Bandana Sharma	-do MA	1.3.1993
4.	Mrs. Sunita Gupta	BA B.Ed.	26.7.1993
5.	Mrs. Vena Badhwal	BA B.Ed. M.Ed. M.Phil. PhD. (Education0	10.5.1995
6.	Mrs. Sunita Sharma	BA B.Ed. M.Ed. M. Phil (Pol. Sc)	25.5.1995
7.	Mrs. Raj Bala Gaur	BA MA, B.Ed.	5.6.1997
8.	Sh. Pushpender Sharma Arts Teacher	BA Diploma in Painting	21.7.1997
9.	Mrs. Reena Dhawan Teacher	B.Sc. B.Ed.	22.7.1997
10.	Teacher Sh. Suresh Verma	PGDCA, MA (Eco.) B.Ed.	9.9.1998
11.	Ms. Anjali Sharma	B.Sc. B.Ed.	21.10.1998
12.	Sh. Hans Raj Sharma	-do-	26.10.1998
13.	Sh. Rakesh Sharma	B.Sc. B.Ed. M.Com	26.10.1998

Their regularization and inter-se seniority will be regulated in accordance with the date of their initial appointment. After their regularization the head master and teaching staff of the school may be allowed.

3. The posts of the non-teaching staff i.e. Aya and peon of the school may be got created in the regular scale of Rs.2520-100-3220-110-3660-120-4140 (with initial start of Rs.2620/-) and against which the following may be considered for their regularization on completion of 8 years service as per instructions of the state Govt.

	NAME & DESIGNATION TEACHERS	ACADEMIC QUALIFICATION	DATE OF JOINING
1.	Mrs. Pushpa Thakur Aya	Matric	3.1.1992
2.	Sh. Geeta Ram Sharma, Peon	Middle	26.9.1994

The financial liabilities of the above mentioned staff would be borne on the staff-strength of the University for first five years and thereafter the such liabilities shall be met out of the resources of the school as there is a proposal to construct a new building for the school for which the revenue /income of the school has been kept reserved for its utilization. In order to met the expenditure on account of salary etc. of the teachers/ staff, it was recommended that 10% hike in fee may be made every year.

The service conditions of the staff of the school will be governed as per Act, Statutes and Ordinances of the University vis-à-vis rules, regulations and instructions as amended from time to time and as applicable to the teaching staff of the State Govt. The school will observe the vacation schedule at par with the State govt. The teaching staff including head master shall form their own separate cadre with a separate entity. The appointing authority of the teaching staff including the head master shall be the vice-chancellor of this University and their service record shall be maintained by the establishment branch."

3. In sequel to the recommendations made by the high power committee, the Vice Chancellor of the respondent-university was pleased to create the posts of Headmaster and teachers in the regular pay scale of Rs. 7000-10980 and Rs. 4500-7200, respectively, subject to the approval from the Executive Council vide notification dated 5.9.2002.

4. Petitioners and similarly situate persons were appointed to the posts of school teachers and Head Master in H.P.U. Model School in the running pay scale mentioned against their post on 9.9.2002. Petitioners joined their duties vide office order dated 30.9.2002. Though the petitioners were put in the regular pay scale but the increments were not released to them. They made several representations, which led to issuance of letter dated 4.11.2008 whereby the petitioners were granted annual increment with effect from 1.9.2003 but on notional basis.

5. Petitioners made several representations seeking G.P.F. account number. The Executive Council vide resolution No.9 in its meeting held on 27.9.2008 approved the creation of one post of Head Master and 13 posts of Teachers in the pay scale given in the notifications dated 5.9.2002 and 13.9.2002. The notification to this effect was issued on 6.2.2009.

6. Mr. Anil God, learned counsel for the petitioner, has vehemently argued that his clients are entitled to regular increments from their initial date of appointment. The petitioners are required to be issued G.P.F. account number instead of C.P.F. account number. He then contended that the appointments of his clients have already been made on regular basis after the creation of posts by the Vice Chancellor.

7. Mr. J.L. Bhardwaj has placed strong reliance upon notification dated 6.2.2009.

8. I have heard the learned counsel for the parties and have gone through the pleadings carefully.

9. Petitioner in CWP No. 160/2011 was appointed on ad hoc/ tenure basis on 31.5.1997. A conscious decision has been taken vide Annexure R-1/A to regularize the petitioners and similarly situate persons in the running pay scale of Rs. 4550-7220. An observation has also been made in Annexure RA-1/C that the petitioners possessed more

than the required educational qualification, as laid down by the Government for the posts of JBTs/TGTs. Thereafter, the Vice Chancellor created the posts as per Annexure P-2 dated 5.9.2002 in the regular pay scale. Petitioners were appointed against these posts in the running pay scale vide office order dated 9.9.2002. They joined their duties on 30.9.2002. Since the petitioners have been appointed/regularized after completing all the codal formalities, that too, after approval by the Executive Counsel, they should have been granted annual increments from their initial date of appointment, i.e. 9.9.2002. Petitioners have been granted annual increments only vide Annexure P-6 dated 4.11.2008, that too, on notional basis after the decision dated 27.9.2008. It is true that the posts were earlier created on ad hoc/tenure basis but thereafter the petitioners were regularized in the regular pay scale after the posts were created by the Vice Chancellor, subject to the approval from the Executive Council. The approval from the Executive Council was only ministerial act since all the codal formalities for the creation of posts have been complied with. The posts have been created by the Vice Chancellor on the basis of the recommendations made by the high power committee vide Annexure P-2. The petitioners have been regularized with effect from 9.9.2002 and the approval of the posts by the Executive Council vide notification dated 27.9.2008 would relate back to the date of creation of posts by the Vice-Chancellor on 5.9.2002. The petitioners possessed the essential qualification. Their suitability has been adjudged by a duly constituted Selection Commission.

10. The posts are created by the Executive Council as per Statute 10 (iii). In the instant case, the posts have been created by the Vice Chancellor, subject to approval of the Executive Council. The Vice Chancellor can take immediate action as per section 12 (c) (7) of the Himachal Pradesh University Act, 1970, but the same is required to be approved by the Executive Council. The Vice Chancellor has created the posts on 5.9.2002, subject to approval by the Executive Council. The Executive Council has approved the same on 27.9.2008.

11. Full Bench of Allahabad High Court in ***Shakir Husain*** vs. ***Chandoo Lal and others***, AIR 1931 Allahabad 567 has defined the difference between approval and permission as under:

> "Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act."

12. This judgment was relied upon by the Division Bench of Allahbad in ***Mohammad Ali*** vs. ***The State of Uttar Pradesh and others***, AIR 1958 Allahabad 681. The Division Bench has held that an appointment which is to be made with the permission of a higher authority or the Government cannot be made unless the permission is first obtained, but an appointment which can be made subject to the approval of a higher authority or the Government may be made and will be rendered invalid only when it is disapproved by the higher authority. The Division has held as under:

> "[1] This special appeal is directed against an order dated 22-11-1957 passed by a learned Single Judge of this Court by which Civil Miscellaneous Writ Petition No. 3023 of 1957 had been rejected. The appellant was employed by the Municipal Board of Maunath Bhanjari in the district of Azamgarh as an overseer. Under the provisions of Section 68(2) of the U. P. Municipalities Act the appointment and the salary and other conditions attached thereto are required to be subjected to the approval of the State Government. The matter in the present case appears never to have been sent up to the State

Government for approval. It came to the notice of the District Magistrate of Azamgarh that the appellant was performing duties as an overseer without the approval of the State Government. Consequently he brought it to the notice of the State Government.

The State Government after carefully considering the matter refused to approve of the appointment and sent a direction to the District Magistrate with a copy to the President of the Municipal Board, Maunath Bhanjan, that the retention of the appellant was wholly unjustified and that his services may be terminated at once. In compliance with the instructions of the Government the President of the Board passed an order on 19-11-1957 terminating the services of the appellant with immediate effect; and that order was communicated to the appellant by the officiating Secretary of the Board on 20-11-1957. In the writ petition two prayers had been made. The first prayer was that a writ in the nature of certiorari be issued quashing the decision of the President of the Board and that of the State Government.

The second prayer was that a writ in the nature of mandamus be issued directing the State Government to accord recognition and approval to the appointment of the appellant as overseer. So far as the second prayer is concerned Mr. M. H. Beg, appearing on behalf of the appellant, has conceded that such a writ in the nature of mandamus cannot be issued to the State Government. We are therefore concerned with the first prayer enunciated above. For the disposal of the matter we have got to look to Section 68 of the U. P. Municipalities Act. That section says that a Board may, and, if so required by the State Government shall by a special resolution appoint the principal officers of its technical departments such as ..... a qualified overseer or sub-Overseer ..... Sub-clause (2) of that section says that each such appointment and the salary and other conditions attached thereto shall be subject to the approval of the State Government.

The view taken by the learned Single Judge was that since the approval of the State Government was not obtained by the Board at the time of appointing the appellant and when the matter came to their knowledge they refused to approve the appointment, there was in fact no valid appointment of the appellant and the result was that the appointment was automatically terminated by the refusal of the State Government to give its approval. The learned Single Judge was further of the opinion that what was done by the President and by the Secretary under the orders of the President was not to dismiss or punish the appellant so as to bring into picture the operation of Section 69 of the U. P. Municipalities Act, but to inform the appellant that in view of the refusal by the State Government to approve of his appointment the appointment had lapsed. In our opinion the view taken by the learned Single Judge was correct.

When a person is employed under a power which is to be exercised subject to the approval of a higher authority or the Government, the appointment holds good so long as the higher authority or the Government has not disapproved of it. There is a distinction between an appointment with the permission of a higher authority or the Government, and an appointment subject to the approval of the higher authority or the Government. An appointment which is to be made with the permission of a higher authority or the Government cannot be made unless the permission is first obtained, but an appointment which can be made subject to the

approval of a higher authority or the Government may be made and will be rendered invalid only when it is disapproved by the higher authority. This distinction was pointed out by a Full Bench of this Court in Shakir Hu-sain v. Chandoolal, AIR 1931 All 567 (A). Sir Shah Sulaiman, Acting Chief Justice, as he then was, observed:

"Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act."

13. Their Lordships of the Hon'ble Supreme Court in ***U.P. Avas Evam Vikas Parishad and another*** vs. ***Friends Coop. Housing society Limited and another***, 1995 (Supp) 3 SCC 456 have held that the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. Their Lordships have further held that permission subsequently granted may validate the previous Act. Their Lordships have held as under:

"[5] This Court in Life Insurance Corpn. of India v. Escorts Ltd., (1986) 1 SCC 264 : (AIR 1986 SC 1370), considering the distinction between "special permission" and "general permission", "previous approval" or "prior approval" in paragraph 63 held that "we are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find on such compelling circumstances justifying reading any such implication into S. 29(1) of the Act". Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous act. As to the word "approval" in S. 33 (2) (b) of the Industrial Disputes Act, it was stated in Lord Krishna Textiles Mills Ltd. v. Workmen, (1961) 1 Lab LJ 211 at 215-16: (AIR 1961 SC 860 at p. 863) that the management need not obtain the pervious consent befor taking any action. The requirement that the management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in S. 33(1). It is seen that approval envisaged under exception (iii) of S.59 (1) (a), is to enable the Parishad to proceed further in implementation of the scheme framed by the Board. Until approval is given by the Government, the Board may not effectively implement the scheme. Neverthless, once the approval is given, all the previous acts done or actions taken in anticipation of the approval get validated and the publications made under the Act thereby become valid."

14. The respondent-University has not permitted the petitioners to opt for G.P.F. account number and were forced for giving option for C.P.F. account number and their case has been rejected on 24.4.2010 vide Annexure P-8. Since the petitioners have been regularized before the cut-off date, i.e. 15.5.2003, the respondent-university was bound to permit them to opt for G.P.F. account number instead of coercing the petitioners to opt for C.P.F. account number. The respondent-University has discriminated against the petitioners since similarly situate persons, who were working on ad hoc basis in the school, their services were regularized alongwith petitioners have been given regular increments and they have been allotted G.P.F. account number. Equals cannot be treated unequals. Action of the respondent-University not to grant effective increments to the petitioners from 9.9.2002 is unreasonable and arbitrary. Their appointments have been made against the

regular pay scale and they should have been granted annual increments from the date of their regularization. Since the appointment of the petitioners is before the cut-off date, i.e. 15.5.2003, they are entitled to opt for G.P.F. account number. Since the petitioners have been appointed after completing all the codal formalities, their services are required to be counted from the initial date of appointment followed by regularization for all intents and purposes, including pension.

15. Accordingly, in view of the analysis and discussion made hereinabove, all the writ petitions are allowed. Annexures P-6 and P-8 dated 4.11.2008 and 24.4.2010, respectively, are quashed and set aside. Respondent-University is directed to release the petitioners annul increments from the initial date of appointment with interest @ 9% per annum. The respondent-University is also directed to permit the petitioners to opt for G.P.F. account number by treating their appointments on regular basis with effect from 9.9.2002. The respondent-University is further directed to pay and release the revised pay scales to the petitioners from the due date. It is made clear that the services rendered by the petitioners on ad hoc basis followed by regularization shall also be counted for all intents and purposes, including pension. Needful be done within a period of four weeks from today. Pending application, if any also stands disposed of.

****

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

Bajaj Allianz General Insurance Company Ltd. ...Appellant

Versus

Smt. Gohdi Devi & others ...Respondents

FAO No. 142 of 2008
Date of decision: 15.05.2015

Motor Vehicle Act, 1988- Section 166- Insurance Company pleaded that brother and sister are not the legal representatives and cannot file a Claim Petition- held, that persons who were dependent upon the deceased at the time of accident can file a Claim Petition - brother & sister if dependant upon the deceased can file a Claim Petition- they were minor at the time of accident and will fall within the definition of dependent. (Para12 to 19)

Cases referred:

Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai and another, AIR 1987 Supreme Court 1690

Gian Singh and others versus Ram Krishan Kohli and others, AIR 2002 J & K 82

United India Insurance Co. Ltd. versus N. Appi Reddy and others, 2013 ACJ, 545

Manjuri Bera versus Oriental Insurance Company Limited, AIR 2007 Supreme Court 1474

Montford Brothers of St. Gabriel and Anr. versus United India Insurance & Anr. etc., 2014 AIR SCW 1051

Samantra Devi & others vs. Sanjeev Kumar & others, ILR 2014 (IX) HP 1, Page-861

For the appellant : Mr. Neeraj Gupta, Advocate.

For the respondents : Mr. Malay Kaushal, Advocate vice Mr. Vinod Thakur, Advocate, for respondents No. 1 to 5.

Mr. Vijay Chaudhary, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of this appeal, the appellant-Bajaj Allianz General Insurance Company has questioned the award, dated 3rd December, 2007, passed by the Motor Accident Claims Tribunal, Chamba Division, Chamba (hereinafter referred to as "the Tribunal") in MAC Petition No. 24 of 2007/2006, whereby compensation to the tune of Rs.4,22,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-respondents No. 1 to 5, (for short, the "impugned award"), on the grounds taken in the memo of appeal.

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

Brief Facts:

3. The claimants, being victims of the motor vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.8,00,000/-, as per the break-ups given in the claim petition. It is averred in the claim petition that on 25.12.2005, Pawan Kumar was traveling in vehicle (Taxi Cab) bearing registration No. JK-08A-3145, which was being driven by driver, namely, Kishan Chand, rashly and negligently and at about 12.30 a.m., near Biana Mor Tehsil Salooni, District Chamba, caused the accident, in which Pawan Kumar sustained injuries and succumbed to the injuries.

4. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

5. Following issues came to be framed by the Tribunal:

> "*1. Whether Shri Pawan Kumar died due to the rash and negligent driving of vehicle No. JK-8A-3145 by its driver (Late Sh. Kishan Chand), as alleged? …OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to the compensation as claimed. If so, its quantum and from whom? ….OP Parties.*
>
> *3. Whether late Shri Kishan Chand was not holding and possessing a valid and effective driving licence to drive the vehicle in question at the desired time. If so, its effect? OPR-2*
>
> *4. Whether the vehicle was being plied in violation of the terms and conditions of the insurance policy, as alleged. If so, its effect? …OPR-2*
>
> *5. Whether the vehicle was not having a valid registration certificate. If so, its effect? …OPR-2*
>
> *6. Relielf."*

6. The claimants have examined Dr. Subhash Chauhan (PW-2), Diwan Chand (PW-3), Head Constable Shish Pal (PW-4) and statement of claimant Smt. Gohdi Devi was recorded. The respondents have not led any evidence. Thus, the evidence led by the claimants has remained unrebutted.

7. The Tribunal, after scanning the evidence, oral as well as documentary, passed the impugned award, whereby the insurer-Insurance Company was asked to satisfy the impugned award.

8. There is no dispute on issue No. 1. Accordingly, the findings returned by the Tribunal on the aforesaid issue are upheld.

9. Onus to prove issues No. 3 to 5 was upon the insurer. The insurer has not led any evidence. Thus, it has failed to discharge the onus. Accordingly, the findings recorded by the Tribunal on the aforesaid issues are upheld.

10. Learned Counsel for the appellant-Insurance Company argued that the claim petition was not maintainable so far as it relates to respondents No. 2 and 5, who are brothers and sisters of the deceased.

11. The argument addressed by the learned Counsel for the appellant is misconceived for the following reasons.

12. Dependant or legal representative of the deceased, who has died in a motor vehicular accident, can file a claim petition. Claimants No. 2 to 5 were minors at the relevant time i.e. the date of accident, are legal representatives of the deceased and were dependants.

13. The Apex Court in a case titled as **Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai and another,** reported in **AIR 1987 Supreme Court 1690,** held that brother of a deceased is also a legal representative, provided he is dependent.

14. The same view has been taken by a Division Bench of the Jammu and Kashmir High Court in a case titled as **Gian Singh and others versus Ram Krishan Kohli and others,** reported in **AIR 2002 Jammu and Kashmir 82,** while holding that sisters and brothers of a person, who dies in accident, are entitled to maintain petition under Section 166 of the MV Act, if they are legal representatives of the deceased.

15. The Andhra Pradesh High Court in a case titled as **United India Insurance Co. Ltd. versus N. Appi Reddy and others,** reported in **2013 ACJ, 545,** has also laid down the same principle.

16. The Apex Court in a case titled as **Smt. Manjuri Bera versus Oriental Insurance Company Limited,** reported in **AIR 2007 Supreme Court 1474,** held that even a married daughter of a deceased, though not dependant on deceased, is entitled to compensation, if she is 'legal representative' of the deceased.

17. The Apex Court in a latest case titled as **Montford Brothers of St. Gabriel and Anr. versus United India Insurance & Anr. etc.,** reported in **2014 AIR SCW 1051,** has taken note of various judgments and held that brothers, sisters, brothers' children and some times, the foster children are entitled to maintain claim petition, provided they are dependent. It is apt to reproduce paras 10, 11, 15 and 16 of the judgment herein:

> *"10. From the aforesaid provisions it is clear that in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act. The issue as to who is a legal representative or its agent is basically an issue of fact and may be decided one*

way or the other dependent upon the facts of a particular case. But as a legal proposition it is undeniable that a person claiming to be a legal representative has the locus to maintain an application for compensation under Section 166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue.

11. Learned counsel for the Insurance Company tried to persuade us that since the term `legal representative' has not been defined under the Act, the provision of Section 1-A of the Fatal Accidents Act, 1855, should be taken as guiding principle and the claim should be confined only for the benefit of wife, husband, parent and child, if any, of the person whose death has been caused by the accident. In this context, he cited judgment of this Court in the case of Gujarat State Road Transport Corporation, Ahmedabad vs. Raman Bhai Prabhatbhai & Anr., AIR 1987 SC 1690. In that case, covered by the Motor Vehicles Act of 1939, the claimant was a brother of a deceased killed in a motor vehicle accident. The Court rejected the contention of the appellant that since the term `legal representative' is not defined under the Motor Vehicles Act, the right of filing the claim should be controlled by the provisions of Fatal Accident Act. It was specifically held that Motor Vehicles Act creates new and enlarged right for filing an application for compensation and such right cannot be hedged in by the limitations on an action under the Fatal Accidents Act. Paragraph 11 of the report reflects the correct philosophy which should guide the courts interpreting legal provisions of beneficial legislations providing for compensation to those who had suffered loss.

"11. We feel that the view taken by the Gujarat High Court is in consonance with the principles of justice, equity and good conscience having regard to the conditions of the Indian society. Every legal representative who suffers on account of the death of a person due to a motor vehicle accident should have a remedy for realisation of compensation and that is provided by Sections 110-A to 110-F of the Act. These provisions are in consonance with the principles of law of torts that every injury must have a remedy. It is for the Motor Vehicles Accidents Tribunal to determine the compensation which appears to it to be just as provided in Section 110-B of the Act and to specify the person or persons to whom compensation shall be paid. The determination of the compensation payable and its apportionment as required by Section 110-B of the Act amongst the legal representatives for whose benefit an application may be filed under Section 110-A of the Act have to be done in accordance with well-known principles of law. We should remember that in an Indian family brothers, sisters and brothers' children and some times foster children live together and they are dependent upon the bread-winner of the family and if the bread-winner is killed on account of a motor vehicle accident, there is no justification to deny them compensation relying upon the provisions of the Fatal Accidents Act, 1855 which as we have already held has been substantially modified by the provisions contained in the

Act in relation to cases arising out of motor vehicles accidents. We express our approval of the decision in Megjibhai Khimji Vira v. Chaturbhai Taljabhai, (AIR 1977 Guj.195) and hold that the brother of a person who dies in a motor vehicle accident is entitled to maintain a petition under Section 110-A of the Act if he is a legal representative of the deceased."

12. .....

13. .....

14. .....

15. On coming to know about the High Court judgment the appellants filed a review petition in which they gave all the relevant facts including the constitution of the society appellant no.1 in support of their claim that a `Brother' of the Society renounced his relations with the natural family and all his earnings and belongings including insurance claims belonged to the society. These facts could not have been ignored by the High Court but even after noticing such facts the review petition was rejected.

16. A perusal of the judgment and order of the Tribunal discloses that although issue no.1 was not pressed and hence decided in favour of the claimants/appellants, while considering the quantum of compensation for the claimants the Tribunal adopted a very cautious approach and framed a question for itself as to what should be the criterion for assessing compensation in such case where the deceased was a Roman Catholic and joined the church services after denouncing his family, and as such having no actual dependents or earning? For answering this issue the Tribunal relied not only upon judgments of American and English Courts but also upon Indian judgments for coming to the conclusion that even a religious order or organization may suffer considerable loss due to death of a voluntary worker. The Tribunal also went on to decide who should be entitled for compensation as legal representative of the deceased and for that purpose it relied upon the Full Bench judgment of Patna High Court reported in AIR 1987 Pat. 239, which held that the term `legal representative' is wide enough to include even "intermeddlers" with the estate of a deceased. The Tribunal also referred to some Indian judgments in which it was held that successors to the trusteeship and trust property are legal representatives within the meaning of Section 2(11) of the Code of Civil Procedure."

18. This Court in **FAO No. 71 of 2007,** titled **Smt. Samantra Devi & others versus Sanjeev Kumar & others,** decided on 17th October, 2014, also laid down the same principle.

19. In view of the ratio laid down by the apex Court, Andhra Pradesh High Court and this Court in the aforesaid judgments, the argument addressed by the learned Counsel for the appellant is turned down.

20. Learned Counsel for the appellant also argued that the amount of compensation is excessive.

21. Claimant No.1 has lost her son and respondents No. 2 to 5, who were minors at the time of accident and dependant upon the deceased, have lost their brother. The Tribunal after taking into consideration the claim petition, pleadings and the evidence on the file, has rightly assessed the compensation, cannot be said to be excessive, in any way. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

22. Learned Counsel for the appellant-insurer has also argued that the Tribunal has fallen in error in rejecting the application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the reply filed on behalf of the insurer.

23. I have gone through the pleadings and the record. I am of the considered view that the Tribunal has rightly rejected the aforesaid application.

24. Having said so, the impugned award is upheld and the appeal is dismissed.

25. 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.

26. 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 P.S. RANA, J.

Vikram Verma. ....Revisionist

Versus

Smt. Manju Verma. ....Non-Revisionist.

Cr. Revision No. 346 of 2014
Decided on: 15.5.2015.

Code of Criminal Procedure, 1973- Section 401- Counsel submitted that in view of compromise executed between the parties, revisionist does not want to continue with the present petition - hence, in view of statement; Revision Petition dismissed as withdrawn.

For the revisionist : Mr. Anirudh Sharma, Advocate.
For the non-revisionist : Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the revisionist submitted that in view of the compromise executed inter-se the parties in divorce petition No. 37-S/3/2012 titled Vikram Verma vs. Manju Verma decided on 2.5.2015 revisionist does not want to continue the revision petition and same be dismissed as withdrawn. In view of the submission of learned Advocate appearing on behalf of the revisionist petition is dismissed as withdrawn. Petition disposed of. Pending applications if any also disposed of.

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

National Insurance Co. Ltd. .....Appellant.

Versus

Sh. Hanogi Mata Sansthan & ors. .....Respondents.

RSA No. 492 of 2003.
Reserved on: 16.5.2015.

Torts - Plaintiff filed a civil suit for recovery of the compensation against the defendants on the ground that widening work of NH at point 229/0 was carried out by defendant No. 1 - heavy blast was done as a result of which heavy boulders and rocks were thrown on the temple and other buildings causing damages to them- Insurance Company pleaded that the plaintiff was a stranger to the contract- held, that work was executed by 'G' who had taken the insurance policy- insurance company had undertaken to indemnify the 'G' for any loss, hence, suit could have been filed against the Insurance Company also.(Para-15)

For the appellant(s): Mr. Ashwani K. Sharma, Advocate.

For the respondent: Mr.C.N.Singh , Advocate for respondent No. 1.
Mr**.** Sanjeev Kuthiala, Advocate, for respondent No.2.
Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG for respondents-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Mandi, H.P. dated 21.10.2000, passed in Civil Appeal No. 83 of 1995.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for payment of damages/compensation against the appellant-defendant No. 5 and respondents-defendants No. 2 to 4 (hereinafter referred to as the defendants). According to the plaintiff, Shrimata Hanogi Sansthan is a Society registered under the Society Registration Act, 1860. The Sansthan manages the affairs including its immovable property which includes Satsang Bhawan, Kitchen, Canteen building and Dharamshala constructed by the trust for the benefit of pilgrims and visitors. Sh. Pawan Kumar, was authorized to file the suit on behalf of the Sansthan. In the last week of December, 1987, widening work of NH at point 229/0 was carried out by defendant No. 1 through Gopal Sharma. During the widening work, heavy blasting was done as a result of which, heavy boulders and rocks/muck were thrown on the temple and other buildings. The damage was caused to the temple and buildings. The necessary remedial measures were not taken to avoid damage to the temple. The plaintiff had to re-construct and re-build the damaged building by spending Rs. 85,000/-.

3. The suit was contested by defendants including the appellant-defendant Insurance Company. According to defendant No. 1 Gopal Sharma, work was allotted to him vide letter dated 4.12.1987. This work was insured with the National Insurance Company. It is denied that heavy blasting was carried out. Inspite of the best efforts by the deendant and keeping in view the nature of the site on the spot, some damage has been caused to the

temple. According to the State Government, the widening work was completed in the year 1978-79. The temple and other buildings were constructed after completion of the widening work. There existed loose boulders on the hill side for which temple authority approached Public Works Department, which in the interest of safety of public and the temple premises engaged defendant No. 1 for removal of loose boulders on contract. The payment of Mr. Gopal Sharma was withheld. It was released only after he produced no-objection certificate from the plaintiff. No damage has been caused to the plaintiff by the defendants. Only defendant Gopal Sharma, was responsible to the loss. There was vertical slope ranging from 70 degree to 80 degree. The appellant-Insurance Company also filed the written statement. They have shown ignorance about the damage caused to the temple while executing the widening work.

4. The learned Senior Sub Judge, Mandi, H.P., framed the issues on 16.3.1992. The suit was dismissed by the learned Senior Sub Judge, Mandi, H.P. on 8.6.1995. The plaintiff, preferred an appeal before the learned Addl. District Judge, Mandi. The learned Addl. District Judge, Mandi, allowed the appeal and suit was decreed partly against appellant-defendant No. 5 i.e Insurance Company for recovery of Rs. 68,590/-. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 19.3.2004:

> "1. Whether the suit filed by the plaintiff claiming damages/ compensation is maintainable against the appellant/insurance company when there was no privity of contract between the two and whether a stranger to the contract can enforce the same even the contract may have been entered for his benefit?"

6. Mr. Ashwani Sharma, Advocate, for the appellant has vehemently argued that the suit was not maintainable against the Insurance Company. On the other hand, Mr. R.L.Chaudhary, Advocate, has supported the judgment of the first appellate Court. Mr. Sanjeev Kuthiala, Advocate, for respondent No. 2 has argued that the National Insurance Co. alone was liable to indemnify the plaintiff.

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

8 The work in question was awarded to the defendant Gopal Sharma vide letter dated 15.12.1987. The widening of the road was taken up by the Public Works Department in the year 1978-79. The work was allotted to Gopal Sharma in larger public interest to protect the public at large including the property of the temple. Gopal Sharma has insured the work against the loss on 5.12.1987.

9. PW-1 Pawan Kumar testified that the damage was caused to the property of the temple. He was looking after development work of the Sansthan. Sh. Gopal Sharma DW-1 started the execution of the work in front of the temple in the year 1987. The work continued up to 3-4 months, as a result of which, the Satsang Bhawan, office building and front portion of the temple was damaged including canteen and kitchen. The damage resulted due to blasting without adopting safety measures. The offerings in the temple were also reduced. He has prepared estimate vide Ext. PW-1/C. He wrote letters to Gopal Sharma about the possible damage vide Ext. PW-1/D and PW-1/G. The reply of the same is Ext. PW-1/H. He also wrote letter to Ex. Engineer vide Ext. PW-1/I and the reply of the Public Works Department is Ext. PW-1/K. He has also proved copy of notices Ext. PW-1/M and Ext. PW-1/N, receipt Ext. PW-1/O and acknowledgement Ext. PW-1/R.

10. PW-2 Yadvinder Sharma, testified that Gopal Sharma was executing the cutting work near Shrimata Hanogi Temple, as a result of which, huge damage was caused to Satsang Bhawan, Dispensary, temple and canteen. The damage was caused due to blasting work. No safety measures were taken.

11. PW-3 Jai Ram, testified that he was working as mason in the temple. The cutting work was undertaken in front of the temple. The damage was caused to the Satsang Bhawan, office and temple. After that re-construction work was carried out by the temple authority. He worked as mason.

12. PW-4 T.D.Sharma, testified that he is founder member and patron of plaintiff. According to him, the trust is looking after movable and immovable property of the plaintiff. According to him also, while executing the work, blasting was undertaken. It resulted in damage caused to Satsang Bhawan, kitchen and canteen. He is Civil Engineer by profession. He has retired as Ex. Engineer from H.P. PWD. The estimates of damage were prepared by Pawan Kumar PW-1.

13. Gopal Sharma, DW-1 has testified that in the year 1987, he undertook contract to remove the boulders and loose strata near the temple. he has taken insurance policy from National Insurance Company for Rs.5,00,000/-. He has proved insurance cover note Ext. DB. According to him, if any damage has been caused, it was to be indemnified by the Insurance Company. He executed the work from December 1987 to March 1988. In the year 1988, he also paid a sum of Rs.15,000/- to the plaintiff. He handed over the Insurance Policy to the plaintiff and thereafter no objection certificate Ext. DA was issued by the plaintiff.

14. DW-2 Suresh Patyal, has proved the insurance policy bearing No. 179894. It was valid between 5.12.1987 to 14.5.1988. He also proved on record the terms and conditions vide Ext. PW-5/A.

15. What emerges from the facts enumerated hereinabove is that the work was allotted to Gopal Sharma on 4.12.1987. He has executed the work between December, 1987 to March, 1988. The insurance cover note of policy was duly proved. it was valid between 5.12.1987 to 14.5.1988. The work in question was insured for a sum of Rs. 5,00,000/-, as per Ext. DB dated 5.12.1987. There was privy between the National Insurance Company and defendant No. 1 whereby the Insurance Company had to indemnify defendant No. 1 Gopal Sharma for the damage caused to the plaintiff while executing the work awarded on 4.12.1987.

16. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Union of India and others. ...Petitioners.

Versus

Tripta Sharma ...Respondent.

CWP No. 2463/2015
Reserved on : 1.5.2015
Decided on: 16.5.2015

Constitution of India, 1950- Article 226- Petitioner was an employee of BCB - she was declared surplus and was redeployed to the NSSO (FOD)- she claimed grant of higher pay scale with ACP- Government of India had taken a decision in the year 1986-1987 to afford fresh option to Ex-BCB employees but she was not given a chance to exercise the option- respondent stated that she was placed in Punjab Government pay-scale and similarly situated person had approached Central Administrative Tribunal and the judgment was upheld by the High Court as well as by the Apex Court- held, that similarly situated person should be treated similarly irrespective of the fact that only one person had approached the Court- denying the benefits to the person who had not approached the Court is unjustified.

(Para-4 to 6)

Cases referred:

State of Karnataka and others versus C. Lalitha, (2006) 2 SCC 747

K.T. Verrappa and others versus State of Karnataka and others, (2006) 9 SCC 406

For the Petitioners: Mr. Ashok Sharma, Assistant Solicitor General of India.

For the Respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

This petition is instituted against the judgment dated 22.7.2014 rendered by the learned Central Administrative Tribunal, Chandigarh Bench, Chandigarh in O.A. No. 332/HP/2012.

2. "Key facts" necessary for the adjudication of this petition are that the respondent has filed O.A. No. 332/HP/2012 before the Central Administrative Tribunal, Chandigarh Bench, Chandigarh, being an Ex-BCB employee. She was declared surplus in the year 1984. She was redeployed to the NSSO (FOD) against the post of a Clerk in the pay scale of Rs. 260-400. She sought the grant of pay scale of Rs. 1350-2200 with effect from 1.1.1986 revised to Rs. 4500-7000 with effect from 1.1.1996, including other benefits such as financial upgradation under the ACP scheme in the pay scale of Rs. 5000-8000 (as first upgradation) and Rs. 5500-9000 (as second upgradation) with arrears of pay and allowance with further revision with effect from 1.1.2006 on the recommendations of 6th Pay Commission alongwith interest @ 18% per annum. According to her, the Government of India has taken a decision in the year 1987 to afford fresh option to Ex-BCB employees, who had opted for the Central Pay scales, but she was not given any opportunity to exercise the option. She was not given option even after letter dated 31.3.1992 on the basis of judgment rendered in O.A. No. 159/1987 titled as ***O.P. Jaswal and others*** Vs. ***Union of India and others***. She has placed strong reliance on O.A. No. 253/CH/1991, titled as ***Bharat Bhushan and others*** vs. ***Union of India and others*** decided on 9.2.2011. The DOPT has already given advice on 4.11.2005 to extend the benefit of related judgments even to the non-petitioners. She made a representation in the year 2006. It was decided on 27.9.2006. She again made representation on 19.11.2011. It was rejected on 6.3.2012.

3. The original application was resisted by the petitioners on the ground of limitation. According to the petitioners, respondent has failed to exercise her option. Thus, she was not entitled to the relief.

4. Respondent has become surplus employee in the year 1984 and was redeployed to the NSSO (FOD. She was put up in the pay scale of Rs. 260-400 in the central pay pattern in lieu of Rs. 400-600 of Punjab Government scale of pay in view of her option to switch over to the Central Pay Scale under the provision of O.M. dated 27.2.1985. Similarly situate persons had approached the Central Administrative Tribunal by way of O.A. No.253/CH/1991. It was decided on 9.2.2000. The judgment was upheld by the High Court and also the Apex Court. Case of the respondent was similar to the case filed by Bharat Bhushan and others with only difference that Bharat Bhushan and others were placed in the pay scale of Rs. 510-800 and the respondent was put in the pay scale of Rs. 400-600. Since the respondent was suffering financial loss every month for non-fixation of pay on the basis of Bharat Bhushan's case, the petition could not be stated to be barred by limitation. She has rather continuous cause of action since non-fixation of her pay has also affected her retiral/pensionary benefits. Moreover, the Government of India has also issued instruction on 11.4.2005 to extend the benefits of judgment even to non-petitioners. The petitioners should have granted the benefits to the respondent instead of coercing her to file the original application before the Central Administrative Tribunal. The earlier judgment is *rem* and not in *personam*. The benefit could not be denied to the respondent on the ground that she was not party in the earlier *lis*.

5. Their Lordships of the Hon'ble Supreme Court in ***State of Karnataka and others*** versus ***C. Lalitha***, (2006) 2 SCC 747 have held that all persons similarly situated should be treated similarly irrespective of the fact that only one person has approached the court. Their Lordships have held as under:

> "29. Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well-settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I Post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

6. Their Lordships of the Hon'ble Supreme Court in ***K.T. Verrappa and others*** versus ***State of Karnataka and others***, (2006) 9 SCC 406 have held that grant of revised pay scale to the 23 employees who had earlier approached the High Court but denying the same benefit to appellants similarly placed employees by the University was unjustified. Their Lordships have held as under:

> "9. In the counter-affidavit filed by the State of Karnataka, it is admitted that the Government of Karnataka has revised the pay scales of its employees with effect from 1-1-1977 and this revision was also extended to the employees of the universities, including the University of Mysore, Respondent 2. Grant of benefit of revised pay scales by the University to its 23 employees, who had succeeded in the earlier writ petitions, is admitted. It is stated that the order of the Division Bench impugned in these appeals has only directed the implementation of the first order of the Division Bench in its true spirit. The State, for the first time, has taken wholly untenable stand that pursuant to the order earlier passed by the Division Bench, the action of the University granting pay scales to the 23 employees was not in

accordance with the provisions of the Karnataka State Universities Act, 1976 as the pay scales of the employees of the University are to be fixed by framing or amending the existing statute of the University.

16. The defence of the State Government that as the appellants were not the petitioners in the writ petition filed by 23 employees of the respondent University to whom the benefit of revised pay scales was granted by the Court, the appellants are estopped from raising their claim of revised pay scales in the year 1992-94, is wholly unjustified, patently irrational, arbitrary and discriminatory. As noticed in the earlier part of this judgment, revised pay scales were given to those 23 employees in the year 1991 when the contempt proceedings were initiated against the Vice-Chancellor and the Registrar of the University of Mysore. The benefits having been given to 23 employees of the University in compliance with the decision dated 21-6-1989 recorded by the learned Single Judge in WPs Nos. 21487-506 of 1982, it was expected that without resorting to any of the methods the other employees identically placed, including the appellants, would have been given the same benefits, which would have avoided not only unnecessary litigation but also the movement of files and papers which only waste public time."

7. Accordingly, there is no merit in the present petition and the same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

Vinay Bodh. …Plaintiff

Versus

Smt. Dolekar & others …Defendants

Civil Suit No. 56 of 2006.
Reserved on: 16.4.2015.
Date of decision: May 16, 2015.

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract by execution of a sale deed, cancellation of the sale deed executed by defendant No. 1 in favour of defendants No. 2 and 3 and cancellation of subsequent sale deed executed by defendants No. 2 and 3 in favour of defendant No. 4- defendant No. 1 stated that she had taken friendly loan from the plaintiff and had executed sale agreement as per past practice – this agreement was not to be acted upon and was executed towards security for securing the repayment of the loan- defendants No. 2 to 4 claimed that they were bonafide purchasers for consideration- defendant No. 1 examined only herself to prove her assertion, any custom, usage or practice is required to be established by leading cogent and convincing evidence - the plea of the defendants No. 2 and 3 that they were bonafide purchasers for consideration was not proved while the plea of the defendant No. 4 that he was bona fide purchaser for consideration was proved, therefore, plaintiff cannot be held entitled for the decree of specific performance and cancellation- plaintiff granted the relief of the refund of entire sale consideration along with interest @ 18% per annum. (Para-7 to 23)

Code of Civil Procedure, 1908- Section 34- Interest is in the nature of the compensation for the loss of money by one who is entitled to the same. (Para-18 to 22)

Cases referred:
Secretary, Irrigation Department, Government of Orissa and others versus G.C.Roy (1992) 1 SCC 508
Riches versus Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)
CIT versus Dr.Sham Lal Narula AIR 1963 Punj 411
Dr.Sham Lal Narula versus CIT, AIR 1964 SC 1878

For the Plaintiff:	Mr.Sunil Mohan Goel, Advocate.
For the Defendants:	Mr.Atul Jhingan, Advocate, for defendant No. 1. Mr. K.D. Sood, Senior Advocate with Ms. Ranjana Chauhan, Advocate, for defendants No.2 and 3. Mr. Ramakant Sharma, Advocate, for defendant No. 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The plaintiff has filed the present suit claiming therein the following reliefs:-

"(i) Pass a decree for specific performance of the contract dated 27.9.2005, directing the defendant No. 1, to execute a legal valid and proper sale deed in favour of the plaintiff and to get the same registered in the office of Sub Registrar Manali in respect of land comprised in Khatauni No. 308(old) 505/660 (new) Khasra No. 686 measuring 0-07-23 hectares alongwith two houses as detailed in agreement to sell in village Shuru, Phati Prini, Kothi Jagatsukh Tehsil Manali District Kullu.

(ii) To cancel sale deed executed and registered on 25.11.2005 by defendant No. 1 in favour of defendants No. 2 & 3 and declaring the same null and void and not binding upon the rights of parties.

(iii) To cancel subsequent sale deed executed and registered on 29.9.2006, by defendant No. 2 & 3 in favour of defendant No. 4 and declare the same null and void and not binding upon the rights of the plaintiff.

(iv) To grant damages to the tune of Rs.20,00,000/- to the plaintiff against the defendants jointly and severally as also in the alternative the refund of entire sale consideration i.e. Rs.15,00,000/- with interest.

(v) To grant injunction in favour of the plaintiff and against the defendants restraining them from transferring, alienating, mortgage the demised property to make any addition or alterations or change the nature of the same or lease out the same to any third party or encumber the said demised property in any manner till the final disposal of the suit.

(vi) Any other equitable relief in addition to relief of specific performance which this Hon'ble Court deems fit just and equitable in the facts and circumstances of the case in the interest of justice"

2. The facts as pleaded in the plaint are that the plaintiff is permanent resident of village Bhuntar, Phati & Kothi Khokan Tehsil and District Kullu and is a bonafide Himachali and is an agriculturist within the meaning of H.P. Tenancy & Land Reforms Act, 1972. Defendant No. 1 is resident of village Shuru, Phati Prini, Kothi Jagatsukh, Tehsil Manali District Kullu and was well known to the plaintiff. She wanted to sell her land and house standing thereupon and after negotiations, defendant No. 1 agreed to sell the two

houses along with land comprised in Khewat No. 308(old) 505/660 (new), Khasra No. 3201/2665 (old) now Khasra No.686 (new), measuring 0-07-23 hectares. An agreement to sell was entered into by the parties on 27.9.2005, on which date the plaintiff paid full sale consideration of Rs.15,00,000/-. In terms of this agreement time for defendant No. 1 to remove her personal belongings was given and the sale deed was agreed to be executed before or latest by 31st March, 2006. Defendant No.1 encashed the cheque on 1.10.2005, but thereafter when the plaintiff contacted her and requested her to execute the sale deed in his favour and deliver physical possession of the demised premises, as agreed to be sold, defendant No.1 kept evading the matter on one pretext or the other and stated that she would get the sale deed executed well before 31st March, 2006. Even on 31st March, 2006, defendant No. 1 failed to appear in the office of Sub Registrar, though the plaintiff reached there at 10:00 A.M. and remained there till 4.30 P.M. An affidavit evidencing the presence of the plaintiff was got attested on 31.3.2006 before the Executive Magistrate, Manali. The plaintiff thereafter contacted defendant No. 1 who still assured him that she would get the sale deed executed and it was only on account of certain unavoidable circumstances that she was compelled to remain at Chandigarh. When defendant No. 1 despite a passage of time failed to execute the sale deed, the plaintiff got a legal notice dated 31.8.2006 served upon defendant No.1, both on her residential address in Tehsil Manali as also the address at Chandigarh. But these notices were received back undelivered. It is then averred that the plaintiff came to know that defendant No.1 had got executed a sale deed and got the same registered in favour of defendants No. 2 and 3 on 25.11.2005 of the same property in the office of Sub Registrar, Manali for a sale consideration of Rs.20,00,000/-. This sale deed was stated to be illegal, void and not binding upon the rights of the plaintiff. It is thereafter averred that defendants No. 2 and 3 after realizing that the sale deed executed in their favour by defendant No. 1 was likely to be cancelled being illegal and void, sold the suit land to defendant No. 4 vide sale deed dated 29.9.2006 for a sale consideration of Rs.20,00,000/-. The plaintiff states that he was ready and willing to perform his part of contract and is still ready and willing to perform his part of contract and even has sufficient funds with him for purchase of stamp papers. It is lastly claimed that the suit is within time, since the cause of action has arisen on 27.9.2005. It is in this background that the present suit has been filed claiming therein the reliefs as mentioned herein above.

3. Defendant No.1 resisted the suit of the plaintiff by filing written statement, wherein preliminary objections regarding the form of suit as also the plaintiff being suppressio veri and suggestio falsi were raised. On merits, specific defence of defendant No. 1 is that she had sought a friendly loan from the plaintiff and as per general practice had executed a sale agreement with him. The sale agreement was not to be acted upon and was actually executed towards security for securing the loan amount. It was implied that the suit land would remain in possession and ownership of defendant No. 1 and as and when the loan amount would be retuned, the sale agreement would be destroyed and not acted upon. Defendant No. 1 did not deny the receipt of notice, but averred that since she was unable to pay the plaintiff friendly loan, she was constrained to sell the suit land in favour of defendants No. 2 and 3 for a sale consideration of Rs.20,00,000/- vide sale deed dated 25.11.2005. Defendants No. 2 and 3 were made fully aware of the fact that the land was being sold, so that defendant No. 1 could repay back the money to the plaintiff. Defendants No. 2 and 3 agreed to purchase the land and undertook to indemnify defendant No. 1 from any claims or litigations, if initiated by the plaintiff with respect to the suit property.

4. Defendants No.2 and 3 have filed separate written statement and have claimed themselves to be bonafide purchasers for consideration, having no knowledge regarding any agreement having been entered into between the plaintiff and defendant No.1. It is claimed that the property in dispute had been agreed to be sold by defendant No.

1 in pursuance to the agreement to sell dated 25.5.2005 for a sale consideration of Rs.20,00,000/-, which sale deed was executed and registered in their favour on 25.11.2005. The suit property was purchased jointly by defendants, but owing to differences between them, they chose to dispose of the property in favour of defendant No. 4 for a sale consideration of Rs.20,00,000/- on 29.9.2006. Neither defendants No. 2 and 3 nor defendant No. 4 was ever aware of any agreement having been entered into between the plaintiff and defendant No. 1 and therefore, claimed that they were bonafide purchasers for consideration.

5. Defendant No. 4 filed separate written statement, wherein she claimed to be a bonafide purchaser for consideration, as she had no knowledge of any agreement having been entered into between the plaintiff and defendant No. 1.

6. On 28.3.2008, this Court framed the following issues:-

"(1) Whether the plaintiff is entitled to a decree for specific performance of the agreement to sell dated 27.9.2005 executed by defendant No. 1 qua suit property as described in the plaint? …OPP.

(2) Whether the plaintiff is entitled to the other reliefs, as prayed for, namely, damages to the extent of Rs.20 lacs and refund of the entire sale consideration of Rs.15 lacs or any other amount, as prayed for? …OPP.

(3) Whether the plaintiff is entitled for a decree declaring the sale deed executed and registered on 25.11.2005 by defendant No. 1 in favour of defendants No. 2 and 3 to be null and void and not binding on the interest of plaintiff? …Onus of proof on plaintiff, defendants 1, 2 and 3

(4) Whether the plaintiff is entitled to a decree declaring the sale deed registered on 29.9.2006 by defendants No. 2 and 3 in favour of defendant No. 4 to be null and void and inoperative on the rights of the plaintiff?

…Onus of proof on the parties.

(5) Whether the plaintiff is entitled to a decree for permanent prohibitory injunction restraining the defendants from transferring, alienating, encumbering or mortgaging the suit property? ….OPP.

(6) Whether the plaint as filed is neither competent not maintainable, as alleged? …OPD-1.

(7) Whether the plaintiff is guilty of suppressio veri and suggestio falsi, as alleged? …OPD-1.

*(**Both issues objected to by learned counsel appearing for the plaintiff on the ground that complete particulars as required by Order 6 Rule 2 of the Code of Civil Procedure have not been given).***

(8) Whether the amount of Rs.15 lacs was paid as sale consideration by the plaintiff to the defendant or was in the nature of a land, as alleged? …OPD-1.

(9) Whether defendants No. 2 and 3 had knowledge of the fact that a valid agreement to sell to the suit property had been executed between the plaintiff and defendant No. 1 such knowledge having been imparted by defendant No. 1 as alleged? ….OPD-1.

(10) Whether defendants No. 2 and 3 had agreed with defendant No. 1 that they would be responsible for any litigation/suit which may be brought against defendant No. 1 and would defend the same at very risk, costs and consequences? …OPD-1.

*(11) Whether defendants No. 2 and 3 are bonafide purchaser of the suit property for a consideration of Rs.20 lacs, as alleged**?** …OPD-2 & 3.*

(12) Whether defendant No. 4 is the bonafide purchaser of the property for valuable consideration, as alleged? …OPD-4.

(13) Relief."

ISSUES NO. 6 & 7.

7. No evidence in support of these issues was led by defendant No.1 apparently because the objections are legal one. However, even the pleadings are wholly deficient and defendant No.1 has failed to establish how the plaint was neither competent nor maintainable, save and except for these bald averments, there is nothing on record to substantiate this plea. Accordingly, these issues are decided against defendant No.1.

ISSUE NO. 8.

8. The defendant No. 1 in order to prove this issue has examined herself as DW-1 and has stated that she is an illiterate and had entered into an agreement with the plaintiff, which was executed on 27th September, 2005. She had taken a loan of Rs.15,00,000/- from the plaintiff. She had no intention to sell the land and the house and the same was only kept as security against the aforesaid loan. After the payment of loan amount she was to get back the land and the house. The loan amount was required to be paid within 4-5 months but when the plaintiff began demanding the amount even before the date, she went to defendant No. 2, Nimat Ram, who is her husband's friend and showed him the agreement and told him that she had to pay the plaintiff Rs.15,00,000/-. Defendant No. 2 told her that he would make the payment to plaintiff and that she should transfer the land and the house in his name. Defendant No. 2 neither made the payment to the plaintiff nor to her. She further states that she had transferred the land and house in the name of defendant No.2 by registered sale deed and had borne the expenses of stamp papers and registration charges. Prior to this sale deed no agreement was executed between her and Nimat Ram and Balak Ram, defendants. After seeing agreement Ex.D-1, she denied that the same contained her signatures at E-1 and E-2 respectively. She specifically denied having received the consideration amount from Sh.Nimat Ram.

9. The defendant No.1 save and except for this bald and uncorroborated statement has led no other evidence to prove this issue. It is more than settled that any custom, usage or practice is required to be established and proved by leading cogent and convincing evidence. Having failed to do so, this issue is decided against defendant No.1.

ISSUES NO. 9 & 10.

10. The defendant No.1 has led no evidence whatsoever in support of these issues and, therefore, the issues are decided against the defendant No.1.

ISSUE NO. 11.

11. The defendants No.2 and 3 have filed common written statement wherein it has been alleged that they jointly bought the property in dispute in pursuance to the agreement to sell dated 25.05.2005. But, when defendant No.3 appeared in the witness box as DW-3 he has nowhere stated that the agreement dated 25.05.2005 had been executed jointly by defendants No.2 and 3 with defendant No.1 rather he claims that the agreement was executed by him with defendant No.1 on 25.05.2005. Similarly, when defendant No.2 entered into the witness box as DWR/1 he has stated that he had entered into an agreement with defendant No.1 vide agreement Ex.D-1. Nowhere in his statement he makes a mention of defendant No.3 or that this agreement was jointly executed by him alongwith defendant No.3. Thus, the agreement dated 25.05.2005 Ex.D-1 has not at all been proved on record.

Now in case the agreement dated 25.05.2005 is ignored, then it was the agreement of the plaintiff Ex.P-2 which was prior in point of time. No evidence has been led by defendants No.2 and 3 to show that they were bonafide purchasers of the suit property. Accordingly, this issue is decided against defendants No.2 and 3.

ISSUE NO.12.

12. Though the defendant No.4 has not appeared in the witness box, however, her husband Pawan Kumar has appeared as DW-4/1. In examination in chief, he has stated that he is the Power of Attorney holder of defendant No.4 and placed on record its original Ex.DW-4-1/A. He states that the land and building was purchased by defendant No.4 from defendants 2 and 3 vide sale deed Ex.P-12 dated 29.09.2006. He goes on to state that prior to entering into sale deed, he alongwith his wife had checked the revenue records and had found that the defendants 2 and 3 were the recorded owners of the land. Defendants No.2 and 3 were not only in possession of the title deed, but even the mutation in the revenue records had been attested in their favour. He states that he alongwith his wife and children are now in possession of the property which they had purchased for a sale consideration of Rs.20,00,000/-.

13. In cross-examination by defendant No.1, this witness has stated that before purchasing the property, his wife had conducted an inquiry in the local area. He denied the suggestion that the plaintiff and defendant No.1 had informed her prior to execution of the sale deed Ex.P-12 that the property was already under an agreement to sell in favour of the plaintiff.

14. In cross-examination by the plaintiff, the witness states that he is residing both at Delhi and Manali. He admitted his address as given in the plaint to be correct. He further stated that his wife before marriage was a resident of Bhunter and after filing of the suit he came to know that even the plaintiff was a resident of Bhunter. He denied the suggestion that his wife was knowing the plaintiff before the property had been purchased by her. He states that the sale deed executed in favour of defendant No.1 was also inspected by him at the Tehsil Office. He denied the suggestion that he was aware of the agreement to sell between the plaintiff and defendant No.1 and clarified that the defendants 2 and 3 were introduced to him by one friend Rupesh, who negotiated the deal.

15. Thus, from the statement of DW-4/1, it is proved beyond reasonable doubt that defendant No.4 is a bonafide purchaser of property for a valuable consideration as he has virtually not been cross-examined on any material aspects with regard to either the sale or its consideration and even his bonafides either by the plaintiff or defendant No.1. The issue is decided accordingly.

ISSUES NOs.1,3,4 & 5.

16. These issues are inter-connected and are, therefore, taken up together for consideration. As the defendant No.4 has proved on record that she is a bonafide purchaser for consideration, therefore, the plaintiff cannot be held entitled to a decree for specific performance of the agreement to sell dated 27.09.2005. It is for this precise reason that the plaintiff cannot be held entitled for a decree of declaration that the sale deed executed and registered on 25.11.2005 by defendant No.1 in favour of defendants No.2 and 3 be declared as null and void and not binding on the interest of the plaintiff. Similarly, the plaintiff cannot also be held entitled to a decree declaring the sale deed registered on 29.09.2006 by defendants 2 and 3 in favour of defendant No.4 to be null and void and inoperative on the rights of the plaintiff. Now, once the plaintiff cannot be accorded the aforesaid declaration, therefore, he also cannot be held entitled to the decree for permanent prohibitory injunction. Accordingly, all these issues are answered against the plaintiff.

ISSUE NO.2.

17. The plaintiff has duly proved on record that he had paid a sum of Rs.15,00,000/- to defendant No.1. However, since defendant No.4 has simultaneously proved on record that she is a bonafide purchaser for a consideration and also in possession of the suit land, therefore, the suit of the plaintiff for specific performance though cannot be decreed, but then the plaintiff cannot be deprived of his right to claim this amount of Rs.15,00,000/-.

18. Since the plaintiff has been deprived of the use of money to which he is entitled, he has a right to be compensated for the deprivation, whether it be by interest, compensation or damages. A Constitution Bench of the Hon'ble Supreme Court in ***Secretary, Irrigation Department, Government of Orissa and others*** *versus* ***G.C.Roy (1992) 1 SCC 508***, held that:-

> "43...(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator."

19. Black's Law Dictionary (7th Edition) defines 'interest' inter alia as:

> '3. The compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of [the] borrowed money.'

20. According to Stroud's Judicial Dictionary of Words And Phrases (5th Edition) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money.

21. The essence of interest in the opinion of Lord Wright, in ***Riches*** *versus* ***Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)*** (AC at p.400: All ER at p.472-E-F) is that:-

> '.....it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation';
>
> the money due to the creditor was not paid, or, in other words,
>
> 'was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute'.

22. At this stage, it may be relevant to note that the following observations made by a Division Bench of the High Court of Punjab in ***CIT*** *versus* ***Dr.Sham Lal Narula AIR 1963 Punj 411*** on the concept of 'interest' were duly approved by the Hon'ble Supreme Court in ***Dr.Sham Lal Narula*** *versus* ***CIT, AIR 1964 SC 1878***, in an appeal preferred against this decision and it was held as under:-

> "8. The words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation.

> "Interest" in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money……
>
> In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

23. Though, plaintiff has claimed damages to the extent of Rs.20,00,000/-, apart from refund of the entire sale consideration of Rs.15,00,000/-. But, I find no basis upon which the plaintiff has laid such a claim. The ends of justice would subserve if the plaintiff is granted refund of the entire sale consideration of Rs.15,00,000/- with interest at the rate of 18% per annum to be paid by defendant No.1. The issue is accordingly answered.

Relief.

24. In view of my issues-wise findings recorded hereinabove, the suit of the plaintiff is decreed to the extent that he is held entitled to the refund of entire sale consideration of Rs.15,00,000/- and is further held entitled to an interest thereupon at the rate of 18% per annum with effect from the date of execution of the agreement i.e. 27.09.2005 till the time the same is not paid by the defendant No.1. Decree sheet be prepared accordingly. Parties are left to bear their costs.

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

Jyoti Kumari & ors. ……Petitioners.

Versus

The Secretary Education & anr. ……..Respondents.

CWP No. 2958 of 2009.
Reserved on: 15.5.2015.
Decided on: 18.5.2015.

Constitution of India, 1950- Article 226- Names of the petitioners were sponsored by District Employment Officer, Hamirpur, for interview to the post of TGT (Med.) under the quota reserved for wards of ex-servicemen- petitioners were not interviewed on the ground that married daughters were not eligible to get the benefit- held, that son of ex-servicemen was eligible for consideration as the ward of ex-servicemen, even though he is married, however, the daughters were not being considered to be the wards of ex-servicemen- this amounted to discrimination on the basis of sex and is violative of the constitution- it has no nexus with the object sought to be achieved – petition allowed and respondents directed to interview the petitioners for the advertised post. (Para-2 to 5)

Cases referred:

Savita Samvedi (Ms) and another versus Union of India and others, (1996) 2 SCC 380
C.B. Muthamma, I.F.S. versus Union of India and others, (1979) 4 SCC 260

For the petitioners: Mr. Nitin Thakur, Advocate, vice Mr. J.R.Thakur, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioners are wards of ex-servicemen. Their names were sponsored by the District Employment Officer, Hamirpur, for interview to the post of TGT (Med.) under the quota reserved for wards of ex-servicemen. They were issued call letters for batch-wise interview for the post of TGT (Med.), vide Annexure P-1. The petitioners were to be interviewed w.e.f. 31.7.2009 to 1.8.2009. However, the date was later on shifted to 5.8.2009. The fact of the matter is that the petitioners were not interviewed on the basis of the note appended to Annexure P-1 to the effect that married daughters were not eligible to get the benefit under the ward of ex-servicemen. There is reference to Annexure R-1 dated 22.2.2003, whereby the married daughters cannot be considered as dependent on ex-servicemen for employment against quota reserved for ex-servicemen.

2. The action of the respondents of not considering the petitioners as wards of ex-servicemen, is wholly unreasonable and arbitrary. There is discrimination on the basis of sex. The son of ex-serviceman is eligible to be considered for the quota under the category "wards of ex-servicemen" even though married, but not the married daughters. It is violative of Articles 14, 15 and 16 of the Constitution of India. There is no nexus with the object sought to be achieved by incorporating the note appended to Annexure P-1 read with Annexure R-1 dated 22.2.2003. The primary object to provide employment to wards of ex-servicemen is to recognize the outstanding services rendered by the ex-servicemen to the Nation and also to ensure that the children who suffers due to long absence of his/her father are given benefit towards employment by making reservation to them under the category of "wards of ex-servicemen". The daughter, even if married, would be eligible for public employment under the category "wards of ex-servicemen". She would be considered by legal fiction dependent upon her father, if she gets married.

3. In a similar situation, their Lordships of Hon'ble Supreme Court in ***Savita Samvedi (Ms) and another versus Union of India and others, (1996) 2 SCC 380*** have held as under (paras 5 to 10):-

> "5. As is obvious from the plain reading of the Circular, the married daughter of a retiring official is eligible to obtain regularization if her retiring father has no son. She thus has a foothold, not to be dubbed as an outcaste outright. In case he has a son, she shall not be in a position to do so, unless he is unable to maintain the parents, e.g. like a minor son, but then she should be the only person who is prepared to maintain her parents. It is thus plain that a married daughter is not altogether debarred from obtaining regularization of a railway quarter, but her right is dependent on contingencies. The authorities concerned as also the Central Administrative Tribunal seemed to have overlooked the important and predominant factor that a married daughter would be entitled to regularization only if she is a railway employee as otherwise, she by mere relationship with the retiring official, is not entitled to regularization. Logically it would lead to the conclusion that the presence of a son or sons, able or unable to maintain the parents, would again have to be railway employees before they can oust the claim of the married daughter. We are not for the moment holding that they

would be capable of doing so just because of being males in gender. Only on literal interpretation of the Circular, does such a result follow, undesirable though.

6. A common saying is worth pressing into service to blunt somewhat the Circular. It is

> "A son is a son untill he gets a wife. A daughter is a daughter throughout her life."

7. The retiring official's expectations in old age for care and attention and its measure from one of his children cannot he faulted, or his hopes dampened, by limiting his choice. That would be unfair and unreasonable. If he was only one married daughter, who is a railway employee, and none of his other children are, then his choice is and has to be limited to that railway employee married daughter. He should be in an unfettered position to nominate that daughter for regularization of railway accommodation. It is only in the case of more than one children in Railway service that he may have to exercise a choice and we see no reason why the choice be not left with the retiring official's judgment on the point and be not respected by the railways authorities irrespective of the gender of the child. There is no occasion for the railways to be regulating or bludgeoning the choice in favour of the son when existing and able to maintain his parents. The railway Ministry's Circular in that regard appears thus to us to be wholly unfair, gender biased and unreasonable, liable to be struck down under Article of the Constitution. The eligibility of a married daughter must be placed at par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit of the earlier part of the Circular, referred to in its first paragraph, above-quoted.

8. The Tribunal took the view that when the Circular dated 11.8.1992 had itself not specifically been impugned before it and ex-facie the conditions contained in the said Circular had not been satisfied in the present case, no relief need be given to the appellants. The Tribunal viewed that when there were two major sons of the second appellant, gainfully employed, the fact that they were not railway employees, not residing in Delhi, did not alter the situation that the terms of the Circular dated 11.8.1992 had not been satisfied, under which alone regularization was permissible. As brought about before, the Tribunal overlooked this aspect that the Circular was meant only to enlist the eligibles, who could claim regularization, but the important condition of one being a railway employee had to be satisfied before claim could be laid. In the instant case, the first appellant, on that basis, alone was eligible (subject to gender disqualification going). So the second appellant could exercise his choice/option in her favour to retain the accommodation, obligating the railway authorities to regularise the quarter in her favour, subject of course to the fulfillment of other conditions prescribed. The error being manifest is hereby corrected, holding the first appellant in the facts and circumstances to be the sole eligible for regularization of the quarter.

9. It was also pointed out before us that the Central Administrative Tribunal, Bombay Bench in one of its decisions in OA 314 of 1990 decided on 12.2.1992 (Ann. P-8) relying upon its own decision in Ms. Ambika R. Nair and another vs. Union of India and others (T.A. No. 467 of 1986) in which the earlier Circular of the railway board dated 27.12.1982 had been

questioned, held that the same to be unconstitutional per se as it suffered from the twin vices of gender discrimination and discrimination inter se among women on account of marriage. We have also come to the same view that the instant case is of gender discrimination and therefore should be and is hereby brought in accord with Article 14 of the Constitution. The Circular shall be taken to have been read down the deemed to have been read in this manner from its initiation in favour of the married daughter as one of the eligibles, subject, amongst others, to the twin conditions that she is (i) a railway employee; and (ii) the retiring official has exercised the choice in her favour for regularization. It is so ordered.

10. For the reasons stated above, this appeal is allowed and direction is issued to the respondents to grant regularization of the quarter in favour of the first appellant with effect from the date of retirement of the second appellant and regulate/re-adjust the charges on account of house rent accordingly. There shall be no order as to costs."

4. Their Lordships of Hon'ble Supreme Court in ***Miss C.B. Muthamma, I.F.S.*** versus ***Union of India and others, (1979) 4 SCC 260*** have held that sex-discrimination in service Rules would be unconstitutional unless justified by the peculiarities and nature of the employment. Their Lordships have held as under (paras 4 to 7):-

"What is more manifest as misogynist in the Foreign Service is the persistence of two rules which have been extracted in the petition. Rule 8(2) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961, unblushingly reads:

"Rule 8(2) : In cases where sub-rule (1) does not apply, a woman member of the service shall obtain the per- 671 mission of the Government in writing before her marriage is solemnized. At any time after the marriage, a woman member of the Service may be required to resign from service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service."

Discrimination against women, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service is likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment Cadre, Seniority and Promotion) Rules, 1961, run in the same prejudicial strain:

(1).....

(2).....

(3).....

(4) No married woman shall be entitled as of right to be appointed to the service."

At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no

worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in Action. And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of die-hard allergy to gender parity is inevitable.

We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the 672 handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern. This creed of our Constitution has at last told on our governmental mentation, perhaps partly pressured by the pendency of this very writ petition. In the counter affidavit, it is stated that Rule 18(4) (referred to earlier) has been deleted on November 12, 1973. And, likewise, the Central Government's affidavit avers that Rule 8(2) is on its way to oblivion since its deletion is being gazetted. Better late than never. At any rate, we are relieved of the need to scrutinise or strike down these rules."

5. Accordingly, the writ petition is allowed. Note appended to Annexure P-1 on the basis of Annexure R-1 dated 22.2.2003, is quashed and set aside. The respondents are directed to interview the petitioners for the post of TGT(Med.), against their respective batch and to issue appointment letters to them with all consequential benefits within six weeks. Pending application(s), if any shall 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.

CWP Nos.8738, 8916, 9002, 9003 of 2014,
1379, 1380 and 1928 of 2015.
Date of decision: 18.05.2015

CWP No.8738 of 2014

Lal Chand Prasad .....Petitioner

Versus

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

CWP No.8916 of 2014

Ramesh Kumar Joshi .....Petitioner

Versus

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

CWP No.9002 of 2014

Ashwani Kumar Kapila .....Petitioner

Versus

HIMUDA and another ..... Respondents

CWP No.9003 of 2014
Jagat Ram Azad ……Petitioner
Versus
HIMUDA and another ….. Respondents
CWP No.1379 of 2015
Y.S. Thakur ……Petitioner
Versus
State of H.P. and another ….. Respondents
CWP No.1380 of 2015
Lal Chand Chauhan ……Petitioner
Versus
State of H.P. and others ….. Respondents
CWP No.1928 of 2015
Nirmala ……Petitioner
Versus
State of H.P. and others ….. Respondents

Constitution of India, 1950- Article 226- State Government had granted extension of one year of service to some of the employees- extension was withdrawn subsequently by the State- held, that policy was promulgated by the State Government in exercise of executive powers and the Policy was withdrawn by exercising the same power and authority – it was specifically mentioned in the policy that it was conditional and could be withdrawn at any stage - once employee accepted the extension in terms of policy, he cannot complain, however, it is directed that any adverse remarks will not affect the petitioners and such remarks are expunged. (Para-5 to 11)

For the petitioner(s): M/s Bipin Negi, J.L. Bhardwaj, Dinesh Bhanot, Archana Dutt, R.S. Gautam and Ajay Vaidya, Advocates.

For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma and Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for the respondents/State.
Mr.Rajnish Maniktala, Advocate, for respondents No.2 and 3 in CWP No.8738 of 2014.
Mr.Bhupender Pathania, Advocate, for respondent No.2 in CWP No.1379 of 2015.
Mr.C.N. Singh, Advocate, for the respondent/HIMUDA.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

These writ petitions are the outcome of a conditional Policy promulgated by the respondent-State, whereby extension of one year in service was granted to some of the employees.

2. The State Government has now withdrawn the said Policy.

3. In some of the writ petitions, the petitioners have questioned the action of the respondent-Authorities, whereby extension in service was not granted in their favour and in some of the writ petitions, the petitioners have challenged the cancellation of the

extension orders, while in some of the writ petitions, the petitioners have challenged the notification whereby the said Policy has been withdrawn.

4. The moot question is – Whether the writ petitions are maintainable?

5. The writ petitions are not maintainable for the reason that the Policy was promulgated by the State Government by exercising executive powers and the Policy has been withdrawn by exercising the same power and authority. Thus, the petitioners are not within their rights to question the action of the State Government of withdrawing the said Policy.

6. A perusal of the Policy notified vide notification, dated 28th May, 2014, clearly shows that the same was conditional and could be withdrawn at any stage. It is apt to reproduce the last clause of the Policy hereunder:

> *"(iv) The extension in service will be subject to satisfaction of the State Government and the State Government may withdraw the extension given at any stage."*

7. While going through the above clause, the State Government was within its power to withdraw the extension at any stage. Once the employee accepted the extension in terms of the said Policy, cannot blow hot and cold in the same breath.

8. The Government has withdrawn the said Policy and also passed the cancellation orders by exercising the power vested in it. Therefore, all the writ petitions have become infructuous.

9. Having said so, the writ petitions are not maintainable.

10. The learned counsel for the petitioners in CWP Nos.1379 and 1380 of 2015 have submitted that while withdrawing/denying the extension granted in favour of the petitioners, the respondents have made some adverse remarks, which are adversely affecting the petitioners. Therefore, it is made clear that any such observation shall not affect the petitioners in any way, and rather, the same are expunged.

11. With these observations, all the writ petitions are disposed of. However, the petitioners are at liberty to seek appropriate remedy, if any, available.

12. Pending CMPs, if any, also stand disposed of.

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

Cr.M.P.(M) No. 395 of 2015 with Cr.M.P.(M) Nos. 396, 397, 398, 399, 400, 401, 402, 403 of 2015.
Reserved on 15.5.2015.
Date of decision: 18.5.2015

1.Cr.M.P.(M) No. 395 of 2015
Nikhil ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent

2. Cr.M.P.(M) No. 396 of 2015
Vishal ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent

3. Cr.M.P.(M) No. 397 of 2015
Sandeep alias Kaku ...Petitioner
Versus
State of Himachal Pradesh ...Respondent
4. Cr.M.P.(M) No. 398 of 2015
Sunil ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
5. Cr.M.P.(M) No. 399 of 2015
Dalip Singh ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
6. Cr.M.P.(M) No. 400 of 2015
Pardeep Kumar alias Ritu ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
7. Cr.M.P.(M) No. 401 of 2015
Devinder ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
8.Cr.M.P.(M) No. 402 of 2015
Prince Mohan ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
9. Cr.M.P.(M) No. 403 of 2015
Man Singh ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioners for the commission of offences punishable under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 IPC- held that in case a person is suspected of a crime of an offence punishable with death or imprisonment for life, there must be ground to negate the existence of reasonable grounds for believing that such a person is guilty of an offence punishable with sentence of death or imprisonment for life - Court must record reasons for prima facie concluding as to how bail was granted- the heinous nature of the crime warrants more caution and there is a greater chance of rejection of bail- mere fact that accused surrendered themselves will not entitle them to bail- investigation is at initial stage- many accused are yet to be arrested- release at this stage would be a serious threat to the peace and tranquility and threat to the safety of the complainant and her family members- release at this stage will also affect the investigation- application dismissed. (Para-10 to 22)

Cases referred:
Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446
Ram Govind Upadhyay Vs. Sudarshan Singh and others, (2002) 3 SCC 598
Dwarku Devi Vs. State of Himachal Pradesh 2014 (2) Shim. LC 882

For the Petitioner(s): Mr.Ajay Kochar, Advocate with Mr.Vivek Sharma, Advocate.

For the Respondent: Mr.V.K. Verma, Ms.Meenakshi Sharma, Mr.Rupinder Singh, Additional Advocate Generals.
Mr.Munish Dhadwal, HPS, Dy. S.P./SDPO, Chopal and Mr. Gulam Akbar, SI/SHO P.S. Chopal, District Shimla present with records.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The above mentioned nine bail petitions have been filed for grant of regular bail in case FIR No. 14 of 2015, dated 11.3.2015 registered under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 IPC at Police Station, Chopal, District Shimla, H.P.

2. In the application(s), it has been pleaded that on 11.3.2015 a marriage ceremony of Manoj Mehta was being solemnized at Village Tuil, Post Office Chambi, Tehsil Chopal, District Shimla, H.P. A few guests had started returning to their respective places after having food. While crossing a village path above the house of one Narvir an altercation took place between the said Narvir and one Bharat Bhushan. Narvir was holding a double barrel gun in his hand and he without any provocation fired at Bharat Bhushan. Bharat Bhushan received gun shot on his stomach and he immediately fell on the field. Narvir threw his gun on the spot and ran downwards. Bharat Bhushan was immediately lifted by the people present on the spot, but he succumbed to the injuries and died. The matter was reported to the police and the police registered a case vide FIR No. 13/2015.

3. When the police reached on the spot with a purpose to investigate the case registered vide FIR No. 13 of 2015, Smt. Virendra Devi, wife of Narvir got recorded a false statement to the police with the purpose to save her husband. She alleged that her husband was assaulted with lethal weapons by a mob.

4. On the basis of the statement of Smt. Virendra Devi, the police has registered a case vide FIR No. 14 of 2015 under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 of the Indian Penal Code against 35 persons, who have been falsely named by the aforesaid complainant.

5. It is the case of the bail petitioners that they had been falsely implicated and many of them being innocent have themselves surrendered before the police, who are now in judicial custody. It is claimed that the petitioners have been falsely implicated in the case, which was a counter blast to the FIR No. 13 of 2014 registered with the sole purpose of saving her husband and herself from the clutches of law.

6. The respondent after having put to notice, have produced the records of the investigation and have also filed the status report.

7. The record discloses that on 11.3.2015, complainant got recorded her statement under Section 154 Cr.P.C. to ASI Partap Singh disclosing therein that she along with her husband and three children is residing in village Tuil. As about 3.00 P.M., on 11.3.2015, she along with her husband was present in her house. Meanwhile, a stone was thrown on the head of her husband, upon which, the husband told her that people are pelting stones upon them, upon which the complainant along with children got into the house. Her husband also came inside the house. The people were pelting stones on the roof of the house. They also proclaimed that if Narvir would come out, they will not spare him. Then, the accused Bantu son of Sunder Singh, Dalip son of Jalam Singh, Bhupinder son of Sh. Roop Singh, Pappu, Kaku son of Joban Dass, Rakesh son of Lachhi Ram, Sunil

son of Sant Ram, Manu son of Beer Singh, Gulshan son of Lachhi Ram, Ritu son of Joban Dass, Joban Dass, Sanu son of Bhupinder, Rajinder son of Balak Ram, Dinesh Mehta son of Masat Ram, Manu alias Sachin son of Rajinder entered in the house. After entering the house, Bhupinder son of Sh. Bhoop Singh caught hold the complainant from her hair, Rinku and Kaku caught hold the complainant from her arms. Rajinder, Sunil and Pappu tore the clothes of the complainant and they have also proclaimed to molest her. Ritu was having stone in his hand and he inflicted injuries on the face of the complainant. Those persons were proclaiming to the deceased Narvir that he could save his wife if he can. The husband of the complainant was having a gun in his hand. He tried to save the complainant, then the persons who came there inflicted Darat blow on the head of her husband. They also snatched the gun. In that process, the bullet got fired and hit Bantu son of Sh. Sunder Singh. Thereafter, all those persons dragged the husband of the complainant out of the house along with the person who sustained the bullet injuries. Apart from the above persons, women were also present there. All of them have beaten the husband of the complainant. One Surinder Nepali had inflicted the axe blow on the husband of the complainant. They dragged the husband of the complainant towards the fields. She also got recorded the names of the accused Rama Nand son of Mahi Ram, Bantu son of Rama Nand, Yashu son of Ram Lal, Yashu son of Gian Singh, Man Singh son of Kumbia, Prince Mohan son of Man Singh, Dimple son of Man Singh, Dimple son of Ishri Nand, Virender son of Sh. Roshan Lal, Devinder son of Roshan Lal, Inder Singh son of Sh.Roshan Lal, Pankaj son of Daulat Ram, Sanjay son of Daulat Ram, Ravi son of Mangat Ram, Vishal son of Sandeep, Sandeep son of Sh. Sohan Singh, Nikhil son of Sh. Sandeep, Pinku son of Bhindru, Kundan Singh son of Jalam Singh, Vir Singh son of Sh. Mehar Singh, Sunder Suingh son of Sh. Mehar Singh. She further recorded that when her husband was dragged by the above persons, then after sometime, the accused Daleep, Pradeep, Bhupinder, Surinder Nepali, Sunil, Manoj, Rajinder came to the house of the complainant and told her that they had killed her husband and thrown his dead body in the rivulet. They have also proclaimed that they will burn the complainant as well as her children. They also sprinkled kerosene oil on the grass and wood lying on the rear side of the house and set the same on fire. On all these allegations the complainant prayed that action be taken against them.

8. On the said statement of the complainant, the police machinery swung into motion and registered F.I.R. No. 14/2015 under Sections 302, 147, 148, 149, 452, 364, 436, 354, 323 and 506 of the Indian Penal Code.

9. The police searched for Narvir Thakur on 11/12.3.2015, but he was not found. On 12.3.2015, the spot was videographed. The other codal formalities were completed on the spot. On 12.3.2015, the dead body of Narvir was found in the jungle. The dead body was taken into possession and the same was sent for postmortem examination. On 16.3.2015, the bail applicants have surrendered before the police. They were arrested and were medico legally examined. During the course of investigation on 19.3.2015, the accused Kundan Singh and Dalip Singh made a statement under Section 27 of the Indian Evidence Act and Kundan Singh got recovered the Axe and Dalip Singh got recovered the clothes which he had worn at the time of incident.

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

10. It is well settled that the matters to be considered in an application for bail are:-

(i) whether there is any *prima facie* or reasonable ground to believe that the accused has committed the offence;

(ii) nature and gravity of the charge;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being tampered with; and

(viii) danger, of course, of justice being thwarted by grant of bail.

11. It is also more then settled that if a person was suspected of a crime of an offence punishable with death or imprisonment for life, then there must explaining grounds which specifically negate the existence of reasonable grounds for believing that such an accused is guilty of an offence punishable with sentence of death or imprisonment for life. The jurisdiction to grant bail must, therefore, be exercised on the basis of well settled principles having regard to the circumstances of each case. The discretion to be exercised in such matters must be exercised in a judicious manner and not as a matter of course. It may not be necessary to do detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, but there is a need to indicate reasons for *prima facie* concluding why bail was being granted, particularly where the accused is charged of having committed a serious offence. The heinous nature of the crime warrants more caution and there is a greater chance of rejection of bail, though, however dependent on the factual matrix of the matter.

12. In ***Ash Mohammad Vs. Shiv Raj Singh,*** *(2012) 9 SCC 446,* the legal position was summed up in the following manner:-

> *"**7**. The centripodal issue that emerges for consideration is: whether the order passed by the High Court is legitimately acceptable and legally sustainable within the ambit and sweep of the principles laid down by this Court for grant of regular bail under Section 439 of the Code?*
>
> ***8**. In Ram Govind Upadhyay V. Sudarshan Singh (2002) 3 SCC 598, it has been opined that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. IN the said case the learned Judges referred to the decision in Prahlad Singh Bhati V. NCT, Delhi (2001) 4 SCC 280 and stated as follows: (Ram Govind case (2002) 3 SCC 598, SCC p. 602, para 4)*
>
> > *"(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.*
> >
> > *(b) Resonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.*
> >
> > *(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prma facie satisfaction of the court in support of the charge.*

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

9. *In Chaman Lal V. State of U.P. (2004) 7 SCC 525 this court while dealing with an application for bail has stated that certain factors are to be considered for grant of bail, they are: (SCC p. 525)*

"…(i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant, and (iii) prima facie satisfaction of the court in support of the charge."

10. *In Mansroor v. State of U.P. (2009) 14 SCC 286, while giving emphasis to ascribing reasons for granting of bail, however, brief it may be, a two-Judge Bench observed that: (SCC p. 290, para 15)*

"15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case."

Bearing in mind the well settled principles of law, I proceed to deal with the merits of the bail applications.

13. Learned counsel for the petitioners has strenuously argued that the present complaint was a counter blast to FIR No. 13 of 2015, which was registered prior in point of time against the deceased husband of the complainant. He further contended that as per the contents of FIR the names of the persons who have entered the house of the complainant are:

(1) Bantu S/o Sunder Singh (Deceased in FIR No. 13/15
(2) Dalip S/o Jalam Singh (bail applicant)
(3) Bhupinder S/o Roop Singh
(4) Pappu S/o Joban Dass
(5) Kaku S/o Joban Dass (Sandeep) bail applicant.
(6) Rakesh S/o Lachhi Ram
(7) Sunil S/o Sant Ram (bail applicant)
(8) Mannu S/o Vir Singh
(9) Gulshan S/o Lachhi Ram
(10) Ritoo S/o Joban Dass (bail applicant)
(11) Joban Dass, S/o Bhupinder
(12) Rajinder S/o Balak Ram
(13) Dinesh Mehta S/o Mast Ram
(14) Mannu @ Sachin S/o Rajinder
(15) Sonu S/o Bhupinder

While the persons who are alleged to be present outside the house are:

(1) Rama Nand S/o Mohi Ram (father of person at Sr. No. 2)
(2) Bantoo S/o Rama Nand
(3) Yashu S/o Rama Nand
(4) Yashu S/o Gian Singh
(5) Maan Singh S/o Kumb Dass (bail applicant)
(6) Prince S/o Maan Singh (bail applicant)
(7) Dimple S/o Maan Singh
(8) Dimple S/o Ishwari Nand
(9) Varinder S/o Roshan Lal
(10) Devinder S/o Roshan Lal (bail applicant)
(11) Inder S/o Roshan Lal
(12) Pankaj S/o Daulat Ram
(13) Sanjay S/o Daulat Ram
(14) Ravi S/o Mangat Ram
(15) Sandeep S/o Sohan Singh
(16) Vishal S/o Sandeep (bail applicant)
(17) Nikhil S/o Sandeep (bail applicant)
(18) Pinku S/o Bhupinder
(19) Kundan S/o Jhalam Singh
(20) Dalip S/o Jalam Singh
(21) Lachi Ram S/o Jhalam Singh
(22) Veer Singh S/o Mehar Singh
(23) Sunder Singh S/o Mehar Singh
(24) Along with all the ladies of the village.

Whereas there is yet a third set of persons, who proclaimed to have killed the husband of the complainant, who are:

(1) Dalip
(2) Pradeep
(3) Bhupinder
(4) Surinder (Gorkha)
(5) Sunil
(6) Manoj
(7) Rajinder

Therefore, each of the accused cannot be made to stand on equal pedestal, as the seriousness of the allegations against one of the accused cannot be taken as a ground to deny bail to all accused against whom allegations may not so serious. It is also contended that one of the accused Mannu @ Sachin S/o Rajinder was not at the scene of the incident on the relevant date and time and was in fact in Shimla, which fact is duly proved from the withdrawal made by him from the ATM. It is also contended that some of the accused have been stated to be present at the spot when admittedly they were accompanying Bantu S/o Sunder Singh (deceased) in FIR No. 13 of 2015 and their names find mentioned in the receipt obtained at the time of handing over of the body. He further argued that the petitioners being innocent had of their own surrendered to the police, which proved their innocence.

14. Before proceeding any further, it would be relevant to note that the learned Sessions Judge has rejected the bail applications of the petitioners on the following grounds:-

(i) Mere fact that the bail applicants are in judicial custody does not mean that the investigation qua them is complete. The investigation was at a crucial juncture where number of accused were yet to be arrested.

(ii) The FIR at the instance of the complainant could not be held to be a counter blast to the accused registered against her deceased husband vide FIR No. 13 of 2015.

(iii) The release of the bail applicants would send wrong signal to the society that after commission of such heinous offence, the applicants are moving freely in the society.

(iv) Since it was a heinous offence, the Court has to maintain a delicate balance between the individual liberty and the larger interest of the society.

(v) In teeth of specific allegation of constitution of unlawful assembly, the petitioner could not be treated to be innocent.

15. The grounds now canvassed before me are virtually the same which had been canvassed before the Learned Sessions Judge. It is not that the accused do not have a right to make successive bail applications, but then the Court entertaining such subsequent applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such case, the Court also has a duty to record what are the sufficient grounds which persuade it to take a different view from the one taken in the earlier application. This was so held by the Hon'ble Supreme Court in ***Ram Govind Upadhyay Vs. Sudarshan Singh and others,*** *(2002) 3 SCC 598*:-

> "**9**. *Undoubtedly, considerations applicable to the grant of bail and considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non- consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on to the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The subsequent FIR is on record and incorporated therein are the charges under Sections 323 and 504 IPC in which the charge-sheet have already been issued ---- the Court ought to take note of the facts on record rather than ignoring it. In any event, the discretion to be used shall always have to be strictly in accordance with law and not dehors the same. The High Court thought it fit not to record any reason, far less any cogent reason, as to why there should be a departure when in fact such a petition was dismissed earlier not very long ago. The consideration of the period of one year spent in jail cannot in our view be a relevant consideration in the matter of grant of bail, more so by reason of the fact that the offence charged is that of murder under Section 302 IPC having the punishment of death or life imprisonment --- it is a heinous crime against the society and as such the court ought to be rather circumspect and cautious in its approach in a matter which stands out to be a social crime of very serious nature."*

16. Leaned counsel for the petitioners has vehemently argued that it was not the police who arrested them, but they of their own volition surrendered, which proved their innocence. Mere fact that the petitioners have surrendered of their own volition, to my mind does not in itself lead to an inference, much less proves their innocence. If such a plea were to be accepted, then in all crimes where the accused surrenders, he would plead innocence only on the sheer strength of his having surrendered, and therefore, this plea cannot be countenanced. The petitioners admittedly have been named as accused in the FIR and definite role has been ascribed to them. This is an exceptional case where allegations have been made against a large number of people, who are claiming themselves to be innocent, but then the investigation is only at the stage of infancy and arming the petitioners with bail at this stage would seriously prejudice and hamper the investigation.

17. It is more then settled that at this stage the examination of the evidence is to be avoided, lest it amounts to prejudging and prejudicing either of the parties. However, a prima facie examination of the record does disclose the commission of offence and the involvement of the petitioners in the commission of the same. In so far as the absence of some of the accused at the time of commission of offence or scene of occurrence is concerned, they admittedly are not the bail petitioners and therefore, no finding on this aspect is being recorded lest it prejudices the case of those accused or the investigating agency.

18. The learned counsel for the petitioners would then contend that the Hon'ble Supreme Court has time and again held that the personal liberty of an individual is a Constitutional guarantee and he cannot be deprived of the same. What has probably been overlooked by the learned counsel is the fact that lawful detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law.

19. The question of "liberty" has come up for consideration repeatedly before the Hon'ble Supreme Court and the position has been summed up by the Hon'ble Supreme Court in ***Ash Mohammad's*** case (supra), wherein it was held:-

> *"**17**. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his*

individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

***18**. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires. Not for nothing J. Oerter stated:*

> *"Personal liberty is the right to act without interference within the limits of the law."*

***19**. Thus analyzed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act.*

***20**. Having said about the sanctity of liberty and the restrictions imposed by law and the necessity of collective security, we may proceed to state as to what is the connotative concept of bail. In Halsbury's Laws of England 4th Edn., Vol. 11, para 166 it has been stated thus: -*

> *"166. Effect of bail.---The effect of granting bail is not to set the defendant [(accused) at liberty], but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned....."*

***21**. In Sunil Fulchand Shah v. Union of India and others (2000) 3 SCC 409 Dr. A.S. Anand, learned Chief Justice, in his concurring opinion, observed: (SCC pp. 429-30, para 24)*

> *"24.....Bail is well understood in criminal jurisprudence and Chapter 33 of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word 'bail' is surety."*

> ***22.*** *As grant of bail as a legal phenomenon arises when a crime is committed it is profitable to refer to certain authorities as to how this Court has understood the concept of crime in the context of society. In P.S.R. Sadhanantham v. Arunachalam, (1980) 3 SCC 141, R.S. Pathak, J. (as His Lordship then was), speaking for himself and A.D. Kaushal, J., referred to Mogul SS Co. Ltd. v. McGregor Gow & Co. (1989) 23 QBD 598, and the definition given by Blackstone and opined thus: (SCC p. 150, para 24)*
>
> > *"24.....A crime, therefore, is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual."*
>
> ***23****. In Mrs. Harpreet Kaur Harvinder Singh Bedi v. State of Maharashtra (1992) 2 SCC 177 a two-Judge Bench, though in a different context, has observed: (SCC p. 186, para 24)*
>
> > *"24. Crime is a revolt against the whole society and an attack on the civilization of the day. Order is the basic need of any organized civilized society and any attempt to disturb that order affects the society and the community."*
>
> ***24****. In T.K. Gopal alias Gopi v. State of Karnataka (2000) 6 SCC 168 it has been held that: (SCC p. 176, para 11)*
>
> > *"11....Crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as commission of an act specifically forbidden by law; it may be an offence against morality or social order."*

20. To be fair to the learned counsel for the petitioners, he has canvassed that this Bench in ***Dwarku Devi Vs. State of Himachal Pradesh*** *2014 (2) Shim. LC 882* had granted bail to the petitioners who too were accused of an offence punishable under Sections 302, 376, 202 read with Section 34 IPC and therefore, the petitioners ought to be released.

21. I have gone through the judgment and find that in that case the shield anchor of the prosecution case was the statement of Kumari Anjana Kashyap recorded under Section 161 Cr.P.C. A perusal whereof revealed that nothing contained therein, even remotely suggested, the complexity or involvement of the petitioners therein. While, this is not the fact situation obtaining in the present case, as the petitioners have been specifically named by the complainant in her statement under Section 154 Cr.P.C.

22. The petitioners are accused of serious and heinous offence and their liberty at this stage cannot be placed at a high pedestal, which would bring in anarchy or disorder in the society. Their release at this stage would be a serious threat to the peace and tranquility and above all would be a threat to the safety of the complainant and her family members. Moreover, their release at this stage may hamper the investigation and they may also coerce the witnesses.

In view of the aforesaid discussion, I find no merit in these petitions and the same are accordingly dismissed.

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

Rajan Chopra ...Petitioner.
Versus
Uttam Chand ...Respondent.

Cr. MMO No. 4018 of 2013
Judgment reserved on: 15.5.2015
Date of decision : May 18, 2015

Code of Criminal Procedure, 1973- Section 482- Matter was compromised before Lok Adalat- petitioner claimed that he had never authorized Advocate to appear before Lok Adalat or to make any statement on his behalf- held, that the proceedings before Lok Adalat cannot be challenged before the High court by filing a petition- statement of facts as to what transpired in the hearing is conclusive regarding the facts so recorded in the judgment and no one can contradict such statement by filing affidavit or by leading evidence- further, petitioner had not placed any material to show that he had taken action against either of the counsels- therefore, in these circumstances, petition dismissed. (Para-4 to 10)

For the Petitioner : Mr. B. S. Attri, Advocate.
For the Respondent : Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Article 227 of the Constitution of India read with Section 482 Cr.P.C. has been preferred by the petitioner with a prayer to quash and set-aside the order dated 16.3.2013 passed by the Lok Adalat, Kullu whereby his complaint under Section 138 of the Negotiable Instruments Act, (for short 'Act') was compounded.

2. The facts as pleaded are that the petitioner filed a complaint under Section 138 of the Act against the respondent for dishonouring cheque of Rs.50,000/- which was returned with the remarks "funds insufficient". After issuing the statutory notice, the proceedings under Section 138 of the Act were initiated and the respondent came to be convicted and sentenced to undergo simple imprisonment of one year and the petitioner was awarded compensation to the tune of Rs.80,000/-. In default of payment, the respondent was further directed to undergo imprisonment of two months.

3. The respondent preferred an appeal before the learned Sessions Judge, Kullu, and upon the notice, the petitioner engaged the services of Sh. Vivek Thakur, Advocate. The criminal appeal came to be listed before the Lok Adalat on 16.3.2013. The statement of the respondent was recorded and on behalf of the petitioner, the statement of one Sudhir Bhatnagar, Advocate was recorded. On the basis of the statement recorded, the appeal was disposed of as having been compromised and the offence was compounded.

4. Now, the grievance of the petitioner is that he had never engaged/ instructed Sh. Sudhir Bhatnagar, Advocate to appear on his behalf much less make a statement before the Lok Adalat regarding the compromise. The petitioner had never instructed him to receive a sum of Rs.25,000/- as had been reflected in the impugned statement dated 16.3.2013. The petitioner also placed on record the power of attorney executed by him in favour of Sh.Vivek Thakur, Advocate. It is also the grievance of the petitioner that the amount of Rs.25,000/- which was alleged to have been received by Sh. Sudhir Bhatnagar, Advocate

was never remitted to the petitioner and further that the awarded compensation of Rs.80,000/- was never deposited or paid to the petitioner. Lastly, it is contended that the statement as arrived at was not only against the settled position of law but also contrary to the provisions of the Act.

5. On the other hand, Mr. N.K. Bhardwaj, learned counsel for the respondent has vehemently argued that his client cannot be made to suffer for no fault on his part because the respondent had duly paid the settled amount of Rs.25,000/- to the counsel for the petitioner and that fact stands reflected in the order of the Lok Adalat dated 16.3.2013.

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

7. A perusal of the grounds of the petition would show that the petitioner is more aggrieved by the fact that he had not engaged Sh. Sudhir Bhatnagar as his Advocate and had engaged Sh. Vivek Thakur, Avocate and, therefore, Sh. Sudhir Bhatnagar had no authority to appear and then compromise the matter with the opposite party. Admittedly, it was on the representation of Sh. Sudhir Bhatnagar, Advocate that the matter was compromised and in case Sh. Sudhir Bhatnagar, had been authorized then no illegality, impropriety or infirmity can be found with the impugned order.

8. In case the petitioner felt that the happenings in the Court (Lok Adalat) had been wrongly recorded in the judgment, then it was incumbent upon him to report the matter to the members of the Lok Adalat and bring this fact to their notice.

9. The happenings in Court (Lok Adalat) cannot be challenged before this Court as it is settled law that statement of facts as to what transpired in the hearing recorded in the judgment of the Court (Lok Adalat), are conclusive of the facts so stated and none can contradict such statement by affidavit or the evidence. Though, the petitioner would contend that the order is not in conformity with the provisions of the Negotiable Instruments Act and the settled position of law, but then it has to be remembered that in cases of compromise, neither rigors of procedure nor the rigors of law would apply.

10. This Court cannot launch an inquiry as to what transpired before the Lok Adalat. Public Policy and judicial decorum do not permit it. The matters of judicial record in that sense are unquestionable. This Court is not a play field where judicial officers can be roped into settle individual claims. This is simply not done especially when the petitioner himself has failed to place on record any material which may even remotely suggest that he had taken action against either of the counsels.

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

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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. 8337 of 2014
a/w CWPs No. 8338, 8340,
8341, 8350 to 8353 of 2014
Decided on: 19.05.2015

1. CWP No. 8337 of 2014

Smt. Anu Mahindru ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

2. CWP No. 8338 of 2014
Sh. Ajay Lotheta ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
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3. CWP No. 8340 of 2014
Sh. Rajesh Chauhan ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
.....
4. CWP No. 8341 of 2014
Dr. Shyam Chand ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
.....
5. CWP No. 8350 of 2014
Sh. Balvir Singh ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
.....
6. CWP No. 8351 of 2014
Sh. Akshay Bhardwaj ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
.....
7. CWP No. 8352 of 2014
Sh. Praveen Kumar Sharma ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
.....
8. CWP No. 8353 of 2014
Sh. Sunil Kumar ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.

Constitution of India, 1950- Article 226- It was stated on behalf of petitioner that Writ Petition was disposed of in terms of reply- counsel for the respondent stated that he has no objection for adopting this course- hence, petition disposed of in terms of para-14 (I to IX) of the reply and respondent directed to do needful within 8 weeks. (Para-1 to 4)

For the petitioner(s): Mr. M.L. Sharma, Senior Advocate, with M/s. B.L. Soni & Aman Parth Sharma, Advocates.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1.
Mr. J.L. Bhardwaj, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. B.L. Soni, learned counsel for the writ petitioners stated at the Bar that respondents No. 2 and 3 have filed reply in CWP No. 8337 of 2014 and prayed that all these writ petitions may be disposed of in terms of the reply contained in para 14 (I to IX), with all just exceptions, with a direction to respondents No. 2 and 3 to do the needful within four weeks. His statement is taken on record.

2. Mr. J.L. Bhardwaj, learned counsel for respondents No. 2 and 3, stated at the Bar that he is not averse to the said proposition, however, sought three months' time to do the needful. His statement is also taken on record.

3. Keeping in view the submissions made, we deem it proper to dispose of these writ petitions in terms of para 14 (I to IX) (supra) of the reply filed by respondents No. 2 and 3, with all just exceptions, with a direction to do the needful within eight weeks and report compliance before the Registrar (Judicial).

4. The writ petitions are disposed of accordingly alongwith all pending applications. Copy dasti.

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

Vishan Dass & anr. .....Petitioners.

Versus

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

CWP No. 6604 of 2014.
Reserved on: 12.5.2015.
Decided on: 19.5.2015.

Constitution of India, 1950- Article 226- Respondent No. 6 started work of the widening the road by cutting and excavating the hill rock - it resulted in massive amount of boulders rolling down the hills causing damage to the plants and land of the petitioners- damage assessment report was prepared but compensation was not paid- held, that respondents should have redressed the grievances of the petitioners on their own level and should have paid the compensation- State has vicarious liability to pay compensation for acts of its employees- a person cannot be deprived of the use of his property except in accordance with law- respondent No. 6 directed to pay compensation of Rs. 15,00,000/- along with interest @ 9% p.a. from the date of filing of the petition. (Para-7 to 14)

Cases referred:

Collector L.A.C. Mandi vs. Karam Singh and others and connected matters, Latest HLJ 2000 (2) (HP) 694

Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee) Vs. State of Orissa and others (1993) 2 Supreme Court Cases 746

Chairman, Railway Board and others Vs. Chandrima Das (Mrs) and others (2000) 2 Supreme Court Cases 465

For the petitioners: Mr. P.P.Chauhan, Advocate.
For the respondents: Mr. Shrawan Dogra, AG with Mr. Romesh Verma, Mr. Anup Rattan, Addl. AGs and Mr. J.K Verma, Dy. AG, for respondents No. 1 to 5.
Mr. Ajay Mohan Goel, Advocate for respondents No. 6 & 7.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioners are owner-in-possession of land comprised in Kh. Nos. 619/548/386, measuring 00-44-88 hectares, Bagicha Kullahu Aval, Kh. No. 630/548/384 measuring 00-03-91 hectares, Bagicha Kullahu Aval, Kh. No. 500/386 measuring 00-15-60 hectares, Bagicha Kullahu Aval and Kh. No. 506/469 measuring 00-16-29 hectares, Banjar Kadim situated in Patwar Circle Kothi, Mauja Up-Mohal Ragura, Pargana Shua, Tehsil Kalpa, Distt. Kinnaur, H.P., as per jamabandi for the years 2003-04 and 2008-09 (Annexures P-1 and P-2).

2. The respondent No. 6 has undertaken the widening work of road called Pangi Intake road between 2006 to 2009. The Contractors employed by respondent No. 6 indiscriminately used explosives for cutting and excavation of the hill rock. It resulted in creation of massive amount of huge boulders rolling down the hills causing total damage to the plants and land of the petitioners. The petitioner No. 1 visited the office of respondent No. 6-Corporation on many occasions but his grievance was not redressed. The petitioners made representations vide Annexure P-4, P-4/A and P-5 on 19.5.2009, 27.12.2010 and 29.12.2010, respectively. The petitioners also approached the revenue authorities in order to get the damage assessed by visiting the spot.

3. The Kanungo submitted the report to the Tehsildar on 31.3.2011, stating therein that he has visited the site in the presence of the petitioners and it was found that the land owned by the petitioners stand littered with huge boulders during the construction of road for Kashang Hydro Electricity Project. The muck has also filled the fields of the petitioners. The Tehsildar submitted the report to the SDM concerned on 6.5.2011. The recommendations were also made by the SDM to the Deputy Commissioner vide letter dated 13.5.2011. The matter was taken up with respondent No. 6 vide Annexure P-9 by the Deputy Commissioner. However, the grievance of the petitioners was not redressed. The District Agriculture Officer has submitted the report of assessment for the loss caused to the crop of the petitioners to the tune of Rs. 6,50,000/- vide Annexure P-15 dated 13.9.2012. The damage to the landed property of the petitioners was also assessed, as per Annexure P-16. It was assessed at Rs.27,59,216/-. As a matter of fact, around 500 apple plants and 18 chilgoza trees were damaged, as per the averments made in the petition. The joint inspection was carried out by SDO, HPPWD in-charge with Asstt. Engineer (Dev.)-cum-Member Secretary, Technical Committee for Hydro Electric Projects alongwith Junior Engineer LADC, in the presence of Asstt. Engineer Integrated Kashang Hydro Electric Project and his staff. The demarcation was also undertaken by the Field Kanungo and Patwari of the Patwar Circle Kothi. They prepared the damage report as per HP PWD Schedule or rate 2009. The damage was duly verified by the Revenue Officer Field Kanungo on 1.9.2012. However, the fact of the matter is that the petitioners have not been paid any compensation. Hence this petition.

4. Respondent No. 6, in its reply, has admitted that it has undertaken the widening of the Pangi Intake road and the work has been got executed through the

contractors engaged for the purpose. The land of the petitioners was below the road in question. However, according to the averments contained in the reply only 217 kg. explosive material was used and the reports have been prepared by the revenue agency and District Agriculture Officer, belatedly.

5. It is apparent from the material placed on record that the Kanungo has visited the spot and came to the conclusion that the plants and landed property of the petitioners was damaged as per Annexure P-6. The Tehsildar has submitted the report to the SDM and the SDM has forwarded it to the Deputy Commissioner. The Deputy Commissioner, though has taken up the matter with the authorities of respondent No. 6 but to no avail. The damage to the petitioners' property was separately assessed vide Annexure P-15, by the District Agriculture Officer on 13.9.2012 and by the various functionaries of H.P. PWD, as per Annexure P-16.

6. According to the reply filed by respondent No. 5, the damage was only to the extent of Rs.4,70,976/-, as per Annexure A-II. In Annexure A-II, it has come that the number of plants of apple completely damaged are 176. The age of the trees was 8 years, the basic value has been assessed at Rs.774/- and the income for remaining bearing years at Rs.1902/-. This calculation is not as per the *Harbans Singh* case formula to determine loss and damage caused to the fruit bearing trees. The assessment at Rs.4,70,976/- only is on the very conservative side.

7. Mr. Shrawan Dogra, learned Advocate General for the State and Mr. Ajay Mohan Goel, Advocate for respondents No. 6 & 7, have vehemently argued that the present petition is not maintainable since the disputed questions of fact are involved and the petitioners should be relegated to file Civil Suit. We have gone through the petition and records. We are of the considered view that on the basis of the material placed on record, duly supported by the affidavit, the present petition is maintainable. The petitioners have placed sufficient material on record from the various functionaries of the State that a colossal loss has been caused to the plants and landed property of the petitioners violating Article 300-A of the Constitution of India.

8. The officials of the revenue agency have visited the spot. The District Agriculture officer has also assessed the damage. The Courts have discretion to grant compensation under Article 226 of the Constitution of India for any infringement of Constitutional rights of the citizens. In the instant case, the damage has been caused to the petitioners' landed property and plants. The petitioners are agriculturists. The respondents, at their own level, should have redressed their grievances instead of forcing them to file the present petition.

9. The Division Bench of this Court in ***Collector L.A.C. Mandi vs. Karam Singh and others*** and connected matters, ***Latest HLJ 2000 (2) (HP) 694,*** while relying upon standing order No.28 of Financial Commissioner, has held that when the fruit bearing trees are acquired, trees distinctly and separately can be assessed. The Division Bench has held as under:

> "12. The Director of the Horticulture of the State Government while % assessing the market value of the fruit bearing trees has been adopting the formula of Shri Harbans Singh. The Land Acquisition Collectors of the State have applied and adopted the same formula in awarding compensation of the fruit bearing trees separately. !n these factual position and circumstances, the State of Himachal Pradesh and the Land Acquisition Collector cannot be permitted to urge that they are not obliged to pay the amount of compensation on the basis of the Standing Order No. 28 and Shri Harbans

Singh formula for acquired lands and fruit bearing tees separately. The Land Acquisition Collector is the agent of the State Government who makes offer to the claimants of the amount of compensation awarded in the awards and if the offer so made is not acceptable to the claimants, the claimants are entitled to receive the amount of compensation under protest and make reference petitions under Section 18 of the Act for enhancement of the amount of compensation. Therefore, the State Govt. and the Land Acquisition Collector, who are appellants before us in these appeals cannot be permitted to raise the plea that the awards of the Collector and enhancement of the amount of compensation by the District Judges and Additional District Judges based upon the Government Standing Order, provisions contained in the Himachal Pradesh Land Records Manual and Shri Harbans Singh formula which allow compensation in respect of the land and fruit bearing trees separately. Nothing contrary has been brought to our notice and, therefore we do not think it proper to disturb the awards of the Courts below making enhancement of the amount of compensation for the land and the fruit bearing trees separately. These cases are squarely covered by the ratio of the judgment of the apex Court in State of J&K Vs. Mohammad Mateen Wani and others (Supra) and we do not find any merit in these appeals filed by the State and the Land Acquisition Collector challenging the awards on the grounds of assessment of compensation for lands and fruit trees separately.

According to para 28.9, the competent revenue officer has to assess the income from horticulture on the basis of age and kind of fruit-bearing plants according to formula evolved and approved by the Government of Himachal Pradesh, as per Appendix 'C' of Chapter 28. Appendix 'C' extract is taken from "the evaluation of fruit trees, basic principles and method by Shri Harbans Singh". This is commonly known as Harbans Singh formula. First part of Appendix deals with classification of fruit trees, value of the fuel of timber and final assessment of a tree. The value fuel of timber and final assessment of the tree, is to be made as under:

"Value of the Fuel of Timber:

Most of the fruit trees yield comparatively small quantity of fuel. Only a few fruit trees will have any timber value. However, every tree will turn out some fuel on being cut down. The extent to which a tree will provide fuel will mainly depend upon the glint of the main limbs and size of the tree. Once one knows the estimated quality of fuel wood on a tree at the time of its acquisition, it is easy to calculate its value by taking into consideration the local market rates of such a non dry wood. As regards timber value the work relates to the forest Department.

Final assessment of a Tree:

Most of the factors affecting the value of a tree have been elucidated. It would appear that the value of a tree at a particular time will be the sum total of the basic value, income from the remaining bearing years of the tree and fuel value. There is another a important factor which cannot escape attention. The owner of the tree will get payment for the future bearing capacity of the tree in one lot without incurring any expenditure on his tree, disposal of fruit etc. for the remaining bearing years. Normally he would have got income in yearly installments spread over a long period. There are obvious advantages and benefits in getting the income of all the future years in one lot. Such a compensation will be not justifiable. Keeping all these factors into

consideration it has been felt that the value of the remaining bearing age of a tree may be reduced to 25 per cent. This will do justice to the owner of the tree getting the compensation and the agency paying the price in one lot. The final formula will thus be as follows:

Basic value of the tree + No. of remaining bearing years. x income per year x ¼ + Fuel value

A. Basic value. An apple tree comes into bearing in the 6th year and as such it remains in sapling stage for 5 yeas. (Sl. No. 1 col. 5 of appendix).

(a) Non recurring expenditure: Rs.5.00 (col. 3 of appendix).

(b) Recurring expenditure for 5 years at the rate of Rs.5/- per year: Rs.59.80 (col. 4 of appendix).

Or say total basic value
5+(5x5)= Rs.30.00

B. Assessment of Remaining Bearing Age:

A ten year old apple tree has already completed five years of bearing life. Average bearing life of an apple tree is 45 years (col. 6 of appendix). Having borne fruit for five years, the tree is expected to bear for another 40 years.

A class I apple tree will give an yearly income of Rs. 100 per year (Col. 7 of appendix). Thus the tree will give a total gross income of Rs.4000.00 during the remaining years of its bearing life. Future expenditure and payment in one lot will reduce the amount by one fourth to Rs.1000.00. or in other words (40x10x1/4)=Rs.1000

Fuel Value:

If the spot inspection reveals that the tree has about 5 quintals of wood and the local rate is Rs.5.00 per quintal of wet wood, the fuel value will be Rs.25.00. Total value of a ten year old class I tree will thus be.

Rs.30.00 (Basic value) +Rs.1000
(Income from the remaining bearing years)
+Rs.25.00 (Fuel value)=Rs.1055.00."

Similarly, now, the court has to determine the compensation for fruit bearing and non-fruit bearing trees. It has come in the standing order No. 28 that the value of the house and trees standing in the land has also to be worked out. Initially, these are worked out by the Department concerned. The compensation for fruit-bearing/non-fruit-bearing trees is to be determined as per Harbans Singh Formula and Appendix-C of para 28.9 of the Himachal Pradesh Land Records Manual. The Harbans Singh Formula was prepared in the year 1966, but while allowing the compensation, the inflationary trends have not been taken into consideration. The Division Bench of this Court in 1988 (1) Shim.L.C. 479 has taken into consideration the inflationary trends on the basis of price index while calculating the damage caused to the fruit bearing trees.

10. Their Lordships of the Hon'ble Supreme Court in **Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee)** Vs. **State of Orissa and others** (1993) 2 Supreme Court Cases 746 have held that award of compensation in proceedings for enforcement of fundamental rights under Articles 32 and 226 is a remedy available in public law. Their Lordships have held as under

"8. The doctor deposed that all the injuries were caused by hard and blunt object; the injuries on the face and left temporal region were post-

mortem while the rest were ante-mortem. The doctor excluded the possibility of the injuries resulting from dragging of the body by a running train and stated that all the ante-mortem injuries could be caused by lathi blows. It was further stated by the doctor that while all the injuries could not be caused in a train accident, it was possible to cause all the injuries by lathi blows. Thus, the medical evidence comprising the testimony of the doctor, who conducted the post-mortem, excludes the possibility of all the injuries to Suman Behera being caused in a train accident while indicating that all of them could result from the merciless beating given to him. The learned Additional Solicitor General placed strong reliance on the written opinion of Dr. K. K. Mishra, Professor & Head of the Department of Forensic Medicine, Medical College, Cuttack, given on 15-2-1988 on a reference made to him wherein he stated on the basis of the documents that the injuries found on the dead body of Suman Behera could have been caused by rolling on the railway track in between the rail and by coming into forceful contact with projecting part of the moving train/engine. While adding that it did not appear to be a case of suicide, he indicated that there was more likelihood of accidental fall on the railway track followed by the running engine/ train. In our view, the opinion of Dr. K. K. Mishra, not examined as a witness, is not of much assistance and does not reduce the weight of the testimony of the doctor who conducted the post-mortem and deposed as a witness during the inquiry. The opinion of Dr. K. K. Mishra is cryptic, based on conjectures for which there is no basis, and says nothing about the injuries being both ante-mortem and post-mortem. We have no hesitation in reaching this conclusion and preferring the testimony of the doctor who conducted the post-mortem.

9. We may also refer to the Report dated 19-12-1988 containing the findings in a joint inquiry conducted by the Executive Magistrate and the Circle Inspector of Police. This Report is stated to have been made under S. 176, Cr. P.C. and was strongly relied on by the learned Additional Solicitor General as a statutory report relating to the cause of death. In the first place, an inquiry under S. 176, Cr. P.C. is contemplated independently by a Magistrate and not jointly with a police officer when the role of the police officer itself is a matter of inquiry. The joint finding recorded is that Suman Behera escaped from police custody at about 3 a.m. on 2-12-1987 and died in a train accident as a result of injuries sustained therein. There was handcuff on the hands of the deceased when his body was found on the railway track with rope around it. It is significant that the Report dated 11-3-1988 of the Regional Forensic Science Laboratory (Annexure 'R-8', at p. 108 of the paperbook) mentions that the two cut ends of the two pieces of rope which were sent for examination do not match with each other in respect of physical appearance. This finding about the rope negatives the respondents' suggestion that Suman Behera managed to escape from police custody by chewing off the rope with which he was tied. It is not necessary for us to refer to the other evidence including the oral evidence adduced during the inquiry, from which the learned District Judge reached the conclusion that it is a case of custodial death and Suman Behera died as a result of the injuries inflicted to him voluntarily while he was in police custody at the Police Outpost Jeraikela. We have reached the same conclusion on a reappraisal of the evidence adduced at the inquiry taking into account the circumstances, which also support that conclusion. This was done in view of the vehemence with which the learned Additional Solicitor General urged that it is not a case of custodial death but of

death of Suman Behera caused by injuries sustained by him in a train accident, after he had managed to escape from police custody by chewing off the rope with which he had been tied for being detained at the Police Outpost. On this conclusion, the question now is of the liability of the respondents for compensation to Suman Behera's mother, the petitioner, for Suman Behera's custodial death.

10. In view of the decisions of this Court in Rudul Sah v. State of Bihar (1983) 3 SCR 508 : (AIR 1983 SC 1086), Sebastian M. Homgray v Union of India (1984) 1 SCR 904 : (AIR 1984 SC 571) and (1984) 3 SCR 544 : (AIR 1984 SC 1026), Bhim Singh v. State of J. & K., 1984 (Supp) SCC 504 and (1985) 4 SCC 677 : (AIR 1986 SC 494), Saheli, A Women's Resources Centre v. Commr. of Police, Delhi Police Headquarters (1990) 1 SCC 422 : (AIR 1990 SC 513) and State of Maharashtra v. Ravikant S. Patil (1991) 2 SCC 373 : (1991 AIR SCW 871) the liability of the State of Orissa in the present case to pay the compensation cannot be doubted and was rightly not disputed by the learned Additional Solicitor General. it would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action on tort. It may be mentioned straightway that award of compensation in a proceeding under Art. 32 by this Court or by the High Court under Art. 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings. We shall now refer to the earlier decisions of this Court as well as some other decisions before further discussion of this principle.

16. Lord Hailsham while dissenting from the majority regarding the liability for compensation in that case, concurred with the majority opinion on this principle and stated at page 687, thus :-

> *"..... I am simply saying that, on the view I take, the expression 'redress' in sub-s. (1) of S. 6 and the expression 'enforcement' in sub-s. (2), 'although capable of embracing damages where damages are available as part of the legal consequences of contravention, do not confer and are not in the context capable of being construed so as to confer a right of damages where they have not hitherto been available, in this case against the state for the judicial errors of a judge ....."*
>
> *Thus, on this principle, the view was unanimous, that enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.*

17. It follows that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to the remedy private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable,

and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution. This is what was indicated in Rudul Sah (AIR 1983 SC 1086) and is the basis of the subsequent decisions in which compensation was awarded under Arts. 32 and 226 of the Constitution, for contravention of fundamental rights.

22. The above discussion indicates the principle on which the Court's power under Arts. 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in Rudul Sah (AIR 1983 SC 1086) and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein. do not really detract from that principle. This is how the decisions of this Court in Rudul Sah and others in that line have to be understood and Kasturilal (AIR 1965 SC 1039) distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son."

11. Their Lordships of the Hon'ble Supreme Court in **Chairman, Railway Board and others** Vs. **Chandrima Das (Mrs) and others** (2000) 2 Supreme Court Cases 465 have held that the State has vicarious liability to pay compensation for tortuous acts of its employees. Their Lordships have further held that the doctrine of sovereign power not applicable in welfare State where functions of the State now extend to various fields which cannot be strictly related to sovereign power. Their Lordships have held as under:

"9. Various aspects of the Public Law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from Rudul Sah v. State of Bihar, (1983) 3 SCR 508 : (1983) 4 SCC 141 : AIR 1983 SC 1086. [See also Bhim Singh v. State of Jammu and Kashmir, (1985) 4 SCC 577 : AIR 1986 SC 494; People's Union for Democratic Rights v. State of Bihar, (1987) 1 SCR 631 : (1987) 1 SCC 265 : AIR 1987 SC 355; People's Union for Democratic Rights Thru. Its Secy. v. Police Commissioner, Delhi Police Headquarters, (1989) 4 SCC 730 : 1989 (1) SCALE 598; Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi,

(1990) 1 SCC 422 : 1989 Supp (2) SCR 488 : AIR 1990 SC 513; Arvinder Singh Bagga v. State of U. P., (1994) 6 SCC 565 : AIR 1995 SC 117 : (1994 AIR SCW 4148); P. Rathinam v. Union of India, 1989 Supp (2) SCC 716; In Re: Death of Sawinder Singh Grower, (1995) Supp (4) SCC 450 : (1992) 6 JT (SC) 271 : 1992 (3) SCALE 34 (2); Inder Singh v. State of Punjab, (1995) 3 SCC 702 : AIR 1995 SC 1949 : (1995 AIR SCW 3037); D. K. Basu v. State of West Bengal, (1997) 1 SCC 416 : AIR 1997 SC 610 : (1997 AIR SCW 233)].

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the Civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.

12. In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. This Court in Bodhisattwa v. Ms. Subhra Chakraborty, (1996) 1 SCC 490 : (1996 AIR SCW 325 : AIR 1996 SC 922) has held "rape" as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed as under (Para 10 of AIR):

"Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21."

14. The main contention of the learned counsel for the appellants is that Mrs. Chandrima Das was only a practising advocate of the Calcutta High Court and was, in no way, connected or related to the victim, Smt. Hanuffa Khatoon and, therefore, she could not have filed a petition under Article 226 for damages or compensation being awarded to Smt. Hanuffa Khatoon on account of the rape committed on her. This contention is based on a misconception. Learned counsel for the appellants is under the impression that the petition filed before the Calcutta High Court was only a petition for damages or compensation for Smt. Hanuffa Khatoon. As a matter of fact, the reliefs which were claimed in the petition included the relief for compensation. But many other reliefs as, for example, relief for eradicating anti-social and criminal activities of various kinds at Howrah Railway Station were also claimed. The true nature of the petition, therefore, was that of a petition filed in public interest.

15. The existence of a legal right, no doubt, is the foundation for a petition under Article 226 and a bare interest, may be of a minimum nature, may give locus standi to a person to file a Writ Petition, but the concept of "Locus Standi" has undergone a sea change, as we shall presently notice. In Dr. Satyanarayana Sinha v. S. Lal and Co. Pvt. Ltd., AIR 1973 SC 2720 : (1973) 2 SCC 696, it was held that the foundation for exercising jurisdiction under Article 32 or Article 226 is ordinarily the personal or individual right of

the petitioner himself. In writs like Habeas Corpus and Quo Warranto, the rule has been relaxed and modified.

17. In the context of Public Interest Litigation, however, the Court in its various judgments has given widest amplitude and meaning to the concept of locus standi. In People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473 : (1982) 3 SCC 235, it was laid down that Public Interest Litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to Court. (See also Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802 : 1984 (2) SCR 87 : (1984) 3 SCC 161 and State of Himachal Pradesh v. Student's Parent Medical College, Shimla, AIR 1985 SC 910 : (1985) 3 SCC 169 on the right to approach the Court in the realm of Public Interest Litigation). In Bangalore Medical Trust v. B. S. Muddappa, AIR 1991 SC 1902 : 1991 (3) SCR 102 : (1991) 4 SCC 54 : (1991 AIR SCW 2082), the Court held that the restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of a broad and wide construction in the wake of Public Interest Litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere "busy-body".

18. Having regard to the nature of the petition filed by respondent Mrs. Chandrima Das and the relief claimed therein it cannot be doubted that this petition was filed in public interest which could legally be filed by the respondent and the argument that she; could not file that petition as there was nothing personal to her involved in that petition must be rejected."

12. The petitioners have also served legal notice upon the respondents and the reply thereof is Annexure P-28. The averments contained in the reply to the legal notice are contrary to the material placed on record by the petitioners. The respondent No. 6-Corporation, is vicariously liable for the acts of the contractor, who has undertaken the widening of the road and resultantly causing loss to the petitioners' property.

13. The petitioners have constitutional/human right to enjoy and protect their properties. A person cannot be deprived of his property save and except in accordance with law. The property of the petitioners has been damaged by the contractor(s) employed on behalf of respondent No. 6. The value of the trees was required to be calculated on the basis of the Harbans Singh, after taking into consideration inflationary trends. Thus, the value of 176 trees of apple and 18 chilgoza trees, which are completely damaged and remaining trees which are partially damaged due to debris, would not be less than rupees twelve lacs. Since there are huge boulders lying on the land of the petitioners, the same are required to be removed and it would at least incur expenditure not less than rupees three lacs. The Court while assessing the damage to completely damaged trees and remaining trees which are partially damaged due to debris, has also relied upon Annexures P-15 and P-16.

14. Accordingly, the Writ Petition is allowed. Respondent No. 6 is directed to pay compensation to the petitioners to the tune of Rs. 15,00,000/- (Fifteen lacs), with interest @ 9% per annum, from the date of filing of the petition, within a period of six weeks from today. Pending application(s), if any, shall stand disposed of.

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

HPSIDC Employees Union .....Petitioners.

Versus

State of H.P. & anr. .....Respondents.

CWP No. 134 of 2009.
Reserved on: 13.5.2015.
Decided on: 20.5.2015.

Constitution of India, 1950- Article 226- Government of India had introduced Voluntary Retirement Scheme for the employees of the public enterprises- scheme was adopted by State Government as well as by HPSIDC- however, subsequently scheme was modified and instead of 1½ months' emoluments for each completed year, one month's emoluments were proposed to be given- the representation was made to the State Government which was rejected without a speaking order- held, that fixation of the date was arbitrary and had no nexus sought to be achieved by retirement scheme- all the employees who were in the service of State Government and Corporation were given the benefit - modified order is quashed and set aside- Corporation directed to grant ex-gratia payment equivalent to 1½ months emoluments as per original scheme. (Para-5 to 9)

Case referred:
D.S. Nakara & Others vs Union Of India, AIR 1983 SC 130

For the petitioners: Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj Sharma, Dy. AG for respondent No. 1.
Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashistha, Advocate, for respondent N o. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner is a registered Union of the employees of the Himachal Pradesh State Industrial Development Corporation Ltd. (hereinafter referred to as the respondent-Corporation, in short). The Union of India has introduced Voluntary Retirement Scheme (VRS) for employees of the public enterprises as per memorandum dated 5.10.1988. The State Government also approved the scheme for implementation of all public sector undertakings in Himachal Pradesh. The proposal was placed before the Board of Directors of the respondent-Corporation. The same was adopted by the respondent-Corporation vide communication dated 3.2.1993 (Annexure P-2). Para (d) of the same reads as under:

> "(d) In addition, an employee whose request for Voluntary Retirement is accepted would also be entitled to an ex-gratia payment equivalent to 1.5 months' emoluments (pay + DA) for each completed year of service of the monthly emoluments at the time of retirement multiplied by the balance months of service left before normal date of retirement, whichever is less. For example an employee, who has put in 24 years of service and has got only one year of service for normal retirement will get ex-gratia payment of only 12 months emoluments and not 36 months' emoluments."

2. The Scheme was also introduced by the Corporation in the year 2000. Thereafter, vide Circular dated 6.1.2005, Scheme was again introduced. This Scheme was further re-introduced vide Annexure P-7 dated 17.3.2007. The fact of the matter is that the respondent-Corporation vide Annexure P-9 has amended the Voluntary Retirement Scheme (VRS) by substituting following clause (d):

> "(d) In addition, an employee whose request for Voluntary Retirement is accepted would also be entitled to an ex-gratia payment equivalent to one month's emoluments (Basic pay + DA) for each completed year of service or the monthly emolument at the time of retirement multiplied by the balance months of service left before normal date of retirement, whichever is less. For example an employee, who has put in 24 years of service and has got only one year of service for normal retirement will get ex-gratia payment of only 12 months emoluments and not 24 months' emoluments."

3. This has been done as per the orders of the Principal Secretary (Fin.) to the Government of H.P., dated 2.9.2008. The petitioner-Union made a representation on 11.11.2008 before the Board of Directors of the respondent-Corporation. It was referred to the State Government on 7.1.2009. The same has been rejected vide Annexure R-2/II on 22.1.2009 by retaining amended clause (d).

4. The Voluntary Retirement Scheme (VRS) was framed by the Government of India vide Office memorandum dated 5.10.1988 for the employees of the public enterprises. The same has been approved by the State Government, as noticed hereinabove, and adopted by the respondent-Corporation, w.e.f. 11.1.1993. It was re-introduced in the year 2000, 2005 and 2007.

5. It is evident from clause (d) of the Scheme, as it existed before 2008, that the ex-gratia payment was equivalent to 1 ½ months' emoluments (pay + DA) for each completed year of service or the monthly emolument at the time of retirement multiplied by the balance months of service left before normal date of retirement, whichever is less. The respondent-Corporation has accorded benefit of granting the ex-gratia payment equivalent to 1 ½ months' emoluments (pay + DA) for each completed year of service or the monthly emolument at the time of retirement multiplied by the balance months of service left before normal date of retirement to those employees who have sought voluntary retirement under Voluntarily Retirement Scheme. However, vide letter dated 2.9.2008 Annexure P-9, the ex-gratia payment has been reduced equivalent to one month's emoluments (pay + DA) for each completed year of service. This has been introduced as per the Circular dated 2.1.2009. All the employees who were in the service of respondent-Corporation have been given the benefit of ex-gratia payment equivalent to 1 ½ months' emoluments but the employees thereafter would only be paid ex-gratia payment equivalent to one month's emoluments (pay + DA), in case they seek voluntary retirement.

6. The purpose of Voluntary Retirement Scheme (VRS) is to offer golden hand shake and should have been applied uniformly to all the employees instead of creating artificial cutoff date i.e. 27.1.2009, whereby the benefits have been drastically reduced from 1 ½ months to 1 month for ex-gratia payment at the time of retirement. The cut-off date i.e. 2.9.2008 and 27.1.2009, has no nexus with the object sought to be achieved. All the employees of the respondent-Corporation constitute a homogeneous class. The employees who have sought voluntary retirement before the cut-off date, as per letter dated 2.9.2008 and 27.1.2009 were released ex-gratia payment equivalent to 1 ½ months' emoluments and employees who would seek voluntary retirement after these dates, would only get the benefit of ex-gratia payment equivalent to 1 month's emoluments (pay + DA).

7. The petitioners have made a detailed representation for not altering the ex-gratia payment from 1 ½ months to one month. The Board of Directors of the respondent-Corporation have referred the matter to the State Government on 26.12.2008. However, surprisingly, the same has been rejected on 27.1.2009 without a speaking order. The petitioners have suffered civil and evil consequences on the basis of alteration of para (d), whereby the ex-gratia payment has been reduced. The representation ought to have been decided by passing a speaking/detailed order, after taking into consideration all the pleas raised by the employees.

8. Their lordships of the Hon'ble Supreme Court in the case of ***D.S. Nakara & Others vs Union Of India,*** reported in ***AIR 1983 SC 130,*** have held that the date must have nexus with the object sought to be achieved and the State Government could not pick up the date arbitrarily. It has been held as follows:

> 51 We repeatedly posed a question: what are those relevant and valid considerations and waited for the answer in vain. We say so because in the written submissions filed on behalf of the Union of India, we find not a single valid or relevant consideration much less any consideration relevant to selection of eligibility criteria. The tenor is "we select the date and it is unquestionable; either take it or leave it as a whole". The only submission was that the date is not severable and some submissions in support of it.
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> 52. Having examined the matter on principle, let us turn to some precedents. In D. R. Nim v. Union of India, (1967) 2 SCR 325 : (AIR 1967 SC 1301) the appellant questioned his seniority which was to be determined in accordance with the provisions contained in Indian Police Service (Regulation of Seniority) Rules, 1954. These rules required first to ascertain the year of allotment of the person concerned for the determination of his seniority. In doing so the Government of India directed that. officers promoted to the Indian Police Service should be allowed the benefit of their continuous officiation with effect only from 19th May, 1951. The appellant challenged the order because the period of officiation from June, 1947 to May, 1951 was excluded for the purpose of fixation of his seniority. His grievance was that there was no rationale behind selecting this date. After taking into consideration affidavit in opposition, this Court held as under:
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> "It would be noticed that the date, May 19, 1951, to begin with had nothing to do with the finalisation of the Gradation List of the Indian Police Service because it was a date which had reference to the finalisation of the gradation list for the IAS Further this date does not seem to have much relevance to the question of avoiding the anomalous position mentioned in para 9 of the affidavit, reproduced above. This date was apparently chosen for the IAS because on this date the Gradation List for all the earlier persons required to the service had been finalised and issued in a somewhat stable stage. But why should this date be applied to the Indian Police Service has not been adequately explained. Mr, B. R. L. Iyengar. the learned counsel for the appellant, strongly urges that selection of May 19, 1951, as a crucial date for classifying people is arbitrary and irrational. We agree with him in this respect. It further appears from the affidavit of Mr. D. K. Guha, Deputy Secretary to the Government of India, Ministry of Home Affairs, dated Dec. 9, 1966, that "the Government of India have recently decided in consultation with the Ministry of Law that the Ministry of Home Affairs Letter No. 2/32/51-AIS, dated the 25th Aug., 1955, will not be applicable to those SCS/SPS Officers, who were appointed to IAS/IPS prior to the promulgation

of IAS/JPS (Regulation of Seniority) Rules, 1954, and the date of the issue of the above letter if their earlier continuous officiation was approved by the Ministry of Home Affairs and Union Public Service Commission". It further appears that 'in the case of Shri C. S. Prasad also, an IPS Officer of Bihar, a decision has been taken to give the benefit of full continuous officiation in senior posts and to revise his year of allotment accordingly'. But, it is stated that "as Shri Nim was appointed to IPS on the 22nd Oct., 1955, i.e. after the promulgation of IPS (Regulation of Seniority) Rules, 1954 and after the issue of letter dated 25-8-1955, his case does not fall even under this category". The above statement of the case of the Government further shows that the date, May 19, 1951 was an artificial and arbitrary date having nothing to do with the application of the first and the second provisos to Rule 3 (3). It appears to us that under the second proviso to Rule 3 (3) the period of officiation of a particular officer has to be considered and approved or disapproved by the Central Government in consulation with the Commission considering all the relevant facts. The Central Government pick out a date from a hat --- and that is what it seems to have done in this case -- and say that a period prior to that date would not be deemed to be approved by the Central Government within the second proviso."

57. The learned Attorney General next referred to D.C. Gouse and Co. etc. v. State of Kerala & Anr. etc. (1) This Court while repelling the contention that the choice of April 1, 1973 as the date of imposition of the building tax is discriminatory with reference to Art. 14 of the Constitution, approved the ratio in the case of M/s. Parameswaran Match Works etc. supra. Even while reaching this conclusion the Court observed that it is not shown how it could be said that the date (April 1, 1973) for the levy of the tax was wide of the reasonable mark. What appealed to the Court was that earlier an attempt was made to impose the building tax with effect from March 2, 1961 under the Kerala Building Tax Act, 1961 but the Act was finally struck down as unconstitutional by this Court as per its decision dated August 13, 1968. While delivering the budget speech, at the time of introduction of the 1970-71 budget, the intention to introduce a fresh Bill for the levy of tax was made clear. The Bill was published in June 73 in which it was made clear that the Act would be brought into force from April 1, 1970. After recalling the various stages through which the Bill passed before being enacted as Act, this Court held that the choice of date April 1, 1973 was not wide of the reasonable mark. The decision proceeds on the facts of the case. But the principle that when a certain date or eligibility criteria is selected with reference to legislative or executive measure which has the pernicious tendency of dividing an otherwise homogeneous class and the choice of beneficiaries of the legislative/executive action becomes selective, the division or classification made by choice of date or eligibility criteria must have some relation to the objects sought to be achieved. And apart from the first test that the division must be referable to some rational principle, if the choice of the date or classification is wholly unrelated to the objects sought to be achieved, it cannot be upheld on the specious plea that was the choice of the Legislature."

9. Accordingly, the Writ petition is allowed. Newly substituted clause (d) of Annexure P-9 is struck down. Annexure R-2/II dated 27.1.2009 is quashed and set aside. It is declared that the employees of the respondent-Corporation shall get ex-gratia payment

equivalent to 1 ½ months' emoluments (pay + DA) for each completed year of service, as per memorandum(s) P-2 dated 3.2.1993, P5 dated 6.1.2005 and P-7 dated 17.3.2007 at the time of their retirement under Voluntary Retirement Scheme. Pending application(s), if any, shall stand disposed of.

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

Kuldeep Thakur son of Shri Ludar Chand .....Appellant.

Vs.

State of Himachal Pradesh. ....Respondent.

Cr.Appeal No. 01 of 2013
Judgment reserved on: 23rd April, 2015
Date of Judgment: May 20, 2015

Indian Penal Code, 1860- Section 376- Prosecutrix, aged 14½ years old, was taken by accused 'K' to go to Rivalsar – she was taken to the house of co-accused 'H' where she was raped – prosecutrix supported the prosecution version – her testimony is trustworthy, reliable and confidence inspiring - same is corroborated by medical evidence- held, that testimony of prosecutrix is enough to convict the person if the same is free from blemish. (Para-11)

Indian Penal Code, 1860- Section 363- Prosecutrix, aged 14½ years old, did not return from the school- she was persuaded by accused 'K' to go to Rivalsar- she was taken to the house of co-accused 'H'- father of the prosecutrix specifically stated that prosecutrix had gone to school and had not returned - there was no evidence that consent of the father was taken - since prosecutrix was minor, therefore, her consent was immaterial- held, that in these circumstances, accused was rightly held liable for the commission of offence punishable under Section 363 of I.P.C. (Para-12)

Indian Evidence Act, 1872- Section 35- Birth certificate is issued under Registration of Birth and Death Act- similarly, family register is prepared by the Public Officer in discharge of his official duty- therefore, both these documents are admissible under Section 35 of Indian Evidence Act. (Para-13)

Cases referred:

Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 SC 922
Mohd. Alam vs. State (NCT of Delhi), 2007 Cri..L.J. 803 (Delhi)
State of Punjab vs. Gurmit Singh and others, (1996)2 SCC 384
State of Rajasthan vs. N.K. the accused, (2000)5 SCC 30
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Madan Gopal Kakkad Vs. Naval Dubey and another, (1992) 3 SCC 204
State of Maharashtra vs. Chander Prakash, (1990)1 SCC 550
State of U.P. vs. Chotte Lal, (2011)2 SCC 550
Harpal Singh vs. State of H.P. (Full Bench), AIR 1981 SC 361
Vidyadhar vs. Mohan, ILR 1978 HP 174
Murugan @ Settu vs. State of Tamil Nadu, AIR 2011 SC 1691
Chitru Devi vs. Ram Dai, AIR 2002 HP 59

For the Appellant: Mr. Chaman Negi, Advocate
For the Respondent: Mr. J.S. Rana Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge

Present appeal is filed against the judgment and sentence passed by learned Sessions Judge Mandi in Sessions Trial No 38 of 2011 titled State vs. Kuldeep Thakur and another decided on dated 28.6.2012 and quantum of sentence announced on dated 29.6.2012.

Brief facts of the case as alleged by the prosecution:-

2. It is alleged by the prosecution that on dated 2.2.2011 prosecutrix left her home in order to attend Government Senior Secondary School Chowk where she was studying. It is alleged by prosecution that age of prosecutrix was 14½ years. It is alleged by prosecution that prosecutrix did not come back and her father inquired about prosecutrix from her relatives. It is also alleged by prosecution that one Ishwar Dass noticed the prosecutrix in Baba bus which was enrouted to Kullu and on dated 4.2.2011 prosecutrix was found at Bhunter along with co-accused Kuldeep and thereafter prosecutrix and co-accused Kuldeep were brought to police station Sarkaghat and FIR Ext.PW3/A was registered. It is alleged by prosecution that on dated 2.2.2011 co-accused Kuldeep met the prosecutrix and pursuaded the minor prosecutrix to go to Rewalsar and also pursuaded the minor prosecutrix to throw away her school bag. It is alleged by prosecution that thereafter prosecutrix accompanied co-accused Kuldeep to Rewalsar in private bus namely Baba bus service and thereafter accused took the prosecutrix to Kullu. It is alleged by prosecution that co-accused Kuldeep expressed his desire to marry the prosecutrix and took the minor prosecutrix to village Kharahal in the house of co-accused Hari Singh. It is alleged by prosecution that co-accused Kuldeep committed forcible sexual intercourse with minor prosecutrix in the house of co-accused Hari Singh in the night of dated 3.2.2011. It is alleged by prosecution that Investigating Officer moved application Ext.PW9/A and requested the medical officer CHC Sarkaghat to conduct medical examination of prosecutrix. It is alleged by prosecution that no lady doctor was available in hospital CHC Sarkaghat and thereafter minor prosecutrix was forwarded to Zonal Hospital Mandi where PW9 Dr. Renu conducted the medical examination of minor prosecutrix and medical officer opined that age of prosecutrix was between 14 to 16½ years. It is alleged by prosecution that accused was also medically examined and MLC of accused Ext.PA was obtained. It is alleged by prosecution that birth certificate of prosecutrix from family register was also obtained. It is alleged by prosecution that date of birth of minor prosecutrix is dated 11.12.1996 and birth certificate of prosecutrix is Ext.PW1/C. It is alleged by prosecution that father of prosecutrix produced the photocopy of middle standard certificate of minor prosecutrix which was took into possession vide seizure memo Ext.PW2/A. It is alleged by prosecution that attendance certificate of minor prosecutrix from school was obtained and copies of school admission and withdrawal certificate were also obtained. It is alleged by prosecution that spot map Ext.PW11/C was prepared and room of co-accused Hari Singh where co-accused Kuldeep committed forcible sexual intercourse upon minor prosecutrix was located and prosecutrix identified blanket Ext.P2 which was took into possession vide seizure memo Ext.PW11/D. It is alleged by prosecution that case property was deposited in malkhana and entry was recorded in malkhana register at Sr. No. 1225/11 and abstract of malkhana register is Ext.PW5/A. It is alleged by prosecution that case property was sent to FSL Junga through PW3 Nanak Chand vide RC No. 49 of 2011 and further alleged that DNA profiling was conducted and report was obtained.

3. Learned trial Court on dated 7.9.2011 framed the charge against co-accused Kuldeep under Sections 363, 366-A and 376 IPC and learned trial Court framed the charge

against co-accused Hari Singh under Section 368 IPC. Both accused persons did not plead guilty and claimed trial.

4. Prosecution examined as many as twelve witnesses in support of its case and accused persons examined one witness as defence witness:-

Sr.No.	Name of Witness
PW1	Jia Lal
PW2	Sita Devi
PW3	Ramjit Singh
PW4	HC Nanak Chand
PW5	HC Dharam Singh
PW6	Pinki Devi
PW7	Dev Raj
PW8	Pyar Chand
PW9	Dr. Renu Behl
PW10	Prosecutrix
PW11	ASI Vikram Singh
DW12	Ayesha Patial
DW1	Ludar

4.1 Prosecution and accused also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description.
Ext.PW1/A	Application.
Ext.PW1/B	Copy of family register
Ext.PW1/C	Birth certificate of prosecutrix
Ext.PW2/A	Memo
Ext.PA	MLC of co-accused Kuldeep Singh
Ext.PW3/A	FIR
Ext.PW4/A	Receipt
Ext.PW4/B	Copy of RC.
Ext.PW5/A	Extract of malkhana register
Ext.PW6/A	Application
Ext.PW6/B	Copy of attendance register
Ext.PW7/A	Certificate
Ext.PW9/A	Application
Ext.PW9/B	Endorsement
Ext.PW9/C	MLC of prosecutrix
Ext.PW9/D	Noting
Ext.PW11/A	Application
Ext.PW11/B	Certificate
Ext.PW11/C	Spot map
Ext.PW11/D	Memo
Ext.PW11/E	Copy of forwarding note
Ext.PW11/F	Identification form of prosecutrix
Ext.PW11/G	Copy of forwarding note

Ext.PW11/H	Identification form of co-accused Kuldeep Singh
Ext.P1	Blanket
Ext.PW11/J	Seal impression
Ext.PW12/A	Report
Ext.PW12/B	FTA card of co-accused Kuldeep Singh
Ext.PW12/C	FTA card of minor prosecutrix
Ext.DA	Copy of family register.

5. Learned trial Court convicted appellant Kuldeep Singh under Sections 363 and 376 IPC and acquitted him under Section 366-A IPC. Learned trial Court acquitted co-accused Hari Singh qua criminal offence punishable under Section 368 IPC. Learned trial Court awarded rigorous imprisonment for a period of three years and fine to the tune of Rs.10,000/- (Rupees ten thousand only) for the offence punishable under Section 363 IPC and further directed that in default of payment of fine convicted shall further undergo simple imprisonment for six months. Learned trial Court also awarded rigorous imprisonment for a period of seven years and fine to the tune of Rs.10,000/- (Rupees ten thousand only) for offence punishable under Section 376 IPC and further directed that in default of payment of fine convicted shall further undergo simple imprisonment for a period of six months.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant filed present appeal. Court heard learned Advocate appearing on behalf of the appellant and learned Assistant Advocate General appearing on behalf of the respondent-State and also perused the entire record carefully.

7. Question that arises for determination in present appeal 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 as mentioned in memorandum of grounds of appeal.

8. ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 Jia Lal has stated that he is posted as Panchayat Secretary in G.P. Dhanalag from November 2009 and on dated 19.3.2011 police of P.S. Sarkaghat moved application Ext.PW1/A before Pardhan G.P. Dhanalag. He has stated that family register of father of prosecutrix and birth register of prosecutrix obtained by police. He has stated that copy of family register is Ext.PW1/B and copy of birth certificate is Ext.PW1/C. He has stated that as per record date of birth of prosecutrix is 11.12.1996. He has stated that entry in the family register is not in his hands. He has stated that as per record information was given by one Meera Kumari. He has denied suggestion that both certificates were issued by him on the basis of wrong information.

8.2 PW2 Smt. Sita Devi has stated that she is Pardhan of G.P. Dhanalag and on dated 3.2.2011 at about 4 AM Pyar Chand resident of Majyath telephonically informed that some pony wallas had enticed away his daughter. She has stated that thereafter she advised Pyar Chand to inform the police and thereafter information was given to police officials. She has stated that she along with Pyar Chand and his relatives visited police post Bhunter and disclosed the entire matter to police. She has stated that thereafter she and relatives of prosecutrix along with one police official went to the house of accused Kuldeep. The witness identified the accused in Court. She has stated that on dated 4.2.2011 Pyar Chand handed over the middle standard examination of prosecutrix which was took into possession by

police vide seizure memo Ext.PW2/A. She has stated that memo was signed by her and was also signed by one another marginal witness Ludar Chand. She has stated that she did not visit the house of Kuldeep at Bhunter.

8.3 PW3 Inspector Ranjit Singh has stated that he remained posted as SHO in P.S. Sarkaghat from November 2010 to July 2011 and on dated 4.2.2011 complainant Pyar Chand got recorded FIR Ext.PW3/A. He has stated that contents of FIR Ext.PW3/A were read over and explained to complainant Pyar Chand who accepted the same as correct and thereafter signed on FIR. He has stated that thereafter investigation of case was entrusted to ASI Vikram Singh for further investigation and after completion of investigation file was produced before him and as he found prima-facie case under Sections 363, 366-A and 376 IPC against accused persons he prepared challan and submitted the same in Court of JMIC Sarkaghat. He has stated that when the complainant came to police station for lodging FIR Ext.PW3/A his daughter and Kuldeep were with him. He has denied suggestion that accused Kuldeep was not accompanied with complainant when he came to police station to file FIR. He has denied suggestion that FIR was recorded on concocted facts. He has denied suggestion that no case under Section 368 IPC was made out against co-accused Hari Singh.

8.4 PW4 HC Nanak Chand has stated that he is posted as HHC in P.S. Sarkaghat for the last one and half years and on dated 1.4.2011 MHC Dharam Singh handed over to him one parcel stated to be containing blanket with direction to take the same to FSL Junga vide RC No. 49/2011 and further stated that on the same day he deposited the case property with FSL Junga vide receipt Ext.PW4/A. He has further stated that RC is Ext.PW4/B and case property remained intact in his custody. He has stated that his departure as well as arrival reports were recorded in daily diary of P.S. Sarkaghat. He has denied suggestion that no case property was given to him and also denied suggestion that he did not take the case property to FSL Junga.

8.5 PW5 HC Dharam Singh has stated that he is posted as MHC in P.S. Sarkaghat since 2010 and on dated 7.2.2011 ASI Vikram Singh deposited with him a parcel sealed with seven seals of T along with sample seal and he entered the parcel in Malkhana register at Sr. No. 1225/11. He has further stated that on dated 1.4.2011 he handed over the said parcel to Nanak Chand vide RC No. 49/2011. He has stated that abstract of malkhana register is Ext.PW5/A.

8.6 PW6 Pinki Devi TGT has stated that she has been posted as TGT in Government Senior Secondary school Chowk since 2006 and on dated 19.3.2011 police of P.S. Sarkaghat moved an application Ext.PW6/A and demanded copy of attendance register of 9th class for the moth of February 2011 and copy of age proof. She has stated that she was class teacher of 9th class and as such she submitted the copy of attendance register after attested from Principal. She has stated that copy of attendance register is Ext.PW6/B and name of prosecutrix is entered as Sr. No. 22 of attendance register. She has stated that as per record prosecutrix remained absent from school w.e.f. 2.2.2011 to 8.2.2011. She has stated that she has brought the original attendance register in Court. She has denied suggestion that she has wrongly marked the absence of prosecutrix in the attendance register at the instance of police. She has denied suggestion that prosecutrix did not remain absent from school w.e.f. 2.2.2011 to 8.2.2011.

8.7 PW7 Dev Raj has stated that he has brought the original admission register of Government Senior Secondary School Chowk Tehsil Sarkaghat District Mandi. He has stated that on dated 19.3.2011 police of P.S. Sarkaghat moved an application Ext.PW6/A to the Principal, Government Senior Secondary school Chowk requesting him to supply the

copy of attendance register as well as copy of age proof on the basis of admission register. He has stated that thereafter he prepared certificate Ext.PW7/A on the basis of official record. He has stated that as per record prosecutrix got admitted in Government Senior Secondary School Chowk on dated 19.4.2010 and date of birth of prosecutrix is recorded as 11.12.1996. He has denied suggestion that wrong birth certificate was issued.

8.8 PW8 Pyar Chand has stated that prosecutrix is his daughter. He has stated that on dated 2.2.2011 prosecutrix had gone to attend the school at Government Senior Secondary School Chowk. He has stated that prosecutrix was student of class 10th and her age was about 14½ years. He has stated that prosecutrix did not come back to her home and he inquired from her class mates who disclosed that prosecutrix did not attend the school. He has stated that thereafter he inquired by way of telephone from his relatives about whereabouts of prosecutrix. He has stated that on same day one Ishwar Dass who was his relative and who was working as Lecturer in Pattrighat school disclosed him that he noticed that prosecutrix was sitting in Baba bus. He has stated that thereafter he reported the matter to police officials. He has stated that his relative Ishwar Dass also disclosed that Baba bus was approaching to Kullu and thereafter he hired a private vehicle and then went to Bhunter, Kullu. He has stated that on dated 4.2.2011 prosecutrix was found at Bhunter. He has stated that prosecutrix was travelling in three-wheeler along with co-accused Kuldeep. He has stated that thereafter he brought prosecutrix as well as accused Kuldeep and handed over both of them to police at P.S. Sarkaghat. He has stated that he also lodged criminal report against accused Ext.PW3/A which bears his signatures at point 'A'. He has stated that during investigation police took into possession school certificate of prosecutrix vide seizure memo Ext.PW2/A. He has stated that he also inquired whole incident from prosecutrix and prosecutrix disclosed him that she was took by accused Kuldeep to Kharahal. He has stated that prosecutrix disclosed him that she was brought to Kharahal District Kullu at the residence of maternal uncle of accused Kuldeep. He has stated that prosecutrix also disclosed him that accused Kuldeep had committed *galat kaam* with her twice. He has stated that prosecutrix was also medically examined. He has stated that he started search of prosecutrix at 4/4.30 PM when other students came back. He has stated that he inquired about his daughter from his brother-in-law and sister-in-law. He has stated that on dated 2.2.2011 his daughter left the home along with school bag for school. He has stated that on the same day the school bag was found at a distance of 1-1½ K.m. from his house. He has stated that bag was found during search operation. He has denied suggestion that no bag was found. He has stated that he hired the private taxi and went to Bhunter Kullu along with five persons. He has stated that prosecutrix and accused were found at Bhunter bus stand. He has stated that accused and prosecutrix told him that they came to bus stand Bhunter in three-wheeler. He has denied suggestion that prosecutrix was failed in her annual examination once or twice. He has stated that accused started living in rice sheller of his brother for about 1-1½ months prior to the incident. He has denied suggestion that accused was not living in rice sheller of his brother. He has denied suggestion that prosecutrix did not meet them at Bhunter and also denied suggestion that he did not go to Bhunter. He has denied suggestion that false case filed against the accused just to extract money from him. He has denied suggestion that age of prosecutrix was 18-19 years. He has denied suggestion that accused had no concern with prosecutrix.

8.9 PW9 Dr. Renu has stated that in the month of February 2011 she was posted as Medical Officer in Zonal Hospital Mandi and on dated 5.2.2011 lady C. Anjana brought prosecutrix present in Court and she conducted medical examination of prosecutrix. She has stated that prosecutrix aged 14 years was brought with alleged history of sexual assault by one Kuldeep who took the prosecutrix to Kullu where he assaulted her sexually. She has stated that on examination she found no injury on person of prosecutrix

and on local examination a fresh mucosal injury to hymen at 9 and 6 O'clock position was found which bleeded on touch. She has further stated that an abrasion on left side of labia minora was found and vaginal swab were taken from posterior fornix of cervix and also two slides of vaginal smear were obtained and seen under microscope but no dead or alive spermatozoa was seen at the time of examination. She has also stated that on per vaginal examination one finger was introduced easily but it was difficult to introduce two fingers and uterus of prosecutrix was found ante-verted normal sized and fornices were clear. She has stated that samples were collected, sealed and handed over to police for chemical analysis. She has stated that as per her opinion prosecutrix was exposed to coitus and probable duration was less than 48 hours and she proved MLC Ext.PW9/C and has further stated that MLC bears her signatures. She has stated that as per report of Radiologist age of prosecutrix was found between 14 to 16½ years. She stated that it was bleeding on touch as such she opined it to be fresh and within 48 hours. She has denied suggestion that such injuries could be caused due to poor hygiene. She has denied suggestion that no reports of radiologist were produced before her and she also denied suggestion that she had not conducted the MLC of prosecutrix.

8.10 PW10 prosecutrix aged 15 years has stated that on dated 2.2.2011 at about 8 AM she was present in her house and at about 8 AM she moved for her school and when she reached at bus stop Nahalan then accused Kuldeep met her and he offered her to go to Rewalsar. She has stated that accused also requested her to throw away her school bag and thereafter she threw away her school bag. She has stated that thereafter accused Kuldeep took her to Rewalsar in a private bus namely Baba Bus Service and at Rewalsar she requested the accused to return back to her house but accused Kuldeep insisted her to go to somewhere. She has further stated that thereafter accused Kuldeep took her to Kullu in same bus and at Kullu accused disclosed her that he wanted to marry her. She has also stated that thereafter accused Kuldeep took her to village Kharahal in house of his maternal uncle. She has stated that co-accused Hari Singh present in Court kept the prosecutrix in his house and further stated that accused Kuldeep forcibly committed the sexual intercourse with her in the house of his maternal uncle. She has stated that accused Kuldeep kept her in his maternal uncle's house for two days. She has stated that on the second night also accused committed forcible sexual intercourse/rape with her. She has stated that after spending two days at Kharahal accused Kuldeep brought her back. She has stated that when she and co-accused Kuldeep reached at Bhunter her father along with Ghop Chand, Pardhan and other persons met them. She has stated that thereafter they were brought to P.S. Sarkaghat and thereafter her custody was handed over to her father. She has stated that her medical examination was conducted and thereafter police officials took her and co-accused Kuldeep to village Kharahal where co-accused Kuldeep identified the house of his uncle. She has stated that police also took into possession the blanket. She has stated that blanket was taken from bed from the house of maternal uncle of accused and further stated that accused committed forcible sexual intercourse with her. She has stated that accused Kuldeep took her to Kullu on the pretext of marrying her. She has stated that she was not interested to marry with co-accused Kuldeep and thereafter co-accused Kuldeep committed forcible sexual intercourse twice at Kharahal. She has stated that her date of birth is dated 11.12.1996. She has stated that accused was working in rice sheller of her uncle. She has stated that rice sheller is situated nearby to her residential house. She has stated that seven persons were found in the house where co-accused Kuldeep kept her for two days. She has stated that four of them were women and three of them were male. She has stated that on dated 3.2.2011 she remained inside the house at Kharahal and due to language problem she could not understand the language of other members of house. She has denied suggestion that co-accused Kuldeep did not work in the rice sheller of her uncle. She has denied suggestion that co-accused did not go to her village.

She has denied suggestion that co-accused Kuldeep did not take her to Kullu and also denied suggestion that co-accused did not keep her in his maternal uncle's house. She has denied suggestion that accused did not commit any forcible sexual intercourse with her. She has denied suggestion that accused did not allure her to marry. She has denied suggestion that her date of birth is 1992. She has denied suggestion that accused was falsely implicated in present case.

8.11 PW11 ASI Vikram Singh has stated that in the month of February 2011 he remained posted in P.S. Sarkaghat and after registration of FIR No. 23 of 2011 Ext.PW3/A investigation of case was entrusted to him. He has stated that he requested the medical officer to conduct the medical examination of prosecutrix. He has stated that no lady doctor was present in CHC Sarkaghat hence medical officer advised to take the prosecutrix to Zonal Hospital Mandi for medico legal examination of prosecutrix. He has stated that consequently PW9 Dr. Renu conducted the medical examination of prosecutrix and her MLC is Ext.PW9/C. He has stated that he also requested the medical officer CHC Sarkaghat to conduct the medical examination of accused. He has stated that during investigation father of prosecutrix produced the school certificate of prosecutrix which is Ext.PW2/A. He has stated that he also recorded statements of witnesses as per their version. He has stated that he prepared spot map Ext.PW11/C and prosecutrix also located the room of co-accused Hari Singh and blanket which was on the cot. He has stated that blanket was took into possession and recovery memo Ext.PW11/D was prepared. He has stated that he also obtained the copy of family register Ext.PW1/B, birth certificate of prosecutrix Ext.PW1/C by moving application Ext.PW1/A. He has stated that case property was handed over to MHC of P.S. Sarkaghat and he also obtained attendance register from GSSS Chowk and date of birth certificate of prosecutrix was also obtained. He has stated that he also filled in FT card/identification forms of prosecutrix and accused which are Ext.PW11/G and Ext.PW11/H. He has denied suggestion that blanket Ext.P2 did not belong to co-accused Hari Singh. He has denied suggestion that when he visited the spot at that time prosecutrix was not with him. He has denied suggestion that prosecutrix did not locate the room in which she was raped. He has denied suggestion that accused has been falsely implicated in present case. He has denied suggestion that accused Kuldeep did not take prosecutrix to Kullu. He has denied suggestion that co-accused Kuldeep has been falsely implicated in present case at the instance of father of prosecutrix. He has denied suggestion that he recorded the statements of prosecution witnesses at his own. He has denied suggestion that co-accused Kuldeep did not visit the house of co-accused Hari Singh.

8.12 PW12 Ayesha Patial Scientific Officer (DNA) has stated that she is posted as Scientific Officer in State Forensic Science Laboratory Junga from 2.11.2010 and on dated 1.4.2011 two sealed parcels were received in DNA division for examination and on dated 5.5.2011 four sealed parcels after biological and serological examination were received from Biology and Serology Division SFSL Junga for examination. She has stated that seals on parcels were intact and tallied with specimen seals sent with docket. She has stated that DNA profile obtained from vaginal swab female DNA fraction of prosecutrix matched with DNA profile obtained from blood sample of prosecutrix on FTA card. She has stated that DNA profile obtained from underwear of co-accused Kuldeep matched with DNA profile obtained from blood sample of co-accused Kuldeep on FTA card. She has also stated that Y-STR DNA profile obtained from salwar of prosecutrix matches completely with Y-STR DNA profile obtained from blood sample of Kuldeep Singh on FTA card. She has stated that co-accused Kuldeep could not excluded as the possible source of male DNA on salwar of minor prosecutrix. She has proved report Ext.PW12/A and proved FTA card of accused Kuldeep as Ext.PW12/B. She has stated that she had qualified M.Sc. Micro Biology from Central Institute Kasauli affiliated to HPU and posted as Scientific Officer (DNA) from dated

2.11.2010. She has stated that she also obtained training from CFSL Hyderabad from 17.1.2011 to 28.1.2011 on DNA profiling and also at FSL Sagar on DNA profiling with reference to criminal investigation. She has stated that report Ext.PW12/A was signed by her as well as by Dr. Vivek Sahajpal Assistant Director DNA Division Junga and they both of them examined the exhibits for DNA profiling. She has denied suggestion that underwear of co-accused Kuldeep and blood sample of co-accused Kuldeep on FTA card were in tampering condition. She has denied suggestion that she has not done the DNA profiling in the laboratory.

9. Statement of accused recorded under Section 313 Cr.P.C. He has stated that he is innocent and prosecution witnesses have deposed falsely against him. Accused also produced oral evidence in defence.

10. Defence evidence adduced by the accused

10.1. DW1 Ludar Singh has stated that he is mule driver by profession and co-accused Kuldeep present in Court did not work with him.

11. Submission of learned Advocate appearing on behalf of appellant that no criminal offence under Section 376 IPC is proved against the appellant is rejected being devoid of any force for the reasons hereinafter mentioned. Prosecutrix while appearing in witness box has specifically stated that appellant Kuldeep took the prosecutrix to Kullu on the pretext of marrying her and thereafter took the prosecutrix to village Kharahal in his maternal uncle Hari Singh's house where accused Kuldeep committed forcible sexual intercourse with prosecutrix twice during the night period. Court has carefully perused the testimony of minor prosecutrix. Testimony of minor prosecutrix is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of minor prosecutrix. There is no evidence on record in order to prove that minor prosecutrix has hostile animus against the appellant at any point of time. Testimony of minor prosecutrix is corroborated with testimony of medical officer PW9 Dr. Renu Behl who opined that prosecutrix was exposed to coitus and medical officer has given the probable duration of sexual assault as less than 48 hours. Minor prosecutrix was medico legally examined on dated 5.2.2011. Even medical Officer PW9 Dr. Renu has clearly stated in positive manner that injury to hymen was 9 and 6 O'clock position and there was bleeding on touch of hymen. Testimony of minor prosecutrix is also corroborated by documentary evidence i.e. MLC of prosecutrix placed on record. Rape is not only a crime against a person of a victim but it is a crime against the entire society. It destroys the entire psychology of woman and pushed the woman into deep emotional crisis. Rape is a crime against the basic human rights and is violative of the victim's most cherished Fundamental Rights as mentioned in Article 21 of Constitution of India. ***(See AIR 1996 SC 922 titled Bodhisattwa Gautam vs. Miss Subhra Chakraborty)*** It is well settled law that sole testimony of prosecutrix is enough to convict the person if the testimony is free from blemish and implicit reliable. ***(See 2007 Cri..L.J. 803 (Delhi) titled Mohd. Alam vs. State (NCT of Delhi).*** It is well settled law that testimony of prosecutrix must be appreciated in the background of entire case and Courts should be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. ***(See (1996)2 SCC 384 titled State of Punjab vs. Gurmit Singh and others, See (2000)5 SCC 30 titled State of Rajasthan vs. N.K. the accused, See (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another, (1992) 3 SCC 204 Madan Gopal Kakkad Vs. Naval Dubey and another. Also see (1990)1 SCC 550 titled State of Maharashtra vs. Chander Prakash. Also see (2011)2 SCC 550 titled State of U.P. vs. Chotte Lal*)**

12. Another submission of learned Advocate appearing on behalf of the appellant that no criminal offence of kidnapping under Section 363 IPC is proved against appellant is rejected being devoid of any force for the reasons hereinafter mentioned. The definition of kidnapping has been defined under Section 361 of Indian Penal Code and as per definition under Section 361 IPC the age of a female should be below 18 years at the time of kidnapping. It is well settled law that kidnapping is of two types. (1) Kidnapping from India as defined under Section 360 of Indian Penal Code and (2) Kidnapping from lawful guardianship as defined under Section 361 of Indian Penal Code 1860. It is proved on record that at the time of incident PW8 Pyare Lal was the lawful guardian of minor prosecutrix and PW8 Pyare Lal has specifically stated in positive manner that on dated 2.2.2011 prosecutrix went to school but did not return back and thereafter she was found at Bhunter along with accused Kuldeep. Testimony of PW8 Pyare Lal is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW8 Pyare Lal. It is proved beyond reasonable doubt that appellant had kidnapped the minor prosecutrix without consent of lawful guardian on dated 2.2.2011 when minor prosecutrix was student of 10th class.

13. Another submission of learned Advocate appearing on behalf of appellant that birth certificate wherein birth of prosecutrix is proved as 11.12.1996 and middle standard examination certificate placed on record wherein date of birth of prosecutrix mentioned as 11.12.1996 and certified copy of family register placed on record have been illegally relied by learned trial Court relating to age of prosecutrix is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that birth certificate was issued under Section 12 and 17 of the Registration of Births and Deaths Act 1969 and Rule 8 of the H.P. Registration of Births and Deaths Rules 2003 and it is also proved on record that certified copy of family register was prepared prior to incident and was issued by pubic servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act. It is also proved on record that family register was also issued by public servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act. It is held that middle standard examination certificate placed on record is also issued by public servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act. Appellant did not adduce any positive cogent and reliable evidence in rebuttal to rebut above stated public documents issued by public servants while discharging their official duty. It was also held in case reported in ***AIR 1981 SC 361 titled Harpal Singh vs. State of H.P. (Full Bench)*** that entry made by public officials in discharge of official duty in public record is relevant fact under Section 35 of Indian Evidence Act. ***(Also see ILR 1978 HP 174 titled Vidyadhar vs. Mohan)*** Even entry in birth register is much prior to incident of rape. It was held in case reported in ***AIR 2011 SC 1691 titled Murugan @ Settu vs. State of Tamil Nadu*** that document made *ante litem motam* can be relied upon safely when such document is admissible under Section 35 of Indian Evidence Act 1872. It was held in case reported in ***AIR 2002 HP 59 titled Chitru Devi vs. Ram Dai*** that entries in birth register kept by competent authority under Birth and Death Registration Act 1969 is admissible in evidence.

14. Another submission of learned Advocate appearing on behalf of appellant that present case is a case of consent and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Definition of rape has been defined under Section 376 of Indian Penal Code 1860 and in description 6th it has been specifically mentioned that factum of consent would be immaterial when age of prosecutrix would be under 16 years of age. In present case it is proved by way of oral as well as documentary evidence that at the time of incident age of prosecutrix was 14 years and two months and it is proved on record that prosecutrix was

minor at the time of incident. Hence it is held that consent of minor is immaterial in view of description 6th mentioned in Section 375 IPC.

15. Another submission of learned Advocate appearing on behalf of the appellant that there was no resistance on the part of prosecutrix and there was no teeth bite or scratches on face of assailant from nails of prosecutrix and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that in view of the fact that age of prosecutrix was 14 years and 2 months at the time of incident the pleas of resistance and teeth biting and scratches on face of assailant is immaterial.

16. Another submission of learned Advocate appearing on behalf of appellant that present case was filed due to vengeance and grudge on the part of prosecutrix and on this ground appeal be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. Accused did not adduce any positive cogent and reliable evidence on record in order to prove that there was prior enmity between prosecutrix and appellant. Plea of appellant that there was prior enmity is defeated on the concept of ipse-dixit (An assertion made without proof).

17. Another submission of learned Advocate appearing on behalf of the appellant that in present case corroboration qua testimony of prosecutrix was required is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimony of prosecutrix. It is held that testimony of prosecutrix is trustworthy reliable and inspires confidence of Court. There are no positive reasons to disbelieve testimonies of prosecution witnesses in present case.

18. Another submission of learned Advocate appearing on behalf of appellant that there is visible tampering in FIR and FIR is result of deliberation and concoctions and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Appellant did not adduce any positive cogent and reliable evidence on record in order to prove tampering in FIR. The plea of appellant that there was tampering in FIR is also defeated on the concept of *ipse dixit* (An assertion made without proof).

19. Another submission of learned Advocate appearing on behalf of the appellant that there is material contradiction and improvement in present case and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire oral and documentary evidence placed on record. There are no material contradictions in testimonies of prosecution witnesses which goes to the root of the case. It is well settled law that minor contradictions are bound to come in criminal case when statements of prosecution witnesses are recorded after a gape of sufficient time. In present case incident took place on dated 2.2.2011 and testimonies of prosecution witnesses were recorded on 25.11.2011, 26.11.2011, 20.12.2011, 24.1.2012, 3.5.2012 and 17.5.2012 after gape of sufficient time.

20. Another submission of learned Advocate appearing on behalf of the appellant that all recoveries and specimen signatures obtained in present case are in violation of Article 20(3) of the Constitution of India and are legally inadmissible is rejected being devoid of any force for the reasons hereinafter mentioned. In present case PW2 Sita Devi Pardhan of G.P. has proved the seizure memo of school certificate Ext.PW2/A in accordance with law. PW2 Sita Devi when appeared in witness box has stated that school certificate took into possession in her presence by Investigating Agency. Even seizure memo of blanket Ext.PW11/D also proved on record as per testimony of marginal witness namely Pyar Chand

PW8 and as per testimonies of other prosecution witnesses. Birth certificate has been proved by PW1 Jia Lal. The birth certificate Ext.PW1/C and copy of family register Ext.PW1/B proved by prosecution as per testimony of PW1 Jia Lal. Testimony of PW1 Jia Lal is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Jia Lal.

21. Another submission of learned Advocate appearing on behalf of the appellant that FSL report tendered in evidence is also inadmissible in law is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the FSL report placed on record. As per FSL report DNA profile obtained from vaginal swab matches with DNA profile obtained from blood sample of prosecutrix on FTA card. Even as per FSL report DNA profile obtained from underwear of accused Kuldeep Singh matches with DNA profile obtained from blood sample of accused Kuldeep Singh on FTA card. As per report of FSL placed on record, Y-STR DNA profile obtained from salwar of prosecutrix matches completely with Y-STR DNA profile obtained from blood sample of accused on FTA card. There is positive recital in FSL report placed on record that appellant could not be excluded possible source of male DNA on salwar of minor prosecutrix.

22. Another submission of learned Advocate appearing on behalf of the appellant that conviction has been based on facts which were not explained to accused under Section 313 Cr.P.C. and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that learned trial Court has put all material questions to accused under Section 313 Cr.P.C. relating to present case and it is further held that no miscarriage of justice has been caused to appellant by way of not putting any material questions under Section 313 Cr.P.C.

23. In view of above stated facts and case law cited supra appeal filed by appellant is 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 and it is further held that no miscarriage of justice has been caused to appellant in present case. 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 TARLOK SINGH CHAUHAN, J.

Municipal Corporation, Shimla ...Appellant.

VERSUS

Mohinder Singh Malhi and others ...Respondents.

LPA No.96 of 2009.
Decided on: May 20, 2015.

Constitution of India, 1950- Article 226- Petitioner applied for 42 days earned leave, which was sanctioned- he applied for extension of leave and when he came to join his duty he was told that his services had been terminated- he made various representations which were rejected- Municipal Corporation Act provides for giving a reasonable opportunity to the employee to the show cause- petitioner was never served with any show cause notice- petitioner was never told that his leave was not sanctioned - no inquiry was conducted – absence is not misconduct unless it is pleaded or proved that absence was willful- employer

had failed to prove that absence was willful, therefore, services of the petitioner were wrongly terminated and the Writ was rightly allowed. (Para-6 to 22)

Cases referred:

Krushnakant B. Parmar vs. Union of India and another, 2012 AIR SCW 1633
State of Rajasthan & Anr. vs. Mohammed Ayub Naz., 2006 AIR SCW 197
Anant R. Kulkarni vs. Y.P. Education Society and others, (2013) 6 Supreme Court Cases 515
N.T.C. (WBAB and O) Ltd. and another vs. Anjan K. Saha, AIR 2004 SC 4255
Dr.C.N. Malla vs. State of J&K, 1999 SLJ 366

For the Appellant:	Mr. Hamender Chandel, Advocate.
For the Respondents:	Mr. K.D. Shreedhar, Senior Advocate with Mr. Yudhvir Singh Thakur, Advocate, for respondent No.1. 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.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By the medium of the present appeal, the appellant-employer (writ respondent) has questioned the judgment and order, dated 7th May, 2009, passed by the learned Single Judge of this Court in CWP(T) No.1978 of 2008, titled Mohinder Singh Malhi vs. Commissioner, Municipal Corporation and others, whereby the writ petition filed by the respondent-employee (writ petitioner) was allowed and the termination order was quashed, (for short, the impugned judgment).

2. The writ petitioner, being a regular employee of the appellant-Corporation, was serving the Corporation as Junior Engineer, applied for 42 days earned leave, which was sanctioned on 24th August, 1981, made applications for extension of leave on various dates right from 7th October, 1981 to 22nd July, 1983 and in the month of February, 1985, when he came back to join his duties, he was informed, rather told, that his services stood already terminated w.e.f. 1st November, 1983, vide office order dated 18th November, 1983, by the appellant/writ respondent. The writ petitioner made representations for re-employment and also questioned the termination order by the medium of representations, which were rejected, constraining him to file the writ petition and question the impugned termination order, on the grounds taken in the memo of writ petition.

3. Appellant-Corporation resisted the writ petition. The learned Single Judge, after appreciating the rival contentions of the parties, allowed the writ petition and quashed the termination order in terms of the impugned judgment. The learned Single Judge has held that the services of the writ petitioner were terminated without conducting a regular inquiry, and thus, the said action of the appellant-employer was held to be against the principles of natural justice and in breach of the mandate of law applicable.

4. The learned Single Judge has also discussed Section 73 of the Himachal Pradesh Municipal Corporation Act, 1979, (hereinafter referred to as the Act), which is reproduced in the impugned judgment.

5. We have gone through the impugned judgment and the material available on the record and are of the view that the impugned judgment is well reasoned and needs to be upheld for the following reasons.

6. Section 73 of the Act provides for giving a reasonable opportunity to the delinquent employee for showing cause. Section 73 of the Act also postulates that in case the competent authority is satisfied that it is not reasonably practicable to give to the delinquent employee an opportunity of showing cause, then the competent authority is required to record reasons.

7. Thus, it was obligatory for the appellant-Corporation to adopt the procedure enshrined in Section 73 of the Act, which procedure was never adopted by it.

8. The Writ Court has categorically recorded that the petitioner was never served with any show cause notice. It was for the employer-appellant to plead and prove that it was not practicable to provide opportunity to show cause and hear him, for which, the appellant-Corporation was required to record reasons. The learned Single Judge has recorded categorical finding that no material was ever placed on record to show that such reasons were ever recorded by the appellant-Corporation.

9. It is beaten law of the land that for passing removal, dismissal or termination order, inquiry is required to be conducted. However, in case the requirement of conducting the inquiry is to be dispensed with, in that eventuality, reasons have to be recorded separately. While going through the writ record and the impugned judgment, one comes to an inescapable conclusion that no such reasons have been recorded or mind has been applied by the competent Authority, while dispensing with the requirement of conducting the regular inquiry. Thus on this count alone, the impugned judgment needs to be upheld.

10. It appears that the petitioner was treated as absent from duty since his application for extension of leave was not approved. However, there is nothing on the file which can be made the basis for holding that the employer has ever communicated to the employee about the non-sanction of the leave. It was for the employer to plead and prove that the employee-writ petitioner (respondent herein) has remained willfully absent from the duty.

11. Thus, the only conclusion which can be drawn in the instant case is that the services of the employee/writ petitioner were terminated without conducting a regular inquiry, though the inquiry was to be conducted in terms of Section 73 of the Act, which fact came to the knowledge of the writ petitioner only when he came for joining his duties. No opportunity was granted to the petitioner to participate in the inquiry proceedings, not to speak of hearing the petitioner at the time of imposing the penalty. In fact, without conducting the inquiry, the termination order was passed and no such ground has been carved out for dispensing with the requirement of conducting a regular inquiry. It was for the Disciplinary Authority to record reasons that the inquiry was not practicable or there were sufficient reasons to dispense with the requirement of conducting the inquiry. No such reasons have been assigned and no reasons have been recorded therefor by the Disciplinary Authority.

12. The absence of the respondent-employee has been made the foundation for passing the termination order. However, absence itself is not misconduct unless it is pleaded and proved that absence of the employee was willful.

13. The Apex Court in case **Krushnakant B. Parmar vs. Union of India and another, 2012 AIR SCW 1633,** has dilated on the issue as to when absence can be said to be willful. It is apt to reproduce paragraphs 16 to 19 of the said decision hereunder:

> *"16. The question whether 'unauthorised absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.*
>
> *17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be willful.*
>
> *18. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be difference eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.*
>
> *19. In a Departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct.*

14. The Apex Court in case **State of Rajasthan & Anr. vs. Mohammed Ayub Naz., 2006 AIR SCW 197,** has referred to various decisions in paragraphs 10, 12, 14, 15, 16 and 17, and has observed that in case the charge of willful absence is proved against a delinquent employee, he can be removed from service, of course after giving an opportunity of hearing. It is apt to reproduce paragraphs 9 and 18 of the said decision hereunder:

> *"9. Absenteeism from office for prolong period of time without prior permission by the Government servants has become a principal cause of indiscipline which have greatly affected various Government Services. In order to mitigate the rampant absenteeism and wilful absence from service without intimation to the Government, the Government of Rajasthan inserted Rule 86 (3) in the Rajasthan Service Rules which contemplated that if a Government servant remains wilfully absent for a period exceeding one month and if the charge of wilful absence from duty is proved against him, he may be removed from service. In the instant case, opportunity was given to the respondent to contest the disciplinary proceedings. He also attended the enquiry. After going through the records, the learned Single Judge held that the admitted fact of absence was borne out from the record and that the respondent himself has admitted that he was absent for about 3 years. After holding so, the learned Single Judge committed a grave error that the respondent can be deemed to have retired after seeking of service of 20 years with all retiral benefits which may be available to him. In our opinion, the impugned order of removal from service is the only proper punishment to be awarded to the respondent herein who was wilfully absent for 3 years without intimation to the Government. The facts and circumstances and the admission made by the respondent would clearly go to show that Rule 86 (3) of the Rajasthan Service Rules is proved against him and, therefore, he may be removed from service.*
>
> xxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx
>
> *18. For the foregoing reasons, we are of the opinion that a Government servant who has wilfully been absent for a period of about 3 years and which fact is not disputed even by the learned Single Judge of the High Court has no right to receive the monetary/retiral benefits during the period in question. The High Court has given all retiral benefits which shall mean a lump sum money of lakhs of rupees shall have to*

be given to the respondent. In our opinion, considering the totality of the circumstances and the admission made by the respondent himself that he was wilfully absent for 3 years, the punishment of removal imposed on him is absolutely correct and not disproportionate as alleged by the respondent. The orders passed by the learned Single Judge in S. B. Civil Writ Petition No. 2239/1991 dated 24-8-2001 and of the order passed by the Division Bench in LPA No. 1073 of 2001 dated 13-12-2001 are set aside and the punishment imposed by the disciplinary authority is restored. However, there shall be no order as to costs. Order accordingly."

15. The Apex Court in another decision in **Anant R. Kulkarni vs. Y.P. Education Society and others, (2013) 6 Supreme Court Cases 515**, has widened on purpose of inquiry against a delinquent. It is apt to reproduce paragraph 17 of the said decision hereunder:

"17. The purpose of holding an enquiry against any person is not only with a view to establish the charges levelled against him or to impose a penalty, but is also conducted with the object of such an enquiry recording the truth of the matter, and in that sense, the outcome of an enquiry may either result in establishing or vindicating his stand, and hence result in his exoneration. Therefore, fair action on the part of the authority concerned is a paramount necessity."

16. The Apex Court in **N.T.C. (WBAB and O) Ltd. and another vs. Anjan K. Saha, AIR 2004 SC 4255,** has held that the delinquent official must be given an opportunity to show cause and he should be heard on the proposed penalty. It is apt to reproduce paragraph 11 of the said decision hereunder:

"11. As a result of the discussion aforesaid this appeal preferred by the employer is partly allowed. The impugned orders of the High Court to the extent they direct reinstatement in service of the respondent with full monetary dues are set aside. It is directed that in accordance with the legal position explained in the case of B. Karunakar and Ors. (supra) [in paragraph 31 as quoted above], there would be a formal reinstatement of the employee for the limited purpose of enabling the employer to proceed with the enquiry from the stage of furnishing him with the copy of the enquiry report. The employer can place him under suspension for completing the enquiry. After conclusion of the enquiry in the manner as directed in the case of B. Karunakar and Ors. (supra), if the employee is exonerated, the authority shall decide according to law how the intervening period from the date of his dismissal to the date of his reinstatement shall be treated and what consequential benefits should be granted. If on the contrary, the employee is found to be guilty, before taking final decision he should be heard on the proposed penalty in accordance with clause 14(4)(c) of the Standing Order on the quantum of punishment."

17. The Jammu and Kashmir High Court, in **Dr.C.N. Malla vs. State of J&K, 1999 SLJ 366,** wherein also the charge of overstaying the leave was framed against the delinquent employee, has held the termination, without holding inquiry, to be bad and not sustainable in the eyes of law.

18. Applying the above tests to the instant case, the employer has failed to establish on record that the absence of the employee/writ petitioner was willful.

19. The inquiry was to be conducted in view of the mandate of Section 73 of the Act and in the inquiry proceedings, notice was to be issued to the employee/writ petitioner and he was to be heard. Though it is pleaded by the employer that notice was sent to the writ petitioner, but the same was received back unserved. It has been pleaded by the

appellant-employer that a notice was issued in the newspaper, which plea has been rightly turned down by the learned Single Judge on the ground that it is not clear whether the said newspaper had wide circulation in the area in which the writ petitioner was residing at the relevant point of time. What steps thereafter the Disciplinary Authority has taken, is not forthcoming. Even, to conduct the inquiry in absentia, the procedure was to be followed and it was imperative for the Authority concerned to record finding about the willful absence of the employee, whether that absence could be termed as misconduct or otherwise and in case he was found to be guilty, he was to be heard on the proposed penalty, which has not been done in the present case. Thus, the order of termination is against the principles of natural justice and came to be passed in breach of the provisions of the Act.

21. During the course of hearing, the learned counsel for the appellant-Corporation submitted that the Corporation has initiated the regular inquiry against the respondent-employee, which is likely to be concluded within two months. Here, we may place on record that the Writ Court, vide the impugned judgment, has already granted opportunity to the appellant-Corporation to conduct a regular inquiry against the employee-respondent as per the law applicable.

22. Having said so, the Writ Court has passed a well reasoned judgment, which warrants no interference.

23. Viewed thus, the impugned judgment needs to be upheld and the instant appeal merits to be dismissed. Ordered accordingly.

24. Pending CMPs, if any, also stand disposed of.

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

S.M. Katwal ... Petitioner/Appellant.
Versus
Virbhadra Singh and others ... Respondents.

Cr.M.P.(M) No. 11350 of 2013.
Reserved on: 22nd April, 2015.
Decided on: 20th May, 2015.

Code of Criminal Procedure, 1973- Section 2 (wa)- Victim is a person who has suffered any loss or injury on account of an act or omission with which accused persons have been charged- petitioner claimed that he had set the criminal law in motion and, therefore, he falls within the definition of victim- complainant had made a complaint on the basis of which an inquiry was conducted but FIR was not lodged– complainant has enmity with accused and, therefore, possibility of filing complaint to wreak-vengeance cannot be ruled out- when the prosecution lodged an FIR on the basis of complaint, it is only the State which can prefer an appeal and not the complainant or informant who is not victim.(Para-34 to 58)
Limitation Act, 1963- Section 5- Petitioner claiming himself to be a victim filing an appeal against the judgment of acquittal- appeal is barred by limitation- an application for condonation of delay was filed pleading that petitioner came to know about the judgment from the newspaper- State had not preferred any appeal against the acquittal and, therefore, petitioner had to file the appeal- explanation furnished by the petitioner is vague, cryptic and highly unbelievable – petitioner was present in the Court when judgment was

announced- acquittal gained wide publicity on the next day and therefore, petitioner would come to know about the judgment, hence, application is liable to be dismissed.
(Para-75 to 89)

Indian Evidence Act, 1872- Sections 3 and 65 (B)- Prosecution relied upon the conversation between the accused and 'K' to prove the acceptance of bribe- held, that before acting upon the electronic record, Court has to consider whether it is genuine or not- technology of preparing CD was not in existence in the year 1989-90 when the bribe was allegedly received by the accused – no evidence was produced to show as to what was the device used for recording the CD- whether such device was technically in order- the name of the person who recorded the conversation was also not mentioned- FSL had raised certain queries which was not answered- there were contradictions in the testimonies of the witnesses- there was no evidence against the accused except CD - therefore, acquittal of the accused in these circumstances was justified. (Para-96 to 120)

Cases referred:

Joginder Singh v. State of Himachal Pradesh, 2013(2) RCR (Criminal) 60
Sheo Nandan Paswan v. State of Bihar and others, AIR 1987 SC 877.
Balasaheb Rangnath Khade v. State of Maharashtra and others, 2012 (2) CCR 381
Ram Kaur @ Jaswinder Kaur v. Jagbir Singh @ Jabi and others (2010) 3 RCR (Cri.), 391 (DB)
Bhavuben Dineshbhai Makwana v. State of Gujarat and others, 2013 Cri.L.J. 4225
National Commission for Women v. State of Delhi and another, (2010) 12 SCC 599
State of Tamilnadu v. N. Suresh Ranjan and others, 2014 (1) RCR (Cr.) 572.
State (NCT of Delhi) v. Ahmed Jaan, 2008 Cri.L.J, 4355
State of Nagaland v. Lipok A.O. and others (2005) 3, SCC, 752
State of Gujarat v. Kaliashchandra Badriprasad, 2001 (1) RCR (Criminal) 162
Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another (2010) 5 SCC, 459
Lanka Venkateswarlu (dead) by LRs. v. State of Andhra Pradesh and others, (2011) 4 SCC 363
Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157
P.K. Ramachanderan v. State of Kerala, AIR 1998 SC, 2276
S. Partap Singh v. State of Punjab, AIR 1964 SC 72
Yusufalli Esmail Nagree v. The State of Maharashtra, AIR 1968 SC 147
Anvar P.V. v. P.K. Basheer and others, AIR 2015 SC 180
State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru, (2005) 11 SCC 600

For the petitioner/appellant:	Mr. A.P.S. Deol, Senior Advocate, with Mr. Virbahadur Verma and Mr. Adhiraj Singh Thakur, Advocates.
For respondents No.1 & 2:	Mr. R.S. Cheema, Senior Advocate, with M/s. Ajay Kochhar, Satyen Vaidya and Vivek Sharma, Advocates.
For respondent No.3:	Mr. R.M. Bisht and Mr. P.M. Negi, Deputy Advocates General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Petitioner S.M. Katwal is an IAS Officer (Retd.). He claims himself to be a 'victim' within the meaning of Section 2(wa) of the Code of Criminal Procedure, in short to be

referred as 'the Code', hence aggrieved by the judgment dated 24th December, 2012, in Corruption Case No.9-S/7 of 2010, passed by learned Special Judge (Forests), Shimla, acquitting accused-private respondents Virbhadra Singh and his wife Pritibha Singh from the charges under Sections 7, 9, 11, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and under Section 120-B of the Indian Penal Code framed against each of them. Hence he has filed a petition under Section 378(4) of the Code seeking leave to appeal along with memorandum of appeal under Section 372 of the Code. The appeal, however, is time barred, therefore, the present petition for condonation of delay has been filed on the grounds, *inter alia* that while he was at PGI, Chandigarh during the months of January-March, 2013 attending to his ailing wife there, he came to know about the judgment dated 24th December, 2012 under challenge in the appeal, through newspaper. He is having no access to the record nor engaged any lawyer to prosecute the case on his behalf. On coming to know that the State of Himachal Pradesh ruled by the Congress Party Government and accused-respondent No.1 the Chief Minister, who is holding the charge of Home Department also and therefore, prosecutor and the accused became one and the same having common interest not to pursue the case for filing the appeal against the judgment of acquittal, the petitioner has come forward to prefer an appeal against the judgment in the capacity of a 'victim'. An age old rule "***nullum tempus qut locus occurrit regi***" embedded in criminal justice delivery system has been pressed into service and it is submitted that the Parliament while acknowledging the said rule has prescribed no period of limitation for filing the appeal under the proviso to Section 372 of the Code against an order of acquittal. The rule of limitation, according to the petitioner, cannot be mechanically applied in a case of this nature. He having obtained Photostat copy of the judgment under challenge in the month of August, 2013 has preferred the appeal immediately thereafter. It has been urged that the delay, as occurred in filing the appeal is not intentional, but attributed to the compelling circumstances under which he was made to search for the relevant record required for the purpose of drafting the grounds of appeal.

2. The stand of the respondent-State in reply to the petition in a nutshell is that in the opinion of the District Attorney it was not a fit case for filing an appeal. The said opinion was examined in the office of Additional Director General, State Vigilance & Anti Corruption Bureau, Himachal Pradesh and the file was forwarded to Additional Secretary (Home/Vig.). Based upon the opinion of the District Attorney and that of Joint Director (Prosecution) in the office of Additional Director General, State Vigilance & Anti Corruption Bureau, Himachal Pradesh, the case file along with relevant record was sent to the Law Department for seeking final opinion. In the office of Law Department the case being of no evidence, a conscious decision was taken for not preferring the appeal. It is pointed out that in a police challan no private individual other than victim can prefer appeal against acquittal. The petitioner allegedly is not a victim because initially it is the State Government, which took a conscious decision to hold vigilance enquiry into the allegations against accused-respondents No.1 and 2 and after submission of enquiry report a decision was taken to register a case against them. Consequently, FIR No.27 of 2009 came to be registered against them on 3rd August, 2009 at the instance of Superintendent of Police in the capacity of complainant. Therefore, the petitioner is stated to be neither complainant nor victim as defined under Section 2(wa) of the Code and as such is not entitled to prefer an appeal under Section 372 of the Code.

3. Private respondents in separate reply filed on their behalf have given the details of the criminal cases, which were registered against the petitioner and all those cases the petitioner instituted against the 1st respondent and have submitted that the petitioner is under an impression that the criminal cases against him were registered at the instance of accused-respondent No.1 and the appeal has been filed by him with ulterior motive. It is

denied that the petitioner came to know about the announcement of judgment of acquittal during the months of January-March, 2013. Rather the judgment dated 24th December, 2012 was given wide publicity in the print as well as electronic media on 25th December, 2012. Not only this, but the statement of the petitioner as one of the witnesses was recorded on the day of announcement of the judgment, i.e., 24th December, 2012 itself and while appearing as a witness he was fully aware about the conclusion of the trial. The appeal having been filed beyond the period of 90 days, is said to be time barred. It has also been urged that the petitioner is neither a complainant nor victim within the meaning of Section 2(wa) of the Code, hence not competent to file the appeal against their acquittal.

4. In the counter reply (rejoinder) while denying the contentions to the contrary being wrong and reiterating the case as set out in the petition, it is pointed out that accused-respondent No.1 is acting in mala fide manner and with ulterior motive to settle scores not only with the petitioner, but also with all Officers/Officials namely, Dr. D.S. Minhas, former Director General of Police, Himachal Pradesh, Shri I.D. Bhandari, the then Additional Director General, Shri Daya Sagar, Inspector (Retired) and Shri Hardesh Bisht, the then Superintendent of Police, Vigilance (now Retired), the Investigating Officers, who supervised the proceedings in the case registered against him and his wife accused-respondent No.2 in one way or the other/investigated the same. The instances of harassment of the above Police Officers have also been highlighted in the counter reply with the help of documents, i.e., Annexure P-3, representation of Dr. D.S. Minhas to Secretary (Home), Government of India against the request made by the State Government for seeking permission to charge-sheet him in connection with the case in hand registered against accused-respondents No.1 and 2, Annexure P-4, a charge-sheet served upon Shri Daya Sagar, the then Inspector, Vigilance, who has investigated the case partly and Annexure P-5, copy of FIR No.5 dated 29th April, 2014 registered under Section 218 of the Indian Penal Code against Shri Hardesh Bisht, the then Superintendent of Police, SIU and Shri Daya Sagar aforesaid with the allegation that they did not investigate the case against the accused in a fair manner.

5. It is in this backdrop, the questions that the petitioner has shown sufficient cause for condonation of delay and that he is victim within the meaning of Section 2(wa) of the Code and entitled to prefer the appeal under the proviso to Section 372 of the Code, have to be examined and answered, however, before that it is desirable to take note of the facts leading to the institution of the appeal along with this petition and also the arguments addressed by learned Counsel on both sides.

6. Accused-respondent No.1 Virbhadra Singh is the Chief Minister of Himachal Pradesh. Accused-respondent No.2 Pritibha Singh, a former Member of Parliament is his wife. Accused-respondent No.1 remained Chief Minister of Himachal Pradesh during the period 1985-1990 also. PW-21 Major Vijay Singh Mankotia, former Minister of Himachal Pradesh in the month of May, 2007 received a secret information at Shimla about the audio-cassette having recording of the voice of accused-respondent No.1. The informer arranged to supply the audio-cassette to PW-21, which was found in an envelop alongwith his other Dak nearby the door of MLA flat where he was residing. He played and heard the audio-cassette and found the same to be containing the conversation of accused-respondent No.1 with Shri Mohinder Lal, the then Deputy Commissioner, Shimla, that of accused-respondent No.2 and said Shri Mohinder Lal and also that of Shri Kedar Nath Sharma, the then OSD-cum-Private Secretary to accused-respondent No.1 and said Shri Mohinder Lal qua the exchange of money in lacs of rupees between the accused-respondents on one side and Mr. Piyush Jain of Mini-Steel Plant, Mr. Suresh Neotia and Mr. P.C. Jain of M/s. Gujarat Ambuja Cement,

Brigadier Kapil Mohan, owner of Mohan Meakin through one Mr. Suresh Kapoor of Mohan Meakin Brewery and one Mr. Mittal of Kangra on the other.

7. PW-21 has convened the press conference on 28th May, 2007. The audio-cassette was played in that conference in the presence of media persons and released to the media. The audio-cassette was given wide publicity in the media. Petitioner S.M. Katwal (PW-37) having gone through the news-item in the issues of Hindi dailies "Dainik Bhaskar" and "Divya Himachal" dated 29th May, 2007, has reported the matter to Station House Officer, Police Station, Vigilance and Anti Corruption, Shimla vide petition dated 30th May, 2007 (Ext.PW-37-A). The contents of the same read as follows:

> "Your attention is invited towards the news published in the Hindi Dailies, Dainik Bhaskar and Divya Himachal of 29-5-2007 containing details of telephonic conversation between a high officer and reportedly the present CM and his wife and mentioning others, about payment/acceptance of huge sums of money. The facts, prima facie disclose commission of offences, under the PC Act and Specific Corrupt Practices Act, IPC (Conspiracy) and other laws. I request that a case against the persons named/mentioned therein be registered and action as per law be taken against the persons, and a copy of the FIR so registered may be supplied to me, as per law. It is no excuse that the case is old or that I have no locus standi. There is no time limit in such like cases and any body can set the law in motion.
>
> Earlier also, I had requested that a case be registered about jobs on chits, and when no action was taken I had to pray to the Hon'ble High Court and as per directions of the Hon'ble Court, a case (FIR No.1/2006) was registered. It is another matter that under pressure and deliberately, no accused was named and efforts have been and are being made to dilute the offences and the cases, about which the Hon'ble Supreme Court in a recently reported case has taken a serious view. Non action or non response will mean that you are also committing an offence under sections 120B, 217, 218 of the IPC and I may have to approach the Hon'ble High Court again impleading your as a party."

8. On receipt of the complaint (Ext.PW37-A) supra, the Vigilance Headquarter forwarded the same to the Secretary-cum-Director Vigilance, Government of Himachal Pradesh vide letter No.Vig-Compl.199/2007 (SML)-8687/Confidential dated 7th June, 2007 for issuance of necessary directions in the matter. Since the complaint was against former Chief Minister of Himachal Pradesh and his wife having reference of CD released by PW-21, the Government decided to get the matter enquired into from the Vigilance Department. The Vigilance Headquarters was directed to take appropriate action in the matter and submit the report to the Government. One CD and copy of CWP No.1913 of 2007 (Ext.PW-37/B) filed by S.M. Katwal (PW-37) was also forwarded to Vigilance Headquarters.

9. Consequently, the Vigilance Headquarters entrusted the enquiry to Shri Anand Pratap Singh, Superintendent of Police, State Vigilance and Anti Corruption Bureau, Southern Zone, Shimla, vide letter dated 18th February, 2008. Shri Anand Pratap Singh aforesaid sought for the service record of Shri Mohinder Lal from General Administration Department of Himachal Pradesh and also sought the voice samples of accused-respondents No.1 and 2 from the Director, Public Relations Department, Himachal Pradesh. The record and voice samples so sought were received. It is on 2nd May, 2008 the Inquiry Officer

recorded the statement of Shri Mohinder Lal in the presence of Shri I.D. Bhandari, the then Additional Director General of Police and Shri Ashok Tiwari, Deputy Inspector General, which reads as follows:

> "I have heard the CD today purported to have been converted from a tape recorded sometime in the year 1989. At that time there was no CD but only Tape Recorders were available. I do not know as to how and where it has been recorded. The contents of the CD contain prima facie my conversation with the then Chief Minister, his wife and Shri K.N. Sharma etc. Prima facie the voice in the CD is mine and as far as I remember the conversation has taken place. As regards the names of the persons and the detail thereof the same must have recorded by Rani Sahiba and may be obtained from her. The persons, who made contributions as far as I remember, were sent to the Chief Minister's house on various occasions and the present CD is a version of those occasions which happened and appears to have been recorded on various dates and made into one tape/CD. I am available for any further clarification based on my memory at any time as and when needed, as the matter relates to long time back."

10. The samples of voice of the accused-respondents supplied by the office of Director, Public Relations, Himachal Pradesh were sent to Forensic Science Laboratory, Chandigarh for comparison and report. The Forensic Science Laboratory has submitted its opinion, which reads as follows:

> "Hence, the voice samples marked 'Exh-Q1 and Exh-S1' are probable voice of the same person (Smt. Praibha Singh)".
>
> "Hence, the voice samples of speakers marked 'Exh-Q2 and Exh-S2' are voice of the same person (Sh. Virbhadra Singh, Former Chief Minister of Himachal Pradesh) with high probability."

11. The record pertaining to allotment of steel plant to one Piyush Jain was requisitioned from the Managing Director, HPSIDC, Shimla. The same was received and Shri Ashok Tiwari, Deputy Inspector General (Vigilance), has examined the same on the directions of the then Additional Director General Vigilance and submitted the report on 14th May, 2008 highlighting therein that the Committee had helped Shri Piyush Jain in the matter of allotment of the steel plant. The exchange of money between R.R., who in the opinion of the Inquiry Officer could have been Shri Rangila Ram Rao, the then Industry Minister-cum-Chairman of Board of Directors and Piyush Jain also surfaced, as per the conversation recorded in the CD.

12. Shri Santosh Patial, Superintendent of Police, Sate Vigilance and Anti Corruption Bureau, Northern Range, Dharamshala, was directed to interrogate Major Vijay Singh Mankotia (PW21) in the matter. The audio-cassette was taken into possession by Shri Paras Ram, Dy.S.P. (Vigilance) on 21st May, 2008 from Major Vijay Singh Mankotia.

13. After conducting the enquiry, the Inquiry Officer Shri Anand Pratap Singh has submitted the report dated 18th August, 2008 to the Vigilance Headquarters, which reads as follows:

> "To the Addl. Director General of Police SV&ACB, Shimla
> dated Shimla-2, the 18th August, 2009. Subject:- Complaint against

former Chief Minister and his wife made by Shri S.M. Katwal IAS (Retd.) on the basis of CD released by Sh. Mankotia. Sir, A complaint dated 16-2-08 (No.Home (Vig) A(5) 147/2007 MLA) was received from Principal Secretary, Home and Vigilance to enquire into the C.D. released by Mr. Vijay Singh Mankotia and CWP 1913/07 filed by Sh. S.M. Katwal, IAS (Retd.) in Hon'ble High Court in this regard. 2. During enquiry, a transcript of the C.D. was made and statement of Sh. Mohindra Lal IAS (Retd.) was recorded on 02-05-08. The statement of Sh. S.M. Katwal IAS (Retd.) was recorded on 07-05-08. On 15-05-08 the statements of Sh. Chaman Kapoor, Sh. Rajinv Bhanot and Smt. Santosh Saini were also recorded at Una. 3. On 08-05-08, the C.D. submitted by Sh. S.M. Katwal IAS (Retd.) was sent for Auditory Analysis to Central Forensic Laboratory, Chandigarh, alongwith a Video C.D. which contained voice samples of both Sh. Virbhadra Singh and Smt. Praibha Singh, and a Digital Video Cassette, which contained the voice samples of Smt. Pratibha Singh. Both the Video C.D. and the Digital Video cassette were obtained from the Director Public Relation H.P. 4. On 21-05-08 Sh. Vijay Singh Mankotia also handed over an audio cassette to the Vigilance team handed by Dy.S.P SV&ACB Dharamshala purporting to contain the voices of Sh.Virbhadra Singh, Smt. Pritabha Singh and Sh. Mohinder Lal, IAS (Retd.). This cassette was sent to Central Forensic Science Laboratory, Chandigarh, on 23-05-08. 5. According to Sh. Mohinder Lal, the voices belong to him, Sh. Virbhadra Singh, Smt. Pratibha Singh and Sh. K.N. Sharma (now deceased). He has also stated that "the persons, who made contributions as far as I remember, were sent to the Chief Minister's House on various occasions and the present CD is a version of those occasions which happened and appears to have been recorded on various dates and made into one tape/CD". He was evasive and did not comment on 'how' and 'where' it was recorded. 6. Sh. S.M. Katwal IAS (Retd.) in this statement has also stated that since he was posted as SDM Rampur in the past and had worked with Sh. Virbhadra Singh in various capacities, he was familiar with his voice and was certain that the voice in the C.D. was that of Sh. Virbhadra Singh. He was also familiar with the voices of Smt. Pratibha Singh and Sh. Mohinder Lal, IAS (Retd.) and was certain that the CD in question also contained their voices. 7. Shri Chaman Kapoor, Sh. Rajiv Bhanot and Smt. Santosh Saini, whose statements were also recorded at Una have claimed to identify the voices in the CD as those of Sh. Virbhadra Singh, Smt. Pratibha Singh and Sh. Mohinder Lal IAS (Retd.). 8. The report from Central Forensic Science Laboratory, Directorate of Forensic Science (No.CFSL/301/08/Phy/62/08-484 dated 8/8/08), copy attached, opines as under: "The auditory analysis of recorded speech samples of speakers marked 'Exh-Q1 and Exh-S1' and subsequent acoustic analysis of the recorded speech samples of the speakers marked Exh-Q1 and Exh-S1 by using Computerized Speech Lab (CSL), revealed that voice exhibits of speakers marked 'Exh-Q1' are similar to the voice exhibits of speaker marked 'Exh-S1' in respect of their acoustic cues and other linguistic and phonetic features. Hence the voice

samples of speakers marked 'Exh-Q1' and 'Exh-S1' are probable voice of the same person (Smt. Pratibha Singh)". "The auditory analysis of recorded speech samples of speakers marked 'Exh-Q2' and 'Exh-S2' and 'Exh-S2' and subsequent acoustic analysis of the recorded speech samples of the speakers marked 'Exh-Q2' and 'Exh-S2' by using Computerized Speech Lab (CSL), revealed that voice exhibits of speakers marked 'Exh-Q2' are similar to the voice exhibits of speakers marked 'Exh-S2' in respect of their acoustic cues and other linguistic and phonetic features. Hence the voice samples of speakers marked 'Exh-Q2' and Exh-S2' are voice of the same person (Sh. Virbhadra Singh, Former Chief Minister of Himachal Pradesh) with high probability". 9. A study of the transcripts and contents of the C.D. reveals a total of nine conversations by Sh. Mohinder Lal, four with Smt. Pratibha Singh, four with Sh. Virbhadra Singh and one with K.N. Sharma. During the course of the conversation the following points comes to notice: 1) The conversations took place immediately prior to the Lok Sabha Elections of February, 1990, as there is discussion regarding 4 seats of Lok Sabha from Himachal Pradesh, and since Shri Mohinder Lal is of the opinion that these conversations took place in 1989, it may be reasonably inferred that the conversations took place during the last months of 1989 and may have gone into the early months of 1990 before the Vidhan Sabha elections. 2) The following persons appeared to have made contributions':1) Atma Ram 2.) Owner of Ambuja Cement 3.) Mr. Jain (In connection with a hotel in Manali 4.) Mr. Kapur of Mohan Meakins 5) Owner of Kangra Flour Mills 6.) One Mr. Mittal from Kangra 7.) Some person from Gujarat 8.) Some person from K&K 9.) One Mr. Neotia. 10.) Mr. Piyush Jain (in connection with the allotment of a steel plaint) 3. There is also a reference of helping "these people as and when the opportunity arises" 4.) There is mention of collection of more than 25 lacs as against the target of 15 lacs. 10. During enquiry the following facts also came to light: 1. A project was awarded to Gujarat Ambuja Cement Ltd. for the manufacture of all types of cements for Rs. 150 crores on 19.2.90, and that this project was under consideration during the period when conversation took place. 2. A mini steel plant project of Mr. Piyush Jain (Sl No. 10) was under consideration during the period when conversation took place. 3. A case of Hotel Honeymoon Inn (then called Hotel Hill Huts) was also pending with the government during the period when conversation took place. An FIR for illegal purchase was also registered against Sh. Satish Chand Jain (Sl No.3) along with revenue employees, in the Vigilance department in 1989 and was under investigation at the time of these conversations. The case was not charge sheeted subsequently because Mr. Satish Chand Jain passed away. A departmental inquiry against revenue officials was ordered. The land was eventually transferred to Hotel Hill Huts by the order of Financial Commissioner-cum-Secretary (Rev) vide order No.Rev 2 F(10)38/88 dated 10/9/1992. 4. Shri Mohinder Lal's case for promotion into the super time Scale was also pending for which DPC was to take place at the time of these conversations and there are references to it. 11. The contents of the C.D. Suggest that

> Sh. Mohinder Lal I.A.S. (Retd.), posted as Director of Industries, was a conduit for arranging delivery of money to Sh. Virbhadra Singh through various industrialists. It is quite obvious that a record was maintained of the amount collected. There is also a reference of an amount having being paid by Sh. Piyush Jain 'Rao Sahab' on allotment of the Steel Mill. 12. Since the voice samples have been matched by CFSL the identity of the speakers is clear. Furthermore, Sh. Mohinder Lal, IAS (Retd.) in his statement identifies these voices as his own and as those of Sh. Virbhadra Singh and Smt. Pratibha Singh. It is also pertinent to mention here that no clues recording where or how or by whom the C.D was made, came to light during inquiry, as the matter in question pertains to 1989. Shri S.M. Katwal IAS (Retd.) only mentions that the C.D was found in his letter box during the time of Lok Sabha Elections. Shri Mohinder Lal, IAS (Retd.) and Sh. Vijay Singh Mankotia has also not provided any information in this regard. 13. During the course of enquiry evidence of allotment of Ambuja Cement and Steel Mill to Sh. Piyush Jain and case of Hotel Honeymoon Inn on behalf of Sh. Sathish Chand Jain also came to light. It cannot be established where any favours were indeed given to any of the contributors mentioned above in the letter. But it is quite clear that these matters were pending with the Government towards the end of 1989. 14. Sec. 13 1(d) (ii) and (d) (iii) of the PC act 1988 define Criminal Misconduct as under: 13. Criminal Misconduct by Public Servant (1) A Public servant is said to commit the offence of criminal misconduct, (d) if he,--(ii) by abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage, without any public interest. The inquiry is complete and the facts that have come to light have been disused above. The entire record collected during the course of enquiry is in the custody of the undersigned. Hence the report is submitted as desired by your letter No. Vig. Compl-199/2007(SML)-2418 dated 18/2/2008." Thanking You, Yours faithfully, Sd/- A.P. Singh, SP SV&ACB SR Shimla."

14. The Additional Director General of Police State Vigilance and Anti Corruption Bureau, Himachal Pradesh has forwarded the report to Principal Secretary (Home) and Vigilance vide letter No.16345 dated 9th September, 2008, with his opinion that prima facie a cognizable offence is found to have been committed by the accused-respondents and that it is the Government, which is the competent authority to take final decision in this regard.

15. The matter was examined in the Home Department and vide letter No.Home(Vig.)A(5)147/2007 (MLA&MP) Govt. of HP Department of Home (E-Section) dated 31st July, 2009, the Vigilance Headquarter was informed as under:

> "As per opinion of the Law Department, the Police Officer has to take an independent decision after due application of mind. You are therefore, requested to take further necessary action in the matter. Enquiry report as received from your office is returned herewith."

16. The above communication was received in the Vigilance Headquarter on 1st August, 2009 and on the receipt thereof, Director General of Police, State Vigilance and Anti Corruption Bureau, Shimla, has ordered as under:

> "Get the case registered in P.S. SV&ACB, Shimla and let it be investigated by S.P. (SIU) SV&ACB, Shimla."

17. It is how the case vide FIR No.27 of 2009 came to be registered against the accused-respondents by Shri Arvind Digvijay Singh Negi, the then Additional Superintendent of Police, Incharge, Police Station, State Vigilance and Anti Corruption Bureau, Shimla, under Sections 8, 9, 10, 13(1) (d)(i)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code.

18. The investigation was entrusted to Special Investigating Unit vide letter No.Reader/SR/09-5045 dated 3rd August, 2009. The Investigating Officer had obtained the notifications qua appointment of accused-respondent No.1 as Chief Minister of Himachal Pradesh. The transcript of CD in nine separate parts was got prepared and each and every part carefully analyzed. It transpired that Super Time Scale was due to Shri Mohinder Lal on 1st January, 1990; however, the same was released to him well before the due date on 23rd November, 1989. The required action in the matter including constitution of the Committee for the purpose was taken on the same day, i.e., 23rd November, 1989 itself. In the opinion of the investigating agency it was done to help Shri Mohinder Lal, who was apprehending the defeat of the Congress Party in 1989 General Election of Lok Sabha followed by the election of HP Legislative Assembly in the month of February, 1990, hence was in hurry in the matter of his induction in super time scale on promotion. Shri Mohinder Lal died on 19th January, 2009 during the investigation of the case and in his place his son Kavinder Lal (PW-22) was associated in the investigation of the case.

19. The permission to set-up cement plant by Gujarat Ambuja Cement was also found to be expedited in haste allegedly on receipt of bribe. In the matter of installation of modified Effluent Treatment Plant by Mohan Meakin, no action was taken by the concerned Department and it so happened on account of accused-respondent No.2 received `2 lacs from its owner. The case to grant permission to set-up mini steel plant by one Piyush Jain was also found to be given with a view to help him in lieu of the money received from him by the accused-respondents and also Shri Rangila Ram Rao, the then Industry Minister; however, no case could be registered against Mr. Rao for want of sufficient evidence.

20. The perusal of the transcript of the CD further reveals that lacs of rupees were taken in bribe by the accused-respondents in connivance with Shri Mohinder Lal. Though involvement of Shri Mohinder Lal was also established, however, as he died during the course of investigation, therefore, no challan could be filed against him.

21. In view of the investigation conducted in the matter, the investigating agency has arrived at a conclusion that accused-respondent No.1 has committed the offence punishable under Sections 10, 13(1)(d),(i), (ii) read with Section 13(2) of the Prevention of Corruption Act and 120-B of the Indian Penal Code, whereas accused-respondent No.2 under Sections 8 and 9 of the Prevention of Corruption Act and 120-B of the Indian Penal Code.

22. The report under Section 173 of the Code of Criminal Procedure was filed accordingly against both accused-respondents in the Court of learned Special Judge (forests), Shimla. This has led to registration of Corruption Case No.9-S/7 of 2010 against them.

23. Learned Special Judge after taking into consideration the police report and the documents annexed therewith and hearing learned Public Prosecutor as well as defence Counsel, has prima facie found a case under Sections 7, 13(1)(d) read with Section 13(2), 11 of the Prevention of Corruption Act and Section 120-B of the Indian Penal Code made out against accused-respondent No.1, whereas under Section 9 of the Prevention of Corruption Act and Section 120-B of the Indian Penal Code against accused-respondent No.2. Charges against both of them were framed accordingly to which they pleaded not guilty and claimed trial.

24. After holding full trial, learned Special Judge has arrived at a conclusion that the prosecution has failed to prove its case against accused-respondents beyond reasonable doubt and vide judgment dated 24th December, 2012 they have been acquitted from the charges framed against each of them.

25. As noticed at the very outset, the State has not preferred any appeal against the judgment of acquittal. It is the petitioner, who claims himself to be the complainant and ultimately a victim within the meaning of Section 2 (wa) of the Code, has filed the appeal under the proviso to Section 372 along with a petition under Section 378 (4) of the Code seeking leave to appeal. Since the appeal is barred by 96 days, the present petition has been filed with a prayer to condone the delay so occurred in filing the same.

26. Mr. A.P.S. Deol, learned Senior Advocate assisted by M/s. Virbahadur Verma and Adhiraj Singh Thakur, Advocates, has made many fold submissions to substantiate the question of maintainability of the appeal, the petitioner a victim within the meaning of Section 2(wa) of the Code and to persuade this Court that the appeal on condonation of delay may be entertained.

27. As the respondent-State and also accused-private respondents have raised the question of locus-standi of the petitioner to file the appeal and that he has not suffered any loss or injury including physical or mental, economic loss or impairment of his fundamental right through acts and omissions for which the accused persons were charged, hence not a 'victim' within the meaning of Section 2(wa) of the Code. The petitioner, however, claims himself to be a 'victim', hence, it is urged that the proviso to Section 372 extends a right in his favour to file the appeal. Besides, while raising the question of fairness of the trial and learned Special Judge allegedly ignored the merits, it is urged that on condonation of delay as occurred in filing the appeal, the same be decided on merits.

28. Therefore, the following points arise for consideration of this Court:

a. Whether the petitioner is a 'victim' within the meaning of Section 2(wa) of the Code and he has locus-standi to file an appeal under the proviso to Section 372 of the Code against the judgment of acquittal passed by learned Special Judge (Forests), Shimla on 24th December, 2012?

b. Whether the petitioner has been able to show sufficient cause to condone the delay, as occurred in filing the appeal?

c. Whether the merit of the case has been ignored by the trial Court?

d. Whether fair trial has not been conducted by the trial Court?

Point No.1.

Brief background:

29. There is no quarrel that proviso to Section 372 of the Code incorporated by way of amendment on and with effect from 31st December, 2009, extends a right in favour of a victim to prefer an appeal against the judgment passed by the Court acquitting the accused or convicting for a lesser sentence or imposing inadequate compensation either to the Sessions Court or to the High Court, as the case may be. In Cr.M.No.790-MA of 2010(O&M), titled ***M/s. Tata Steel Ltd***. v. ***M/s. Atma Tube Products Ltd. and others*** along with its connected matter Cr.M.A. No.547-MA of 2011(O&M), titled ***Kesar Singh*** v. ***Dheeraj Kumar,*** Punjab and Haryana High Court though has held that in an appeal filed under the proviso to Section 372 of the Code, the leave to appeal under Section 378 of the Code is not required to be obtained in a case of private complaint and the victim is a complainant. He has got two options, i.e. either to file appeal against the order of acquittal recorded by the trial Court to the High Court under Section 378 of the Code or to the Sessions Court, as the case may be under the proviso to Section 372 of the Code. The present, however, is a case where the proceedings against accused-respondents No.1 and 2 have been launched consequent upon registration of a criminal case against both of them. In a case of this nature, as per Division Bench of our own High Court in ***Joginder Singh*** v. ***State of Himachal Pradesh, 2013(2) RCR (Criminal) 60***, leave to appeal is required to be obtained by the victim for filing an appeal under the proviso to Section 372 of the Code.

30. Any how the main dispute herein is as to whether the petitioner is a victim within the meaning of Section 2(wa) of the Code and has locus-standi to file the appeal or not.

31. The urge to find out true answers to the questions so formulated vis-à-vis the law laid down by the Apex Court and various High Courts by way of judicial pronouncements led to lengthy arguments addressed on behalf of the petitioner by Mr. A.P.S. Deol, learned Senior Advocate assisted by bright young lawyers S/Shri Virbahadur Verma and Adhiraj Singh Thakur, Advocates, whereas the private respondents by Mr. R.S. Cheema, learned Senior Advocate assisted by S/Shri Ajay Kochhar, Satyen Vaidya and Vivek Sharma, Advocates and respondent No.3-State by S/Shri R.M. Bisht and P.M. Negi, learned Deputy Advocate General.

Respective contentions of learned Counsel representing the parties.

32. Though it is Mr. Cheema, who has raised the question of maintainability of the petition for condonation of delay and also leave to appeal as well as the appeal filed therewith, this Court allowed Mr. Deol to address arguments first in counter to the question so raised.

33. Mr. Deol has drawn the attention of the Court to the definition of the 'victim' as defined in Section 2(wa) of the Code, the same reads as follows:

> "Victim means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

34. The 'victim', therefore, is a person, who has suffered any loss or injury on account of an act or omission with which the accused persons have been charged. The emphasis, therefore, is on terms "loss" or "injury". The term "loss" has not been defined in

the Code. However, it is Section 23 of the Indian Penal Code, which defines term "wrongful loss" as follows:

> "**"Wrongful loss"**.- "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled."

35. The term "injury" is also defined in Section 44 of the Indian Penal Code, which reads as follows:

> "44. **"Injury".-** The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

36. According to Mr. Deol, Ext.PW-37/A is the complaint, which has been made by the petitioner and thereby set into motion the machinery. He is a public spirited person and as the acquittal of the accused persons has resulted in "loss" or "injury" to him, therefore, he is a 'victim' and as such entitled to file the appeal under the proviso to Section 372 of the Code.

37. In support of his contentions, he placed reliance on the decision of Full Bench judgment of Punjab and Haryana High Court in ***M/s. Tata Steel's*** case supra. In this judgment terms "victim", "wrongful loss" and "injury" have been discussed in detail and liberally construed.

38. Mr. Deol has also placed reliance upon a decision of the Apex Court in ***Sheo Nandan Paswan*** v. ***State of Bihar and others, AIR 1987 SC 877***.

39. Another precedent relied upon is the judgment of Bombay High Court in ***Balasaheb Rangnath Khade*** v. ***State of Maharashtra and others, 2012 (2) CCR 381***. It is the observations in paras 47 and 48 of this report which have been pressed into service.

40. Mr. Deol has also placed reliance on a Division Bench judgment of this Court in ***Joginder Singh's*** case supra. In this judgment also it is held that a victim has a right to file an appeal against a judgment of acquittal of the accused and also conviction for lesser offence as well as inadequacy of compensation on obtaining leave to appeal under Section 378 (4) of the Code.

41. Mr. Deol has also placed reliance on a Division Bench judgment of Gauhati High Court (Agartala Bench) in C.M. Appl (Crl) 89 of 2011 in Crl. A. No.13 of 2011, titled ***Gouranga Debnath*** v. ***State of Tripura and others*** and on that of Punjab and Haryana High Court in ***Ram Kaur @ Jaswinder Kaur*** v**. *Jagbir Singh @ Jabi and others (2010) 3 RCR (Cri.), 391 (DB).***

42. A Full Bench of Gujarat High Court in ***Bhavuben Dineshbhai Makwana*** v. ***State of Gujarat and others, 2013 Cri.L.J. 4225*** has also held that the victim can file an appeal under the proviso to Section 372 of the Code to challenge therein the order of acquittal or conviction for lesser offence or award of inadequate compensation, irrespective of the State has also filed an appeal against the same order.

43. Mr. R.S. Cheema, learned Senior Advocate, while repelling the arguments addressed by Mr. Deol on the question of maintainability of the delay petition, the petition for leave to appeal and the appeal, has strenuously contended that the petitioner is neither a complainant nor even an informant and rather a whistle blower, as the FIR against the accused-respondents was registered on the basis of the complaint made by Superintendent of Police, State Vigilance and Anti Corruption Bureau, Shimla. The petitioner's claim that he

being a public spirited person and as such is a complainant/first informant is not sustainable. The proceedings have been initiated by the petitioner merely to wreak-vengeance against the private respondents as he is under the impression that the criminal cases have been registered against him at their instance. Therefore, according to Mr. Cheema, the petitioner is inimical towards accused-respondents No.1 and 2. He according to Mr. Cheema, at the most is a whistle-blower. A whistle-blower cannot be termed to be a 'victim'. It is also urged that even if the petitioner is to be treated as an informant or a complainant in that event also he has no right to prefer an appeal as the proviso to Section 372 of the Code extends a right only in favour of a victim and not in favour of the complainant/ first informant. From the case law referred to by Mr. Deol, it is pointed out that there is not even a single decision in which a view that complainant has a right to file an appeal in terms of Section 372 of the Code, is taken. According to Mr. Cheema, in ***M/s. Tata Steel's*** case supra, the point in issue was qua the definition of victim, whereas in ***Balasaheb Rangnath Khade's*** case the question examined and answered was with regard to the requirement of obtaining leave to appeal by the victim to file an appeal under the proviso to Section 372 of the Code. The judgment rendered by Full Bench of Gujarat High Court in ***Bhavuben Dineshbhai Makwana's*** case deals only with the right of a victim to file an appeal and stated to be not relevant to the present controversy. The ratio of the law laid down by the High Court of Gauhati (Agartala Bench) in ***Gouranga Debnath's*** case deals only with the question that the father of a person murdered, is victim or not whereas that of the Apex Court in ***Sheo Nandan Paswan's*** case deals with the question of a non-informant to challenge an order of withdrawal of prosecution by the Prosecutor.

44. Per contra, Mr. Cheema has placed reliance on the judgment of the Apex Court in ***National Commission for Women*** v. ***State of Delhi and another, (2010) 12 SCC 599.*** It is held in this judgment that the impression 'victim' has to be interpreted in appropriate legal perspective. It was a case of atrocities against woman and the Apex Court has held that National Commission for Women was neither victim nor complainant to file the appeal. This judgment reads as follows:

> "11. An appeal is a creature of a Statute and cannot lie under any inherent power. This Court does undoubtedly grant leave to the appeal under the discretionary power conferred under Article 136 of the Constitution of India at the behest of the State or an affected private individual but to permit anybody or an organization pro-bono publico to file an appeal would be a dangerous doctrine and would cause utter confusion in the criminal justice system. We are, therefore, of the opinion that the Special Leave Petition itself was not maintainable."

45. Reliance has also been placed upon a Division Bench judgment of Punjab and Haryana High Court in CRM No.26221 of 2011 and CRM No.A-402-MA of 2011, titled ***Parmod Kumar*** v. ***Har Parkash and others***, in which petitioner Parmod Kumar, who had lodged the FIR, was not held to be a victim.

Discussion and the conclusion drawn:

46. Now analyzing the rival submissions and also the law cited at the bar, proviso to Section 372 of the Code extends an indefeasible right to the victim to prefer an appeal against an order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. There is no quarrel in this regard. The petitioner is a victim or not, is a question hotly contested on both sides.

47. It is well established from the law cited on both sides that it is not necessary that an informant or the complainant is always a victim and proviso to Section 372 of the Code confers a right upon the victim alone to prefer an appeal and not on an informant or a complainant. The appeal is a creation of statute and the right to file an appeal has to be determined with reference to the relevant statutory provisions.

48. In a case of prosecution launched on the registration of FIR and presentation of police report under Section 173 of the Code, it is only the State, which is competent to prefer the appeal and the statute does not confer power on a complainant or informant, who is not a victim, to prefer an appeal against the acquittal.

49. Adverting to the case in hand, of course, on the complaint Ext.PW-37/A made by the petitioner, he set into motion the machinery because it is consequent upon said complaint the Government ordered an enquiry into allegations in the complaint, which was conducted by Shri Anand Pratap Singh, Superintendent of Police, State Vigilance and Anti Corruption Bureau. He submitted the report and it is on the basis thereof FIR No.27 of 2009 under Sections 8, 9, 10, 13(1)(d)(i)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code was registered against accused-respondents No.1 and 2.

50. As per the decisions cited at the bar and the law as discussed hereinabove, laid down therein, the proviso to Section 372 of the Code empowers the victim to prefer an appeal against an order acquitting the accused or convicting for lesser sentence or imposing inadequate compensation. None of the precedents so cited except for ***M/s. Tata Steel Limited*** and ***Gouranga DebNath's*** cases supra, however, deal with term 'victim' within the meaning of Section 2(wa) of the Code. The Full Bench of Punjab and Haryana High Court in ***M/s. Tata Steel Limited***, after examining the term 'victim' within the meaning of Section 2(wa) of the Code and also words "loss" and "injury" within the meaning of Sections 23 and 44 of the Indian Penal Code with the help of the case law relied upon has held that words "loss" and "injury" used in Section 2(wa) are synonymous and that a person, who has suffered an injury in body or mind or reputation or to his/her property, is a 'victim' within the meaning of Section ibid. No doubt, as per law laid down by the Full Bench, 'victim' is a person not only suffered with an injury in body or mind or to the property, but reputation also, is a victim. This judgment reads as follows:

> "47. Section 2(wa) of the Code defines 'victim' to mean a person who has suffered any loss or injury caused by the reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her 'guardian' or 'legal heir'. We find on its plain reading that the Legislature has classified the 'victim' in two categories i.e. (i) a person who has suffered any loss or injury caused by the act or omission attributed to the accused; and (ii) the 'guardian' or 'legal heir' of such 'victim'. The correct understanding of the first part of the term "victim" is contingent and is subject to the true scope of the words "loss" or "injury" contained therein. Both these words are not denied in the Code, however, its Section 2(y) says that "words and expressions used herein and not denied but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code".
>
> 48. Section 23 IPC defines "wrongful loss" and it says that "wrongful loss" is the loss by unlawful means of property

> to which the person losing it is legally entitled". It is further explained that "a person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property". According to Section 44 IPC, the word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property". It is, thus, in the context of offences against property, especially under Section 418 and 'mischief' as defined in Section 425 IPC that the term 'wrongful loss' has been used in the Penal code. The Legislature while defining 'victim' in Section 2(wa) of the code has used the word 'any loss' before 'or injury' and has not restricted it to 'wrongful loss' only. We, thus, find that the words 'loss' and 'injury' used in Section 2(wa) are synonymous. This view is also fortified by the use of wide term 'any loss' in clause (b) as compared to 'the loss' in clause (c) of Section 357(1) of the Code.
>
> 49. It is so acte clair that a person who has suffered any injury in body or mind or reputation or to his/her property or if such person has been caused loss of property, to which he is legally entitled to, unlawfully at the hands of another person who has charged as an accused, is the 'victim' within the meaning of Section 2(wa). Similarly, if as a result of the aggravated form of victimization, such 'victim' of first part does not survive, the second part of the definition of 'victim' as defined in Section 2(wa) of the Code substitutes the first part and becomes operative whereupon the guardian (if such 'victim' was a minor or of unsound mind) or the legal heirs of the deceased victim, as the case may be, step-in for the 'victims' for the varied purposes under the Code".

51. In ***Gouranga Debnath's*** case, Gauhati High Court (Agartala Bench), while giving a wider interpretation to the term 'victim', has observed that the 'victim' is a person, who individually or collectively have suffered hard, including physical or mental injury, emotional suffering, economical loss or substantial impairment to his fundamental rights through the acts or omissions in conflict with criminal law. As a matter of fact, this was the meaning assigned to term 'victim'. This judgment reads as follows:

> "41. In the case of **Smt. Ram Kaur**, the High Court of Punjab and Haryana while examined the Section 2(wa) of the Code took note of the Minutes of the 96th Plenary meeting on 29th November, 1985 of the General Assembly of the United Nations wherein the United Nations made a Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power, recognizing that millions of people throughout the world suffer hard as a result of crime and the abuse of power and that the right of these victims have not been adequately recognized and also that frequently their families, witnesses and other who aid them are unjustly subjected to loss, damage or injury. The Assembly affirmed the necessity of adopting national and international norms in order to secure universal and effective recognition of and respect for, the

rights of victims of crimes and abuse of power. In the said declaration, the word 'victim' was defined as under:

> 6.2:- 6.2 The Declaration defines victims as "person who, individually or collectively, have suffered hard, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power".

42. The aforesaid definition of victim has been discussed in 154th Report of Law Commission, but the legislation has not adopted the said definition and have given a restricted meaning of the word "victim" means only a person, who has suffered any loss or injury caused by a reason of the act or omission of the offender and victim includes his or her guardian or legal heir, which in fact subsequently incorporated in the amendment of the Code by way of inserting the clause (wa) of Section 2 of the Code.

43. A joint reading of Smt. Ram Kaur (supra) and Section 2(wa) of the Code, we are of the opinion that person who has suffered loss due to a crime is obviously a victim and more particularly we are also in agreement with Mr. Kar Bhowmik as well as Mr. Deb that in Section 2(wa) of the Code, there are two parts. One part is relating to victim who has suffered loss and injury and by way of other parts, the Legislature expanded the word 'victim' even to the persons who are the guardian and legal heirs."

52. In CRM No. 26221 of 2011 and CRM No.A-402-MA of 2011, titled ***Parmod Kumar*** v. ***Har Parkash and Others***, Punjab and Haryana High Court has held as follows:

> "In terms of the proviso to Section 372 of the Code of Criminal Procedure ("Cr. PC" – for short) only a 'victim' can file an appeal. 'Victim' has been defined in Section 2 (wa) Cr.PC to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

53. In rest of the judgments cited on behalf of the petitioner, the only legal question dealt with pertains to the entitlement of a victim to prefer an appeal against a judgment of acquittal under the proviso to Section 372 of the Code, qua which there is not much quarrel, hence need no further elaboration.

54. The question, however, arises that the petitioner before this Court is covered by the meaning so assigned to term 'victim' or not. The answer to this poser in all fairness and in the ends of justice would be in the negative for the reason that irrespective of the complaint Ext.PW-37/A having been made by him, he is not a complainant nor the case is registered at his instance. He at the most is a whistle blower. On going through the reply to this petition filed on behalf of accused-respondents No.1 and 2, the petitioner is an accused in criminal cases registered vide FIR No. 3 of 2003 under Sections 465, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR 15 of 2003 under

Sections 420, 467, 468, 471, 120-B of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No. 27 of 2005 under Sections 420, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No.11 of 2006 under Sections 420, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No.1 of 2004 under Sections 420, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No.4 of 2003 under Sections 420, 467, 468, 471, 120B of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, and FIR No.2 of 2004 under Sections 420, 467, 468, 471, 120B of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, in Police Station, Enforcement North Zone, Dharamshala. Therefore, all these cases were registered against him at a time when accused-respondent No.1 was the Chief Minister of this State. Not only this, but three Civil Suits bearing No.5 of 2004, 5 of 2005 and 8 of 2005 have been instituted by the petitioner against accused-respondent No.1. It can reasonably be believed that both accused-respondent No.1 and the petitioner are inimical to each other. Therefore, the possibility of he having initiated these proceedings against the accused-respondents merely to wreak-vengeance against them cannot be ruled out. Although, the kind of "loss" and "injury" as discussed by the Full Bench of Punjab and Haryana High Court in ***M/s. Tata Steel Limited*** and Gauhati High Court in ***Gouranga Debnath's*** case have not been suffered by the petitioner and at the most he can only be said to have suffered with mental injury or emotional suffering and for that matter even every citizen suffers such loss and injury if an offence of the nature already committed by the accused-respondents is found to be committed by a person occupying such a high position, yet keeping in view that the petitioner has not set the machinery in motion in the capacity of a public spirited person and rather on account of he being inimical to the accused-respondents, he cannot be termed as 'victim' within the meaning of Section 2(wa) of the Code nor competent to prefer an appeal under the proviso to Section 372 of the Code.

55. Of course, charges against accused-respondents No.1 and 2 are that of corruption, therefore, if any "loss" or "injury" including the emotional loss or mental injury is caused by their acquittal, it cannot only be to a particular individual, like the petitioner, but also to the public at large. As already said, the term 'victim' is wide enough and to be construed liberally in a case having charges of corruption that too against a person occupying high position and at the helm of affairs. What to speak of complainant or informant having suffered loss on account of acquittal of an accused from the charge of this nature, any one else may also feel aggrieved, however, this alone is not sufficient because under the proviso to Section 372 of the Code, it is a victim alone competent to prefer appeal. In this case since the petitioner is inimical to accused-respondents No.1 and 2, therefore, if he claims himself to be a 'victim', it is difficult to believe. I am, therefore, in agreement with Mr. Cheema that the petitioner is not a victim within the meaning of Section 2(wa) of the Code for the reason that an informant or complainant has no right to prefer an appeal. The amendment empowers only a 'victim' and none else to prefer an appeal, not a complainant or first informant that too when the criminal proceedings were launched consequent upon the investigation conducted on registration of FIR. It is worth to mention here that in ***National Commission for Women*** v. ***State of Delhi and another***, supra the Apex Court has not held the National Commission for Women as 'victim' in-spite of that case being that of atrocities/crime against women. To my mind in that case the National Commission was on better footing as compared to the petitioner in the case in hand.

56. In another precedent cited by Mr. Cheema, **Parmod Kumar,** at whose instance the FIR was registered, was not held to be a victim by the Punjab and Haryana High Court.

57. As regards ***Sheo Nandan Paswan's*** case supra, the same also does not deal with the questions arising in the present case at all. In this case, learned Public Prosecutor moved an application for withdrawal of prosecution, which was opposed by ***Sheo Nandan Paswan***. The said application was allowed and the accused Dr. Jagannath Misra and others were ordered to be discharged. Sheo Nandan Paswan filed a revision against the said order, which was dismissed by the High Court. Sheo Nandan Paswan challenged the orders of learned Courts below before the Hon'ble Supreme Court. Therefore, the questions involved in ***Paswan's*** case were entirely different and dealt with the locus standi of a non-informant to challenge an order of withdrawal of prosecution. It was not a case of an appeal against acquittal. The reference by the Hon'ble Supreme Court in para 14 to a decision of the Constitution Bench in ***A.R. Antulay's*** case stating that anybody could set the machinery of law in motion on commission of a crime and file the complaint, does not render any assistance to the petitioner, who has to plead his case on the basis of a statutory right to file an appeal.

58. In view of what has been said in para supra, it would not be improper to conclude that the right to file an appeal is creature of statute and the same need determination with reference to the statutory provisions. In a case, where the prosecution is launched on the basis of an FIR, it is only the State, which can prefer an appeal against the acquittal and not the complainant or informant, who is not a victim. Therefore, when the petitioner is not proved to be a victim, he is not entitled to prefer an appeal under the proviso to Section 372 of the Code against the acquittal of the accused-respondents. This takes us to the second question which pertains to the delay as occurred in filing the appeal. **Point No.2.**

Brief background:

59. After having said that the petitioner is not a victim within the meaning of Section 2 (wa) of the Code and as such not competent to file the appeal, it is deemed appropriate to go into the question of limitation also.

60. Now coming to the question of delay the reasons therefor as mentioned in paras 2 to 4 of the petition read as follows:

> "2. That the applicant received knowledge of the judgment dated 24.12.2012 through Newspaper when he was attending to his sick wife who was undergoing treatment for a serious ailment at PGI, Chandigarh during the months of Jan-March, 2013.
>
> 3. That the applicant had no access to the file record since he had not engaged any private counsel for prosecuting this case. On receiving knowledge that the State of Himachal Pradesh which is ruled by Sh. Virbhadra Singh (respondent No.1) and who is also holding charge of Home Department would not let the prosecution department to file any appeal against his acquittal, the petitioner has come forward as a 'victim' to prefer an appeal against the judgment of acquittal. The competent authority to give fitness/unfitness certificate for filing appeal in the High Court was special public prosecutor, appointed in the case by present Govt. after declaration of result of State Assembly on 23.12.2012. The said prosecutor was appointed by the Govt. headed by Sh. Virbhadra Singh by Home Department which intern was headed by Respondent No. 1. Thus the

prosecutor and the accused became one and the same having common interest not to peruse the case in effectiveness.

The State Govt. department of Home is thus happy to oblige the accused in this case i.e. Respondent No. 1 and 2 by not filing any appeal against the acquittal and has let the period of limitation expire conveniently for obvious reasons. In this peculiar circumstance the delay in filing the appeal may kindly be considered in the light of above stated facts.

4. That although Section 372 Cr.P.C does not provide a period of limitation for filing an appeal by the victim. However, the period as provided under Article 114 of the Limitation Act has been made applicable by certain decisions rendered by the Hon'ble High Courts in the country. Full Bench of the Gujarat High Court in the case of **Bhavu Ben Dinesh Bhai Makwana vs. State of Gujarat Crl Appeal No. 238 of 2012 and 608 of 2012** has held that the period of 90 days should be a reasonable period for the victim to file an appeal since the said period is the longest period of limitation for filing an appeal prescribed by the legislature.

This view is based upon the well recognized principles of criminal jurisprudence (Crime never dies), the **Maxim "nullum tempus qut locus occurrit regi"** (Lapse of time is no bar to Crown in proceedings against offenders) is an age old rule embedded in criminal justice delivery system. The public policy behind this rule is that a criminal offence is considered as a wrong committed against the State and the Society. The aforesaid rule of prudence has been duly acknowledged by the Parliament as it has prescribed no period of limitation for filing an appeal under proviso to Section 372 of the Code against an order of acquittal. It would be pertinent to mention here that the applicant/appellant has got the Photostat copy of the judgment in the month of August, 2013."

61. The response on behalf of accused-respondents is that not only the petition but also the appeal is mala fide, filed with an ulterior motive to settle score with them as he is under the impression that the criminal cases registered against him during the period 2003 to 2006 detailed in earlier part of this judgment were registered at the behest of accused-respondent No.1. It is denied that the petitioner acquired knowledge of passing judgment of acquittal during the period January-March, 2013. As averred in reply to the petition, the case of the accused-respondents is that the petitioner appeared as PW-37 on 24th December, 2012 in the Court. The impugned judgment was announced on that day itself. The judgment so delivered was given wide publicity in Print and electronic media on 25th December, 2012. The petitioner, therefore, was fully aware about passing of the judgment on 24th December, 2012 and he has filed the appeal due to personal grudge and vindictive attitude against the accused-respondents. The petitioner's claim that he is a victim within the meaning of Section 2(wa) was also denied being wrong. The allegations against the accused-respondents and other functionaries of the State are stated to be baseless, malicious and defamatory. The averments that accused-respondent No.1 having taken over as Chief Minister of Himachal Pradesh and Minister in charge of Home Department, the department of Home obliged him by not filing the appeal against his acquittal, have also been denied being wrong. In this behalf, it is submitted that since the

competent authority had found the present a case of no evidence, hence rightly decided not to file appeal. It is denied that no period of limitation is prescribed for filing an appeal under the proviso to Section 372 of the Code and stated that the period of limitation as provided under Article 114 of the Limitation Act is 90 days. It is also denied that the petitioner got Photostat copy of the judgment in August, 2013. He rather intentionally and deliberately suppressed the source from where he got the copy of the judgment. The copy of the judgment annexed to the appeal is shown to have been prepared on 31st December, 2012. Therefore, according to accused respondents, the petitioner has no right to file the appeal. Otherwise also, the petition discloses no cause or reason muchless sufficient cause or reason for condonation of delay.

62. The respondent-State in preliminary submissions has come forward with the version that on receipt of the copy of judgment of acquittal, the District Attorney has examined the matter and opined that it was not a fit case for filing the appeal. The opinion of District Attorney was forwarded to Additional Director General, State Vigilance and Anti-Corruption Bureau, Himachal Pradesh and was examined in Vigilance Headquarters by Joint Director (Prosecution). The file along with the opinion of Joint Director was sent to Additional Chief Secretary (Home). The Home Department has forwarded the matter to Law Department for seeking opinion. In the opinion of the Law Department, it was a case of no evidence; therefore, a thoughtful and conscious decision not to file appeal by the State was taken.

63. The petitioner should have been vigilant and approached the Court within the reasonable time for redressal of his grievances. He however, remained negligent. Otherwise also, the present being a police case, it is only the victim, who alone is competent to file an appeal under the proviso to Section 372 of the Code. The petitioner in this case is not a victim, hence not competent to file the appeal. It is denied that the Home Department has obliged the accused-respondent No.1 by not filing the appeal against the judgment. It is also denied that no limitation is prescribed for filing an appeal under the proviso to Section 372 of the Code. It is submitted that the procedure as prescribed under Section 378 of the Code for filing the appeal against the acquittal is applicable for filing the appeal under the proviso to Section 372 of the Code also.

64. In rejoinder to the reply filed on behalf of the accused/respondents, while pointing out the alleged revengeful and vindictive attitude of accused respondent No.1 on becoming Chief Minister of the State, the instances of initiation of criminal/departmental proceedings against Dr. D.S. Minhas, the then Director General of Police, Himachal Pradesh, who allegedly has ordered the registration of FIR No.27 of 2009 against the said accused and monitored the investigation conducted therein, Shri I.D. Bhandari, on the charges of snooping upon certain politicians now in power, Inspector Daya Sagar (Retd.), the Investigating Officer., who allegedly have been charged with recording statements of Brigadier Kapil Mohan and Shri P.C. Jain, the witnesses examined by the prosecution in the trial against the accused/respondents allegedly falsely and Shri Hardesh Bisht, the then Superintendent of Police, SIU one of the Investigating Officer, who filed final report under Section 173 of the Code against accused- respondents No.1 and 2. Therefore, the complaint is that, it is not the petitioner, but the accused-respondent No.1, who is vindictive and inimical not only against the petitioner but also against all those who any how or other monitored/investigated the case FIR No. 27 of 2009, which was registered against him and his wife Pratibha Kumari, accused No.2 on taking over as Chief Minster of the State.

65. The representation Annexure P-3 to the rejoinder highlighting the alleged acts of vindictiveness on the part of accused-respondent No.1, made by Dr. D.S. Minhas to Shri Anil Goswami, Secretary (Home) to the Government of India against the communication

made by respondent-State for seeking permission to charge-sheet Dr. Minhas. Annexure P-4 (Colly.) is a communication addressed to Additional Superintendent of Police, Police Station, State Vigilance and Anti-Corruption Bureau, Shimla- 2, with a request to serve charge-sheet upon Shri Daya Sagar, aforesaid and Annexure P-5, copy of FIR No.5 of 2014 registered against Shri Hardesh Bisht, Superintendent of Police, SIU and Shri Daya Sagar, Inspector (Retd.), aforesaid have also been pressed into service.

Respective Contentions of learned Counsel for the parties.

66. Mr. Deol, learned Senior Advocate has argued that the petitioner have not engaged any counsel in the trial Court nor have any access to the record and decided to file appeal against the judgment of acquittal only on coming to know that respondent-State will not file the appeal. Therefore, the delay, which according to Mr. Deol, is not inordinate and on the other hand the offence like immorality and corruption by the persons occupying high position the term "sufficient cause", has been sought to be liberally construed. Therefore, on condonation of delay the appeal has been sought to be entertained and decided on merits.

67. In order to buttress the arguments so addressed, Mr. Deol, has placed reliance on the judgment of the Apex Court in ***State of Tamilnadu*** v. ***N. Suresh Ranjan and others***, ***2014 (1) RCR (Cr.) 572***. While answering the issue of delay, the observations made by Hon'ble Apex Court are as under:-

> "10. The contentions put forth by Mr. Sorabjee are weighty, deserving thoughtful consideration and at one point of time we were inclined to reject the petitions filed for condonation of delay and dismiss the special leave petitions. However, on a second thought we find that the validity of the order impugned in these special leave petitions has to be gone into in criminal appeals arising out of Special Leave Petitions (Criminal) Nos. 3810-3811 of 2012 and in the face of it, it shall be unwise to dismiss these special leave petitions on the ground of limitation. It is worth mentioning here that the order impugned in the criminal appeals arising out of Special Leave Petition (Criminal) Nos. 3810-3811 of 2012, State of Tamil Nadu by Ins. of Police, Vigilance and Anti Corruption v. N. Suresh Rajan & Ors., has been mainly rendered, relying on the decision in State by Deputy Superintendent of Police, Vigilance and Anti Corruption Cuddalore Detachment vs. K. Ponmudi and Ors.(2007-1MLJ-CRL.-100), which is impugned in the present special leave petitions. In fact, by order dated 3rd of January, 2013, these petitions were directed to be heard along with the aforesaid special leave petitions. In such circumstances, we condone the delay in filing and re-filing the special leave petitions."

68. The reliance has also been placed on the judgment again that of the apex Court in ***State (NCT of Delhi)*** v. ***Ahmed Jaan, 2008 Cri.L.J, 4355.*** In this judgment, the Apex Court, after taking note of the law laid down in various judicial pronouncements has elaborated the expression "sufficient cause" as follows:-

> ".....The expression "sufficient cause" is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose for the existence of the institution of courts. It is

> common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. 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 because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the State is the petitioner. The delay was accordingly condoned."

69. Similar is the ratio of the judgment again that of the Apex Court in ***State of Nagaland*** v. ***Lipok A.O. and others (2005) 3, SCC, 752***, which reads as follows:

> "15. It is axiomatic that decisions are taken by officers/agencies proverbially at a slow pace and encumbered process of pushing the files from table to table and keeping it on the table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be

> laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal, needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or petition since he is a person legally injured while the State is an impersonal machinery working through its officers or servants."

70. Mr. Deol then placed reliance on a full Bench judgment of Gujarat High Court in ***State of Gujarat*** v. ***Kaliashchandra Badriprasad, 2001 (1) RCR (Criminal) 162*** and on that of Gauhati High Court in ***Gouranga Debnath's*** case supra.

71. Reliance has also been placed on a Division Bench judgment of our own High Court in ***Joginder Singh's*** case cited supra.

72. On the other hand Mr. Cheema, learned Senior Advocate has very fairly submitted that he would have not raised any objections to the plea of condonation of delay, but the petition, according to him, does not disclose sufficient cause and rather has been filed for extraneous consideration with mala fide intention to harass the accused-respondents on account of enmity. The very foundation that the petitioner came to know about the passing of impugned judgment somewhere in January-March 2013, on the face of it is false, as according to Mr. Cheema, the acquittal of the accused followed by taking over as Chief Minister, Himachal Pradesh by accused-respondent No.1 on the next day i.e. 25th December, 2012, the judgment was given wide publicity not only in print media but also in electronic media.

73. The day when the judgment was pronounced i.e. 24th December, 2012, the petitioner was present in the Court as a witness. The copy of judgment is not certified one. The same is Photostat copy having been prepared on 31st December, 2012. There being no explanation as to who applied for the same and when its copy was supplied, renders the explanation so coming forth absolutely false. The petitioner is a convict and his conviction even affirmed by the High Court also, of course the appeal he filed is pending disposal in the Hon'ble Supreme Court. His perception is that the criminal cases against him were registered at the instance of accused-respondent No.1. He, according to Mr. Cheema, is inimical to the accused-respondents and betting for personal interest and not for the cause of public at large. Mr. Cheema has fairly conceded that the Courts have wider discretion in the matter of condonation of delay; however, the discretion should also be exercised judiciously depending upon the facts and circumstances of each case. According to Mr. Cheema, in the present case neither any plausible explanation is forthcoming nor is sufficient cause found to have been shown. It has, therefore, been urged that the delay cannot be condoned. Mr. Cheema has placed reliance on the judgment of Apex Court in ***Oriental Aroma Chemical Industries Limited*** v. ***Gujarat Industrial Development Corporation and another (2010) 5 SCC, 459.*** Another judgment as relied upon is again that of Apex Court in ***Lanka Venkateswarlu (dead) by LRs***. v. ***State of Andhra Pradesh and others, (2011) 4 SCC 363.*** Reliance has also been placed on the judgment of Apex

Court in ***Maniben Devraj Shah*** v. ***Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157***.

74. On the similar lines are the arguments addressed qua this aspect of the matter on behalf of the respondent-State.

Discussion and the conclusion drawn:

75. The above stated factual and legal position takes us to the adjudication of the question of condonation of delay. The present is a case where the delay of 96 days has occurred in filing the appeal. The same has been sought to be condoned on the above grounds in the petition discussed in para supra.

76. It is well settled at this stage that a party seeking the condonation of delay has to show "sufficient cause" warranting condonation of delay.

77. As per the law laid down by the Apex Court in ***Ahmed Jaan's*** case supra, 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 also be applied in a rational common sense by taking pragmatic approach to do substantial justice.

78. To the similar effect is the ratio of the judgment again that of Apex Court in ***Lipok A.O's*** case supra relied upon in support of the case of the petitioner. Be that as it may, however, one should also not lost sight of the fact that the expiry of the period of limitation prescribed for filing appeal/petition results in existence of a valuable right to the opposite party and such right should not be taken away by condoning the delay without sufficient cause. It is apt to make reference to the judgment of Apex Court in ***P.K. Ramachanderan*** v. ***State of Kerala, AIR 1998 SC, 2276***. It is held in this judgment that the law of limitation may harshly affect a particular party, but it has to be applied with all rigors when the statute so prescribes and the Courts have no powers to extend the period of limitation on equitable grounds.

79. Here the delay has been sought to be condoned on the following grounds:

i) the petitioner came to know about the judgment under challenge somewhere in January-March 2013 at such a time when he was looking after his ailing wife in PGI Chandigarh;

ii) the trial was being conducted by the public prosecutor and as he had not engaged any counsel hence not having the record of the case;

iii) photocopy of the judgment was made available to him in the month of August, 2013; and

iv) on coming to know that the Home Department with a view to oblige accused respondent No.1, who by that time took over as the Chief Minister of Himachal Pradesh, not opted for filing appeal against the judgment of acquittal.

80. Now applying the law as discussed hereinabove in the light of the explanation so forthcoming, taking a lenient view of the matter and pragmatic approach as well keeping in mind that the matter should normally not be closed merely that it is time barred and the merit should not be made to suffer, this Court finds itself unable to agree with the explanation as set forth in the petition for seeking the condonation of delay for the reason that the same does not constitute "sufficient cause" as is required to be shown for

seeking the condonation of delay. In the case in hand, the explanation as forth coming is absolutely vague, cryptic and highly unbelievable. The judgment under challenge has been passed on 24th December, 2012. The petitioner on that day was very much present in the Court because he appeared as one of the witnesses. The pronouncement of judgment on 24th December, 2012, followed by oath taking ceremony of accused-respondent No.1 on the very next day, i.e., 25th December, 2012, were such events, which were given wide publicity in print and electronic media. The petitioner, a Himachali and being an IAS Officer (Retired) can reasonably be believed to have gone through the reports in print media and the news in electronic media regarding acquittal of the accused-respondent by learned trial Court on 24th December, 2012. The plea that he came to know about the acquittal of the accused respondents somewhere during January-March, 2013 is not only palpably false but vague, evasive and absurd also. Therefore, on that basis the delay as occurred in filing the appeal could have not been condoned even if the appellant is held to be a 'victim' having right to prefer appeal against the judgment of acquittal. It may be that the petitioner was not represented by a counsel nor had any access to the records of the case; however, no explanation is forthcoming to show as to how and what efforts he made to obtain the record and from whom. It is also missing that he applied for the certified/uncertified copies of record on a particular day and the date on which the same was supplied to him.

81. Surprisingly enough, the petitioner even does not have certified copy of the judgment under challenge because it is only a photocopy of certified copy, which has been filed along with the appeal. It is not known as to who applied for the same. The stamp of copying agency, however, reveals that the certified copy was complete for delivery on 31st December, 2012 and was actually delivered on 23rd February, 2013. The petitioner is persuading this Court to exercise discretion in his favour in the matter of condonation of delay even without disclosing the name of the person, who has supplied him the Photostat copy of the judgment. There is no explanation as to why he himself did not apply for the certified copy of the judgment under challenge. It is again absurd and evasive that he filed the appeal on coming to know that the Home Department with a view to oblige the accused-respondent No.1, has not preferred appeal against the impugned judgment because he has not disclosed the source of such information and also when he came to know about it. The present is a case where there is nothing on record to show that since when the limitation start running because here the petitioner has neither applied for certified copy of the judgment nor is it his case that he came to know on a particular date about passing of the impugned judgment or the date when he received information qua the State Government having decided not to prefer an appeal against the impugned judgment. The explanation for condonation of delay as forth coming is therefore, neither plausible nor cogent and reliable nor constitute sufficient cause. The grounds raised rather are absolutely vague, absurd, cryptic and evasive also. The present, therefore, is a case where the petitioner has miserably failed to show sufficient cause warranting the condonation of delay as occurred in filing the appeal. Therefore, this is not a case warranting liberal construction of expression "sufficient cause" nor any ground for taking pragmatic and justice oriented approach as held by the Apex Court in ***Lipok AO's*** and ***Ahmed Jaan's*** cases supra, is made out. The present rather is a case where sufficient cause has not been shown nor from the petition any ground is made out warranting condonation of 96 days' delay as occurred in filing the appeal. The present rather is a case where an order condoning the delay would amount to take away a valuable right having accrued in favour of the accused-respondents on the expiry of the period prescribed for filing the appeal. In the given facts and circumstances, the right so accrued in favour of the accused respondents cannot be taken away.

82. Mr. Deol has also placed reliance on a Full Bench judgment of Gujarat High Court in ***Kaliashchandra Badraiprasad's*** case supra. However, the law laid down therein

is not attracted in this case for the reason that the question referred to the full bench in that case was as to whether delay can be condoned without hearing an accused or not, which has been answered in affirmative while holding that the delay cannot be condoned without hearing the accused and also that in a case of acquittal rather the delay should not be condoned without sufficient cause. The law laid down in this judgment is hardly of any help to the case of the petitioner and rather substantiate the cause of the accused-respondents for the reason that the petitioner has failed to show sufficient cause and as such the delay cannot be condoned.

83. The question for determination before a Division Bench of Gauhati High Court in ***Gouranga Debnath's*** case was with regard to exclusion of time by extending the benefit of Section 470 of the Code in certain cases because in that case initially instead of filing an appeal, revision petition was filed, which later on was sought to be withdrawn and dismissed as such. It is in this backdrop, it was held that on coming to know the revisional proceedings and the appeal cannot be pursued together, the petitioner having withdrawn the revision petition in good faith, was held entitled to the benefit of Section 470 of the Code. This, however, is not the point in issue in the case in hand.

84. Coming to the Division Bench judgment of our own High Court in ***Joginder Singh's*** case supra, it has been held that the procedure as prescribed for filing the appeal under Section 378 of the Code is applicable even to an appeal under the proviso to Section 372 of the Code. Therefore, the limitation for filing an appeal under the proviso to Section 372 has been held to be 90 days. Anyhow, there is no quarrel on this score as the petitioner himself submits in the petition that the period of limitation prescribed for filing appeal under Section 372 of the Code is 90 days.

85. Now coming to the judgment of Apex Court in ***N. Suresh Ranjan's*** case, supra, true it is that the delay of 2171 days as occurred in filing the appeal has been ordered to be condoned, however, on consideration of the facts that the accused, a former Minister, charge-sheeted with the allegations of corruption and in possession of disproportionate assets in his own name and also in the name of his wife, friends and sons as compared to their known sources of income, was discharged by the trial Court and the order affirmed by the High Court. It is in the nature of the allegations and gravity of the offence committed, the Apex Court, while holding that the validity of the order impugned should be gone into in appeal, has condoned the delay.

86. The present is not a case of discharge of the accused-respondents and rather they both have faced the charge and it is on appreciation of the evidence available on record learned trial Court has acquitted them from the charge.

87. On behalf of the accused-respondents reliance has been placed on a judgment rendered in ***Oriental Aroma Chemical Industries Limited*** v. ***Gujarat Industrial Development Corporation, Lanka Venkateswarlu (dead) by LRs.*** v. ***State of Andhra Pradesh and others*** and ***Maniben Devraj Shah*** v. ***Municipal Corporation of Brihan Mumbai's*** cases supra. The ratio of these judgments is also that while considering the petition for condonation of delay the Court should apply the law in a pragmatic manner to sub-serves the ends of justice and nothing beyond that.

88. The crux of what has been said hereinabove, therefore, would be that 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. In the case in hand there is nothing to infer that the delay is bonafide and occurred owing to the circumstances beyond the control of the petitioner. The petitioner, for the reasons

already recorded, seems to be inimical to accused-respondent No.1. The so called vindictive attitude of the said respondent towards the petitioner and other officers named in rejoinder to the reply filed by accused-respondents is not an issue to be discussed and decided in the present petition being not the part of the record of this case. The officers named in the rejoinder in case feel that in order to wreak-vengeance against them, they have been victimized by accused-respondent No.1 on account of they having monitored/ investigated the case registered against him vide FIR No. 27 of 2009, they are at liberty to have recourse to appropriate remedy available to them against the said respondent, in accordance with law. However, so far as this petition is concerned, the so called vindictive and revengeful attitude of the accused-respondents towards them cannot be treated a ground for condonation of delay. Therefore, even if the petitioner had been held to be a 'victim' and competent to file the appeal under the proviso to Section 372 of the Code in that event also the same should have not been entertained being time barred.

89. In view of what has been said hereinabove no case for condonation of delay, as occurred in filing the appeal, is made out. Therefore, the petition for seeking leave to appeal and the appeal itself being time barred cannot be entertained. Consequently, the petition being without any merit deserves to be dismissed.

Point No. 3.

Brief background:

90. Irrespective of the findings that the petitioner is not a victim within the meaning of Section 2 (wa) of the Code, hence not competent to file an appeal under the proviso to Section 372 of the Code and that sufficient cause has also not been shown for condonation of delay of 96 days as occurred in filing the appeal, it is deemed appropriate to examine the merits of the case also because the Apex Court in **Lipok A.O.'s** case supra has held that the Court should decide the matters on merits unless the case is hopelessly time barred and without merit.

Respective contentions of learned Counsel.

91. Mr. Deol, learned Senior Advocate has mainly emphasized on the transcripts of the CD and also the statement Ex.PW-22/A of late Mohinder Lal, the then Director (Industries), Himachal Pradesh, who as per the transcripts of CDs allegedly spoken with respondents/ accused and late Shri K.N. Sharma, the then OSD to accused respondent No.1 to prove the acceptance of bribe by both accused from Suresh Neotia, Vice President of M/s. Gujarat Ambuja Cement, P.C. Jain, its Chairman, late Shri Suresh Kapoor of Mohan Meakin and Piyush Jain, one of the applicants for allotment of mini Steel Plant etc. The report Ext.PW-32/E and PW-33/H qua analysis of voice samples of both the accused have also been pressed into service. According to Mr. Deol, out of 4 points formulated by learned Special Judge for adjudication no point pertains to the CD and it has vitiated the judgment under challenge, which according to him is perverse, hence not legally sustainable. It is further urged that tape is a document within the meaning of Section 3 of the Evidence Act, hence such evidence having come on record should have been relied upon. While arguing that tape-recorder is admissible in evidence, reliance has been placed on a judgment rendered by a Constitutional Bench of the Apex Court in **S. Partap Singh** v. ***State of Punjab, AIR 1964 SC 72*** and on the strength of the ratio thereof, contended that like any other document a tape-recorder is also document. The tape-recorder version should have not been ignored merely because of capable of being tempered with as according to Mr. Deol for that matter any other document is also capable of being tempered with. Reliance has also been placed on another judgment of the Apex Court in ***Yusufalli Esmail Nagree*** v. ***The***

State of Maharashtra, AIR 1968 SC 147, in which it has been held that if a statement is relevant and accurate tape-recorder of such statement, is also relevant and admissible.

92. Mr. Cheema, while repelling the arguments addressed on behalf of the appellant-petitioner has urged that Suresh Neotia of Ambuja Cement was neither associated during the course of investigation nor examined as a witness though was available. Shri S.S. Sodhi, General Manager (Personnel), Ambuja Cement (PW-18) though was examined, however, turned hostile and not supported the prosecution case. Though charge is that Shri Neotia paid a sum of Rs.3 lacs to accused-respondent No.1 in Himachal Bhawan Delhi, however, no evidence to substantiate the same is produced. It is further urged that again there is no evidence that Brigadier Kapil Mohan (PW-26) of Mohan Meakin through one Suresh Kapoor and in consultation with PW-30 H.N. Handa has paid a sum of Rs.2,00,000/- to accused Pratibha so that on account of non-installation of modified Effluent Treatment Plant (ET Plant) electricity and water supply to Brewery premises are not disconnected. Shri P.C. Jain, PW-25 of M/s. Gujarat Ambuja Cement has also not supported the prosecution case and turned hostile. It is further argued that P.C. Jain and Brigadier Kapil Mohan rather filed CWP Nos.145 of 2011 and 1856 of 2011 in this Court on the ground that they never made the statement under Section 161 of the Code with a prayer to direct the investigating agency to record their statements correctly. Major Vijay Singh Mankotia (PW-21) allegedly produced the audio-cassette before the Police and not CD. The audio-cassette was also ordered to be excluded from the evidence by the trial Court in its order framing charge, passed on 25th June, 2012 against the accused person.

93. In order to persuade this Court to discard the audio-cassette/CD as legal and acceptable evidence, reliance has been placed on a recent judgment rendered by the Apex Court in ***Anvar P.V***. v. ***P.K. Basheer and others, AIR 2015 SC 180***. It is urged that no doubt an electronic record is a documentary evidence under Section 3 of the Indian Evidence Act, however, whether it is genuine or not is a question to be taken into consideration in accordance with the legal provisions and also in the given facts and circumstances of the case.

94. Mr. Cheema, while disputing the authenticity of the audio cassette/CD has urged that the report Ex.PW-32/E cannot be relied upon particularly when as per the final report Ex.PW-33/H received from Forensic Science Laboratory, it was not possible to verify the authenticity of the audio recording in exhibits C/1 and A/1. While inviting the attention of this Court to the reply Ex.PW-32/G, in response to the quarries of the laboratory made vide letter Ex.PW-32/F, it is urged that the Forensic Science Laboratory was not apprised with correct position as at that time Mohinder Lal was also alive.

95. Mr. R.M. Bisht, learned Deputy Advocate General has also urged that Audio cassette has already been discarded by learned Special Judge being not a material piece of evidence. Original tape was neither sealed nor seized. According to Mr. Bisht, the bribe allegedly was obtained by accused respondents No.1 and 2 somewhere in 1989-90. At that time CDs were not in existence. Therefore, according to Mr. Bisht, it is for this reason the present was found to be a case of no evidence and as such no appeal was preferred by the respondent State.

Discussion and the conclusion drawn:

96. Now analyzing the rival contentions in the light of the given facts and circumstances and also evidence available on record, admittedly CD (Compact Disk) was not in existence in the year 1989-90 when the alleged recorded talk between Mohinder Lal and accused-respondent No.1, Mohinder Lal and accused-respondent No.2 and Mohinder Lal and Kedar Nath Sharma qua exchange of money had taken place. Of course, tape-recorder

used to be there at that time and as such the audio-cassette of recorded talk was being prepared. PW-21 Major Vijay Singh Mankotia is not sure that packet he received through secret source was audio-cassette or CD. According to him, when the document, which he understood audio-cassette played in the press-conference, the same was found to be a CD made by someone else. Even if it was an audio-cassette learned Special Judge has excluded the same from record being not admissible in evidence at the stage of consideration of charge, as is apparent from order dated 25th June, 2012. If it was a CD, the same again is not admissible in evidence for the reason that as per evidence available on record the same has been prepared on the basis of recording done on 1st January, 1995. Above all, CDs were not in existence during the years 1989-90, when the occurrence took place.

97. As noticed supra, the technology of CD was not in existence in the year 1989-90 when accused-respondents No.1 and 2 allegedly received bribe and committed offence. The CD being of 1st January, 1995 rather is belated and creation of undisclosed and unauthenticated version. No evidence is forth-coming that what was the device used for making the recording in the CD. Whether such device(s) was technically in order, again there is no evidence in this behalf. Who has made the recording, is also missing. According to PW-21 also, the CD might have been prepared by someone else.

98. The law on the question of admissibility of an electronic document in evidence is no more res-integra as the Apex Court in ***Anvar P.V.*** v. ***P.K. Basheer*** supra while taking note of the provisions contained under Sections 22A, 45A, 59, 65A and 65B of the Indian Evidence Act has held as follows:

> "**13.** Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a *non obstante* clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:
>
> (ii) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
>
> (iii) The information of the kind contained in electronic record or of the kind from which the information is

derived was regularly fed into the computer in the ordinary course of the said activity;

(iv) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(v) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A–opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements

> under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

99. The larger Bench of the Apex Court has overruled two-Judge Bench judgment of the same Court in ***State (NCT of Delhi)*** v. ***Navjot Sandhu alias Afsan Guru, (2005) 11 SCC 600*** and has further held as follows:

> "…Thus, in the case of CD, VCD, chip etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which the secondary evidence pertaining to that electronic record is inadmissible."

100. In the case before the Apex Court also certificate in terms of Section 65B of the Evidence Act was not produced in respect of the CDs relied upon, hence the Apex Court has held that the same cannot be admitted in evidence.

101. In this case the conditions specified under Section 65B (2) of the Evidence Act are not at all satisfied because nothing is there to show that the information in the CD was being regularly stored or processed in the computer or being regularly fed into the computer in the ordinary course of activity and that the computer at the relevant time was being operated properly or when not operated properly the break, if any, not effected either the record or the accuracy of its contents as well as that the information in the electronic record (CD in the present case) is reproduction of the information fed into the computer in the ordinary course of the activity. The certificate duly signed by a responsible official dealing with the operation of the relevant device within the meaning of Section 65B(4) of the Evidence Act identifying the statement contained in the CD, the manner in which CD was produced, device used for preparation *of the CD and its* production *by PW-21, who* does not know anything as to how the same is prepared and by whom and with what device, rendered the document inadmissible in evidence. It is not known as to who played the CD and maker of the statement has neither initialed the CD nor signed the transcript of the contents thereof. The CD during the course of enquiry and investigation remained unsealed throughout. The prosecution story reveals that it was unsealed when received by enquiry officer, remained unsealed during the course of enquiry and received unsealed by the Investigating Officer along with other records of the case. The CD Ext.PW-21/B, therefore, is not a document to be relied upon in evidence.

102. The Forensic Science Laboratory had sought for the following information before the CD/audio cassette is analyzed vide letter dated 9th September, 2008 (Ext.PW-32/F):

> "i) Recording device with which questioned sample was recorded is not provided which is essential to authenticate the recordings;
>
> ii) How and when it was recorded may be informed?
>
> iii) The control samples may be provided as per the transcription of the question sample."

103. The reply (Ex.PW-32/G) to the letter Ex.PW-32/F supra given by the Superintendent of Police, State Vigilance & Anti Corruption Bureau, reveals that the Bureau was not in a position to satisfy the three conditions find mentioned in the letter Ext.PW-32/F supra. Meaning thereby that neither the device used for making recording of CD nor origin of CD nor control samples as per transcription of the CD were available with the Vigilance Bureau. True it is that in the opinion of the Forensic Science Laboratory Ext.PW-

32/E qua the voice-samples Ext.Q2 and Ext.S2 were found to be that of the voice of accused respondent No.1, however, as regards the voice samples Ext.Q1 and Ext.S1 in the opinion of the examiner, most probably the same were that of the voice of accused-respondent No.2. However, the report Ext.PW-33/H is fatal to the prosecution case for the reason that as per the same it was not possible for the experts to verify the authenticity of the tape-recording version in the absence of phone call details and original recording device. The evidence as produced, therefore, is tainted. The prosecution rather has withheld the material required by the Central Forensic Science Laboratory as is apparent from the perusal of letter Ext.PW-32/F and PW-32/G. In the report Ext.PW-33/H, CD is marked as C/1, whereas the audio-cassette as A/1. In the opinion of the Scientific Officer against Item No.9 "Results of examination sub-paras vii., viii and ix", it could not be ascertained that the conversation in C/1 and A/1 was recorded at the instance of Mohinder Lal or at that of the accused-respondents. Also that the authenticity of the audio recording in Ext.C/1 and A/1 could not be verified in absence of phone call details and original recording device. Ext.C/2 and V/1 the specimen of voice recording were returned un-examined. Thus, there hardly remains any legal and acceptable evidence to arrive at a conclusion that the deal of accused-respondents with the representatives of Ambuja Cement, Mohan Meakin Brewery, and Mini-Steel Plant etc. had taken place through Mohinder Lal and that they obtained the bribe and extended undue favour to these industrial units.

104. The law laid down in ***S. Partap Singh's*** and ***Yusufalli*** **Esmail Nagree's** cases supra cited on behalf of the petitioner, is not at all attracted in the present case because the point in issue in ***S. Partap Singh's*** case was qua the tape-recording version capable of being tempered with and it is in that background held that like other documentary evidence tape-recording can also be tempered with, but it should not be taken to conclude that the tape-recordings are not legally admissible in evidence. In **Yusufalli Esmail Nagree's** case it is held that a tape-recorder statement if recorded accurately is also relevant and admissible. As a matter of fact, there cannot be any quarrel so far as the law so laid down in the judgments supra is concerned, however, for the detailed reasons hereinabove, in the case hand, CD/audio-cassette cannot at all be considered as legal and acceptable evidence.

105. Much has been said about the statement Ext.PW-22/A of late Mohinder Lal. The same reads as follows:

> "I have heard the CD today purported to have been converted from a tape recorded sometime in the year 1989. At that time there was no CD but only Tape Recorders were available. I do not know as to how and where it has been recorded. The contents of the CD contain prima facie my conversation with the then Chief Minister, his wife and Shri K.N. Sharma etc. Prima facie the voice in the CD is mine and as far as I remember the conversation has taken place. As regards the names of the persons and the detail thereof the same must have recorded by Rani Sahiba and may be obtained from her. The persons, who made contributions as far as I remember, were sent to the Chief Minister's house on various occasions and the present CD is a version of those occasions which happened and appears to have been recorded on various dates and made into one tape/CD. I am available for any further clarification based on my memory at any time as and when needed, as the matter relates to long time back."

106. It is seen that the CDs as per this statement were not available at that time. Mohinder Lal was not aware of as to where it was recorded. Although, he has said that so far

his memory, it was his conversation and the person who made contributions as far as he remembered were sent to the Chief Minister's house on various occasions and the recording also made on various dates, but made into one tape/CD. When the CD/audio-cassette has already been discarded, therefore, the statement of late Shri Mohinder Lal is hardly of any help to the prosecution case. He was not available to make statement in the Court. Though PW-22 Dr. Kavindra Lal, his son, has been examined to prove this document, however, the evidence as has come on record by way of his statement is also hear-say hence not admissible in evidence. Above all, the statement Ext.PW-22/A is vague. The maker of the statement late Shri Mohinder Lal could not recognize his voice with all certainty and rather said that prima facie the voice in the CD was his voice. It is, therefore, not safe to place reliance on such a statement. Nothing can be made out therefrom qua the demand, offer or acceptance of bribe by the accused persons. He repeatedly used the words "as far as I remember", "appears to have been recorded". The statement, therefore, is absurd also and no findings can be recorded on such statement.

107. There are contradictions in the statements of PW-31 I.D. Bhandari, the then Additional Director General of Police and PW-32 A.P. Singh, Superintendent of Police because as per the version of former, Mohinder Lal was interrogated by PW-32 A.P. Singh. He has not said that Mohinder Lal was interrogated in his presence, however, as per version of PW-31 he was called by the Additional Director General of Police to his office and before recording the statement of Mohinder Lal by him CD was already heard by Mohinder Lal. The statement of Mohinder Lal has not been endorsed by any police officer. Therefore, in the considered opinion of this Court the statement Ext.PW-22/A cannot be held to be admissible in evidence by any stretch of imagination.

108. If the CD/audio cassette is excluded from the record, there hardly remains any evidence connecting the accused-respondents with the commission of alleged offence. The charge under Section 7 of the Prevention of Corruption Act against accused-respondent No.1 is that while the Chief Minister of the State of Himachal Pradesh, he has obtained Rs.2 lacs towards illegal gratification from Shri Suresh Neotia of M/s. Gujarat Ambuja Cement for clearance of its cement plant at Darlaghat. The allegations are that Shri Suresh Neotia, Chairman of M/s. Gujarat Ambuja Cement, accompanied by PW-25 P.C. Jain met accused-respondent No.1, the then Chief Minister of Himachal Pradesh in Himachal Bhawan at New Delhi and Shri Neotia paid a sum of Rs.2 lacs to the said accused-respondent for early installation of the plant. Surprisingly enough, said Shri Suresh Neotia has neither been associated during the course of investigation nor examined as a witness.

109. Shri P.C. Jain, of course, has stepped into witness box as PW-25, however, has not at all supported the prosecution case, as according to him he never met the then Director (Industries) in the year 1989 nor any political executive, head of the State, in connection with seeking permission of IPARA (Industrial Projects Approval and Review Authority) nor entered into the financial deal with any functionary of the State in connection with seeking such permission. He had not talked with the Chief Minister also. He, therefore, turned hostile to the prosecution. In his cross-examination conducted by learned Public Prosecutor though it is admitted that Shri Suresh Neotia was the Chairman of M/s. Gujarat Ambuja Cement, however, it is denied that he accompanied by Shri Suresh Neotia met accused-respondent No.1 in Himachal Bhawan at New Delhi and that said Shri Neotia paid a sum of Rs.2 lacs to the said accused for early installation of the cement plant. When confronted with his statement Ext.PW-39/E recorded under Section 161 of the Code, he has denied making of such statement. It is also denied that he went to Holly-Lodge, the residence of the Chief Minister and met with accused Pritibha Singh to whom he paid Rs.3 lacs for seeking early clearance of IPARA permission. In a nutshell, Shri P.C. Jain has

denied all the suggestions put to him in his cross-examination, being wrong. In his further cross-examination conducted by learned defence Counsel he rather stated that writ petition Ext.RX was filed by him when he came to know from his son about the contents of the statement recorded by the police. The writ petition was filed on the ground that his statement was wrongly recorded by the police. Therefore, the charges under Sections 7 and 11 of the Prevention of Corruption Act against accused-respondent No.1 are not at all proved.

110. PW-18 S.S. Sodhi, General Manager (Personnel) of M/s. Gujarat Ambuja Cement tells us that P.N. Neotia was the Chairman of M/s. Gujarat Ambuja Cement and its head office was at Bombay. Shri P.C. Jain was also Chairman of the Company. He, however, expressed his inability to state that it is Shri P.C. Jain, who had been liaisoning with the State Government at the time of installation of the cement plant of the Company at Darlaghat. He was also declared hostile and his version in cross-examination also remained the same. In his cross-examination conducted by learned defence Counsel, he expressed his ignorance as to whether Shri P.C. Jain was President or Senior Vice President because according to him, Mr. Jain retired well before he joined duties at Darlaghat.

111. Now coming to the charge against accused-respondent Pritibha Singh that she received Rs.2 lacs from one Suresh Kapoor, an employee of M/s. Mohan Meakin Limited and Rs.3 lacs from PW-25 P.C. Jain of M/s. Gujarat Ambuja Cement Plant for exercising influence on her husband accused-respondent Virbhadra Singh to ensure early clearance of IPARA in favour of M/s. Gujarat Ambuja and to ensure that electricity and water supply is not stopped to the premises of M/s. Mohan Meakin Limited on account of non-installation of modified ET Plant, there is again no evidence to substantiate the same for the reason that Shri Suresh Kapoor of M/s. Mohan Meakin Limited, on account of his death, was not available to make statement in the Court and as regards Shri P.C. Jain, as noticed supra, he has not supported the prosecution case at all.

112. PW-30 H.N. Handa also turned hostile to the prosecution because as per his version, he never received any notice from the State Pollution Control Board for installation of modified ET Plant at Solan, as according to him, such plant was already installed. When cross-examined by learned Pubic Prosecutor, he expressed his ignorance that in the year 1983 State Pollution Control Board made correspondence with the Company qua installation of new modified ET Plant and ordered disconnection of water and electricity supply if the plant is not installed. It is also denied that on receipt of the said notice, he contacted Brigadier Kapil Mohan, the Managing Director of the Company and that he asked him to contact Mohinder Lal (since dead) and act accordingly. It is also denied that he was asked by Mohinder Lal to pay Rs.2 lacs to accused-respondent No.2 in Holly-Lodge and that he handed over Rs.2 lacs to Suresh Kapoor for payment thereof to accused-respondent No.2. It is also denied that said Shri Suresh Kapoor had paid the money to accused-respondent No.2 and informed him when came back to Solan. It is also denied that he informed Mohinder Lal qua the payment so made and it is thereafter no notice qua installation of modified ET Plant was made. He has denied his statement Ext.PW-39/C having been recorded by Inspector Daya Sagar, as per his version.

113. Now coming to the statement of Brigadier Kapil Mohan, Managing Director of Mohan Meakin Private Limited, he has stepped into the witness box as PW-26. He was also turned hostile to the prosecution, as according to him, though notice for installation of modified ET Plant was received in the year 1983 from State Pollution Control Board, yet he never asked H.N. Handa (PW-30) to contact Mohinder Lal, the then Director of Industries. Therefore, he was also cross-examined by learned Public Prosecutor, but in sundry because nothing material lending support to the prosecution case could be elicited. He has denied

his statement Ext.PW-39/D having been recorded by Inspector Daya Sagar (PW-39) at Gaziabad. He has also denied his relations with accused-respondent Virbhadra Singh. It is denied that he asked PW-30 to make payment to accused-respondents, if required to be made in order to avoid the installation of modified ET Plant. It is also denied that the Company made the payment of money to State Government functionaries and not counted for the same in the accounts. According to this witness, he had filed petition Ext.RS for seeking a direction to record his statement in a proper manner.

114. PW-38 Amar Singh has also not supported the prosecution case that late Suresh Kapoor disclosed him about he having brought Rs.2 lacs for being paid to accused-respondent No.2 Pratibha Singh. He has denied that he made statement Ext.PW-39/B.

115. Now coming to the evidence as has come on record by way of the testimony of PW-21 Major Vijay Singh Mankotia, the star prosecution witness, his statement also not lends any support to the prosecution case. He rather is turned hostile to the prosecution. According to him, original audio-cassette, he played in the press conference is Ext.PW-21/B and that in his opinion the same is the original one. Except for Ext.PW-21/B, he allegedly had another audio-cassette Ext.PW-21/C and that in his opinion voice in the audio-cassette was that of accused Virbhadra Singh, accused Pritabha Singh, Mohinder Lal and Kehar Nath Sharma. When further cross-examined by learned defence Counsel while stating that audio-cassette Ext.PW-21/B was not prepared in his presence and that he is not aware as to who and where it was prepared and that the CDs/audio-cassette were played extensively in the election at Hamirpur by Bhartiya Janta Party, has demolished the entire prosecution case. His admission that no identification mark was put by him on the audio-cassette recovered by the police from him and that CD/audio-cassette like Ext.PW-21/B are being largely manufactured and distributed, render the authenticity and genuineness of this document highly doubtful. The statement of PW-21 only reveals that there was an audio-cassette he received from secret source, however, his statement is not suggestive of that Ext.PW-21/B is the same audio-cassette he produced before the police. He has simply produced the same before the police. He has not said anything as to how and at what time as well as about the identity of the person, who has prepared the same. Therefore, the audio-cassette/CD does not stand for the test of legal scrutiny, as discussed in detail in this judgment in paras supra.

116. Another star witness is none-else but petitioner S.M. Katwal, who has stepped into the witness box as PW-37. He also tells us about one CD he found to have been kept in an envelop in his letter-box and on hearing the same he found the voices of Mohinder Lal, Virbhadra Singh and Pratibha Singh therein. He has also said that since he remained posted in various capacities in the Government, therefore, was well conversant with their voices. He made the petition Ext.PW-37/A to Station House Officer, State Vigilance and Anti Corruption Bureau, Shimla. He also filed writ petition Ext.PW-37/B in the High Court. The CD was handed over by him to his lawyer. His testimony in cross-examination is very interesting as he expressed his inability to tell that the CD received by him was original or copied one, when the same was received. In the complaint Ext.PW-37/A there is no mention of CD, which he admits to be correct and tells us that the report he made to the police was based on the news published in a section of newspapers. He further tells us that he did not put any identification mark on the CD and that the CD given by him to the lawyer is still in existence or not, he cannot tell. He also expressed his ignorance about the enquiry, if any, made by the police from him qua the CD. Nothing incriminating has come in the statement of the petitioner connecting the accused-respondents with the commission of offence.

117. The testimony of PW-31 and PW-32, as already noticed, is contradictory on certain aspects because according to Shri I.D. Bhandari (PW-31), Shri Mohinder Lal might have been called by Shri A.P. Singh (PW-32) for the purpose of interrogation and that he did not associate himself with any enquiry, whereas as per the version of PW-32, Mohinder Lal was called by the then ADGP (PW-31) and it is PW-31 who called Mohinder Lal to his office. When he reached in the office of ADGP, the CD was already heard by the ADGP (PW-31) and Mohinder Lal. PW-32, no doubt, tells us that CD was seized by him; however, it was not original. He had asked Santosh Patial, Superintendent of Police, State Vigilance and Anti Corruption Bureau, Dharamshala to seize the CD, but he had sent audio-cassette in a sealed condition. He admits that original audio-cassette was never seized and sent to Forensic Science Laboratory. On the CD, no identification mark was there and the same remained unsealed during the course of enquiry he conducted. The statement of PW-32, who, as a matter of fact, conducted the enquiry in this matter also not substantiate the prosecution case, in any manner whatsoever. The testimony of this witness and that of PW-31 I.D. Bhandari and PW-21 Major Vijay Singh Mankotia rather are contradictory with each other.

118. PW-39 is Daya Sagar, who has partly investigated the case. Though, as per his version, statements Exts.PW-39/A to PW-39/E of S/Shri Vijay Singh Mankotia, Amar Singh, H.N. Handa, Kapil Mohan and P.C. Jain, were rightly recorded by him, however, as noticed supra the above witnesses have stated in one voice that their statements were not recorded by the police as per their version and they rather resiled from the statements so recorded. Therefore, PW-39 is also of no help to the prosecution case.

119. As discussed hereinabove, the testimony of the material prosecution witnesses also not lends any support to the prosecution case. PW-25 P.C. Jain and PW-26 Brigadier Kapil Mohan rather have filed two separate writ petitions in this Court on the ground that their statements in this case have been recorded wrongly by the police. The writ petitions were disposed of by a Division Bench of this Court with the observations that the appropriate course available to them was to have moved to senior officers for recording of their statements. Consequently, petition Ext.RZ was moved by PW-25 with a request to record his statement correctly.

120. The remaining prosecution witnesses are formal in nature. The evidence as has come on record by way of their testimony could have at the most been used as link evidence had the prosecution been otherwise able to bring guilt home to the accused persons beyond all reasonable doubt. Therefore, on merits also, no case is made out to interfere with the impugned judgment.

Point No.4:

Brief Background and respective contentions:

121. On the question of fairness of trial, the complaint is that after declaration of the result of the Himachal Pradesh Legislative Assembly Election on 20th December, 2012 the proceedings in the trial witnessed tremendous speed and that about 20 witnesses were given up by the prosecution thereafter, i.e., during the period 20th December, 2012 to 24th December, 2012 . It is further contended that special Prosecutor conducting the trial on behalf of the prosecution was abruptly replaced by a new Prosecutor. Judgment was delivered on a day before accused-respondent No.1 took over as Chief Minister of Himachal Pradesh. The evidence available on record has not been discussed. Mr. Deol has, therefore, urged that the judgment under challenge has been passed in haste to the reasons best known to learned Special Judge. The same allegedly being perverse has been sought to be quashed.

122. On the other hand, Mr. Cheema has urged that who is the material witness, given up by the Prosecutor remained unexplained. Nothing to this effect is forth-coming on record. Also that the present being a case under the Prevention of Corruption Act otherwise was also required to be decided at the earliest. It is pointed out from the record that the charges against the accused were framed in the month of June, 2012, whereas the impugned judgment passed on 24th December, 2012. The present, therefore, is said to be not a case, where it can be said that learned Special Judge has delivered the judgment in a haste. It is rather the prosecution not proceeded in the matter in a fair manner and irrespective of technology of CD was not available in the year 1989 by hook and crook believing the audio-cassette to be a genuine document, booked both the accused falsely in the case. The investigation according to Mr. Cheema has not been conducted in a fair and impartial manner.

Discussion and conclusion drawn:

123. On analyzing the arguments addressed on both sides, true it is that on and after declaration of the result of Himachal Pradesh Legislative Assembly on 20th December, 2012, 24 witnesses were summoned for examination. Out of the eight witnesses summoned for 20th December, 2012 only one witness H.N. Handa could be recorded whereas statement of Rajinder Tarlokta was deferred for the next day, i.e., 21st December, 2012 and one witness was given up by the prosecution. Remaining five not present on that day were ordered to be summoned for 22nd December, 2012, i.e., after one day. On 21st December, 2012, out of eight witnesses plus PW Rajinder Tarlokta aforesaid, statements of three including Rajinder Tarlokta were recorded and four were give up, whereas PW S.K. Jain was not present on that day. There is nothing in the order passed on 21st December, 2012 that PW A.P. Singh summoned for that day was present or not. Similarly on 22nd December, 2012, out of eight witnesses, five including aforesaid A.P. Singh were recorded and six given up. PW Daya Sagar being Investigating Officer was ordered to be examined on 24th December, 2012 along with remaining PWs S.M. Katwal and Amar Singh Thakur. On that day, i.e., 22nd December, 2012, though learned Public Prosecutor prayed for a long date, yet learned Special Judge while recording that only PWs S.M. Katwal and Amar Singh Thakur are left to be examined, adjourned the trial to 3rd day, i.e., 24th December, 2012. On that day, statements of the remaining three witnesses were recorded. The statements of both accused under Section 313 of the Code were also recorded and on hearing arguments, the judgment was also delivered on the same day.

124. Be it stated that out of total 59 witnesses, 24 were ordered to be summoned on the above three dates and those witnesses not present on a particular date were ordered to be summoned either on the next day or a day next to it as discussed hereinabove. The trend, however, was not so before 20th December, 2012. For example on 16th November, 2012 PW Amar Singh was not present, whereas PW Rajinder Tarlokta though present but not produced the record. The case though was adjourned to 17th December, 2012, i.e., after one month for recording remaining prosecution evidence including that of S/Shri Amar Singh and Rajinder Tarlokta, however, they both were not summoned or bound down for 17th November, 2012 and rather Amar Singh was recorded on 24th December, 2012 whereas Rajinder Tarlokta on 20th/21st December, 2012. Again on 9th November, 2012 when PW Nagin Nanda could not appear despite service, no order is passed on that day qua his appearance on the next date, i.e., 16th November, 2012. The order passed on 7th November, 2012 reveals that some of the witnesses were not present on that day. Though, the case was already listed for 8th and 9th November, 2012 also for recording prosecution witnesses, however, such witnesses were not ordered to be summoned/produced for the next day or day thereafter.

125. True it is that the cases in respect of offence under Prevention of Corruption Act, 1988 need expeditious hearing and disposal. The cases under the Act are, otherwise also, being fast-tracked and taken up for hearing on priority basis, both at the High Court and District Courts levels, under the Mission Mode Programme and instructions/guidelines issued by the Supreme Court and also the High Court from time to time. Even under sub-section (4) of Section 4 of the Prevention of Corruption Act also a case registered under the Act is required to be heard on day-to-day basis. But sudden change in the trend of proceedings in the case in hand during the period from 20th December, 2012 to 24th December, 2012 casts a doubt that learned trial Judge being guided by instructions issued by the High Court or the provisions ibid under the Act proceeded in the case to dispose it of expeditiously because had it been so the speed in the proceedings observed during the period of four days, i.e., 20th December, 2012 to 24th December, 2012, the speed should have been the same right from very beginning. Anyhow, there being nothing on record that learned trial Judge did so for some extraneous consideration or with oblique motive to help the accused-respondents and particularly accused-respondent No.1 to take over as Chief Minister of Himachal Pradesh after declaration of the result of general election of Himachal Pradesh Legislative Assembly on 20th December, 2012, no further discussion on this aspect of the matter is required.

126. Although, nothing is there on record that Shri J.L. Sharma, Special Public Prosecutor was removed and rather he was very much in position upto 20th December, 2012, as is apparent from his presence marked in the zimni order passed on that day. He, however, was replaced on the next day, i.e., 21st December, 2012 by Shri Ashwani Dhiman, Public Prosecutor, whereas on 24th December, 2012, the day when the proceedings in the trial concluded and the judgment announced, the State was represented by Shri L.S. Negi, learned Public Prosecutor. The Public Prosecutor though was replaced on and after 20th December, 2012, however, what prejudice thereby is caused to the petitioner, Mr. Deol has failed to spell out during the course of arguments. The complaint that on and after 20th December, 2012, 20 witnesses were ordered to be given up, is not correct because out of 24 witnesses summoned for three days, i.e., 20th to 22nd December, 2012 and also for 24th December, 2012, 13 were recorded whereas 11 were given up.

127. I find no substance in the submissions that the witnesses were given up for extraneous consideration or with malafide intention to help the accused persons. Otherwise also, it is for the Public Prosecutor to decide as to out of the witnesses cited in the final report, who is to be examined in the Court and who is to be given up. Otherwise also, Mr. Deol again could not point out during the course of arguments as to what prejudice has been caused to the petitioner or for that matter the prosecution from the decision of the Public Prosecutor to give up 11 witnesses or why the said witnesses were required to be recorded and how such evidence would have been material for the prosecution case.

128. True it is that learned trial Judge has avoided the elaboration of the evidence available on record at the pretext that it was not required to do so. Support in this regard has been drawn by learned trial Judge from various judicial pronouncements made by the High Courts including the Apex Court. The impugned judgment reveals that the evidence has not out-rightly been ignored, but learned trial Judge has referred to and discussed the relevant evidence as and where required to do so. Mr. Deol, therefore, failed to persuade this Court to take a different view of the matter on this score. Otherwise also, for want of legal and acceptable evidence connecting both the accused with the commission of the alleged offence even if it is held that fair trial has not been conducted, will hardly be of any help to the petitioner, who being not victim, is not competent to file the appeal and even failed to show sufficient cause for condonation of delay.

129. The investigation of the case seems to be not conducted in a fair manner for the reason that irrespective of technology on CD was not in existence in the year 1989-90, the same has been made basis for registration of a case against the accused persons vide FIR No.27 of 2009 on 3rd August, 2009, i.e., after the expiry of about 20 years from the commission of the alleged offence by them. Both the accused are in their public life because respondent No.1 is the Chief Minister of the State, whereas his wife accused-respondent No.2 is a former Member of Parliament. In the nature of the evidence available on record, discussed supra, they have rightly been acquitted from the charges. Therefore, on this score and on merits also, no case is found to be made out against them.

Crux of the above discussion and conclusion drawn:

130. In view of what has been said hereinabove, the petitioner has no locus-standi to file the appeal as he is not a victim within the meaning of Section 2(wa) of the Code, hence not competent to file the appeal against the judgment of acquittal dated 24th December, 2012 passed by learned Special Judge (Forests), Shimla.

131. Admittedly, the petitioner has been convicted in few of the cases which were registered against him during the period when accused-respondent No.1 previously was also the Chief Minister of Himachal Pradesh. Of course, appeals against his conviction he preferred are pending disposal in the Supreme Court. Admittedly, the petitioner has also instituted civil and criminal cases against accused-respondent No.1, out of which few stands disposed of whereas few are still pending disposal. The facts, therefore, remain that the petitioner is inimical to accused-respondent No.1.

132. The petition even does not disclose sufficient cause as required for condonation of 96 days' delay, as occurred in filing the appeal. The expiry of the limitation prescribed for filing the appeal has resulted in a valuable right in favour of the accused-respondents and the same cannot be taken away on such grounds, which are not only vague, absurd, but false also. On merits also, no case is found to be made out against the accused-respondents. Therefore, there is no merit in this petition and the same is accordingly dismissed. Consequently, the petition for seeking leave to appeal and the appeal itself shall also stand dismissed. Pending application(s), if any, shall also stand disposed of.

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

M/s Cosmo Ferrites Limited and others. ...Petitioners.

Versus

Rajinder Singh. ...Respondent.

CMPMO No. 117/2015
Decided on: 21.4.2015

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit seeking injunction for transferring the defendants from Cosmo Ferrites Limited Jabli for restraining the defendant from causing any obstruction in entering the factory premises for attending his job- he also sought an injunction, which was allowed- an appeal preferred against the order was dismissed- according to Clause 20 of the Standing Order, the workman can be transferred according to exigency of the work from one department to another provided that his wages, grade, continuity of service and other conditions of service are not adversely affected by such transfer - such transfer can be made only when the workman consents

after getting a reasonable notice - plaintiff had brought to the notice of the management that he was not capable of performing heavy work and that he may be given work according to his capability- he had never requested for his transfer- transfer was made simply because the workman had participated in a strike and an FIR was also registered against him, therefore, trial Court below had rightly granted injunction. (Para-6 to 8)

Code of Civil Procedure, 1908- Section 9 - A dispute between an employer and a single workman cannot be termed as an industrial dispute but may become one, if it is taken up by Union or number of workmen- the case of the plaintiff was not taken up by the Union, therefore, civil Court had jurisdiction to hear and entertain and suit. (Para-10 and 11)

Cases referred:

The Bombay Union of Journalists and others vs. The Hindu, Bombay and another, AIR 1963 SC 318

Rajashtan State Road Transport Corporation and another versus Bal Mukund Bairwa (2), (2009) 4 SCC 299

For the Petitioners: Mr. O.C. Sharma, Advocate.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

This petition is instituted against the order dated 3.3.2015 rendered by the Additional District Judge-II, Solan in Civil Miscellaneous Appeal No. 7-FTC/14 of 2010.

2. "Key facts" necessary for the adjudication of this petition are that respondent-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) has filed a suit against the petitioners-defendants (hereinafter referred to as the "defendants" for convenience sake) under section 38 of Specific Relief Act for decree of permanent injunction restraining the defendants from transferring the plaintiff from Cosmo Ferrites Limited Jabli, Tehsil Kasauli, District Solan and also restraining the defendants from causing any obstruction in entering into the factory premises for attending his job, duty and putting any kind of illegal restriction by themselves through their agents, employees, workers etc.

3. The plaintiff has also moved an application under order 39 rule 1 and 2 read with section 151 of the Code of Civil Procedure. The application was contested by the defendants. Learned Civil Judge (Senior Division) allowed the application vide order dated 23.9.2010 whereby the transfer order dated 26.7.2010 was stayed and the defendants were directed not to restrain the plaintiff to come to his place of work. The defendants feeling aggrieved by the order dated 23.9.2010 filed an appeal before the learned Additional District Judge-II, Solan. He dismissed the same on 3.3.2015. Hence, the present petition.

4. Mr. O.C. Sharma, learned counsel for the defendants; has vehemently argued that the civil court had no jurisdiction to entertain the suit. He has relied upon standing order framed under the Industrial Employment (Standing Orders) Act, 1946. He also contended that the courts below have not taken into consideration the well known principles governing the ad-interim injunction.

5. I have heard Mr. O.C. Sahrma and gone through order dated 23.9.2010 and judgment dated 3.3.2015.

6. The plaintiff was appointed on 12.5.1989. He met with an accident in the year 1992. He has taken treatment from P.G.I. and thereafter from Ludhiana. Employees of the defendant-company had gone on strike with effect from 19.7.2009 to 30.8.2009. FIR No.70/2009 was also registered against the plaintiff. Defendant-company has framed standing order under the Industrial Employment (Standing Orders) Act, 1946. Clause 20 of the Standing Order deals with the transfer of the workman. The Additional District Judge has made elaborate reference to clause 20 of the Standing Order. According to clause 20 of the Standing Order, the workman can be transferred according to the exigency of work from one job or department to another or from one station to another or from one establishment to another under the same employer provided that his wages, grade, continuity of service and other conditions of service are not adversely affected by such transfer and where the transfer involves moving from one station to another, such transfer is to take place either with the consent of the workmen where there is a specified provision to this effect in the letter of appointment and provided that reasonable notice is given to such workmen and reasonable joining time is allowed. The plaintiff has been transferred from Jabali, Tehsil Kasauli, District Solan to M/s Sterling Oxide Limited, Works Industrial Area, Sikendrabad, District Buldandshehar, U.P. as Assistant (Clerical). It is not in dispute that Sterling oxide Limited was wound up on 11.7.2013.

7. In the instant case, a notice was issued to the plaintiff on 20.7.2010 informing him that if he did not want to work with them, then his services would be terminated. The plaintiff replied to the notice on 27.7.2010. He brought to the notice of the management that as per medical certificate, he was not capable of performing heavy work and he may be given work as per his capability. The plaintiff has never prayed to be transferred from the present place of posting to Sikendrabad.

8. Mr. O.C. Sharma has vehemently argued that the consent of the plaintiff was obtained. The transfer of the plaintiff was *mala fide* since he has participated in the strike with effect from 19.7.2009 to 30.8.2009. FIR No.70/2009 was also registered against the plaintiff. The transfer of the plaintiff is also actuated with *malice* since the workman has been transferred to a distant place without any administrative exigency. The defendants could not be oblivious that plaintiff has suffered injury on four fingers and remained under treatment for a considerable time. The suit has been instituted under section 38 of the Specific Relief Act on the basis of Standing Order framed under the Industrial Employment (Standing Orders) Act, 1946.

9. Their Lordships of the Hon'ble Supreme Court in ***The Bombay Union of Journalists and others*** vs. ***The Hindu, Bombay and another***, AIR 1963 SC 318 have held that a dispute between employer and single workman cannot *per se* be an industrial dispute, but it may become one if it is taken up by the Union or a number of workmen. Their Lordships have held as under:

> "7. The terms of reference by the Government of Bombay under S. 12(2) indicate that the dispute was primarily between "The Hindu" Bombay and the appellant -- a single employee, relating to his individual claim in which the other employees of "The Hindu" Bombay were not directly interested. In Central Provinces Transport Services Ltd. v. Raghunath Gopal Patwardhan, 1956 SCR 956: ((S) AIR SC l04) this Court after setting out the three possible views on the question whether a dispute by an individual workman may be regarded as an industrial dispute within the meaning of S. 2(k) of the Industrial Disputes Act, 1947, observed,
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> > "The preponderance of judicial opinion is clearly in favour of the last of the three views stated above (i.e., a dispute between an employer

and a single employee cannot per se be an industrial dispute, but it may become one if it is taken up by the Union or a number of workmen and there is considerable reason behind it.) Notwithstanding that the language of S. 2(k) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion, to settle only disputes which involve the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of an adjudication under the Act, when the same had not been taken up by the Union or a number of workmen.

This view was reiterated in Newspapers Ltd. v. Slate Industrial Tribunal, U. P. 1957 SCR 754: ((S) AIR 1957 SC 532). Therefore, the applicability of the Industrial Disputes Act to an individual dispute as distinguished from a dispute involving a group of workmen is excluded, unless the workmen as a body or a considerable section of them make common cause with the individual workman.

9. By its constitution the Bombay Union of Journalists is a Union not of employees of one employer, but of all employees in the industry of journalism in Bombay. Support of the cause, by the Union, will not in our judgment convert the individual dispute of one of its members unto an industrial dispute. The dispute between "The Hindu" Bombay and Salivateeswaran was in respect of alleged wrongful termination of employment; it could acquire the character of an industrial dispute only if it was proved that it was, before it was referred, supported by the Union of the employee of "The Hindu" Bombay or by an appreciable number of its employees. In Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate 1958 SCR 1156: (AIR 1958 SC 353) this Court held by a majority that the two tests of an industrial dispute as defined by sub-sec. (k) of S. 2 of the Industrial Disputes Act, 1947, must, therefore, be -- (1) the dispute must be a real dispute capable. of being settled by relief given by one party to the other and (2) the person in respect of whom the dispute is raised must be one in whose employment, non-employment, terms of employment, or conditions of labour (as the case may be), the parties to the dispute have a direct or substantial interest, and this must depend on the facts and circumstances of each case. In that case certain employees sought to raise a dispute about a person who was not a workman. In the present case members of the Union who were not workmen of the employer against whom the dispute was sought to be raised, seek by supporting the dispute to convert what is prima facie an individual dispute into an industrial dispute. The principle that the persons who seek to support the cause of a workman must themselves be directly and substantially interested in the dispute in our view applies to this class of case also: persons who are not employees of the same employer cannot be regarded as so interested, that by their support they may convert an individual dispute into an industrial dispute. The mere support to his cause by the Bombay Union of Journalists cannot therefore assist the claim of Salivateswaran so as to convert it into an industrial dispute.

16. The effect of the support to the cause of Salivateeswaran by the Indian Federation of Working Journalists and the claim founded thereon

does not call for any detailed consideration. After the reference was submitted and it was pending hearing before the Tribunal a letter was written by the President of the Indian Federation of Working Journalists to the General Secretary of the Bombay Union of Journalists on April 16, 1959, stating that the Federation had lent support to Salivateeswaran in the writ petition filed by "The Hindu" in the Supreme Court and that the Federation did so as it was a test case. Another letter dated April,17, 1959, was addressed by the General Secretary of the Indian Federation of Working Journalists to the General Secretary, Bombay Union of Journalists, Bombay stating that they had advised Salivateeswaran to file a petition before the Presiding officer of the Industrial Court in Bombay and had also intervened in the Supreme Court, and further that the Federation fully supported all actions taken by the Bombay Union of Journalists to get justice for Salivateeswaran. The Secretary of the Union by letter dated July 9, 1959, wrote to the President and Secretary-General of the Indian Federation of Working Journalists that Salivateeswaran's case was being heard for a week and that Salivateeswaran was to undergo cross-examination on the next day and that Mahatame, the previous Secretary was to give evidence. He further stated "I am of opinion that we must produce some document whereby it will be possible to prove that the Federation had supported Salivateeswaran's case' and requested the Federation to send a document in the form of a minute of a meeting or a letter or a resolution and if there was none such on the record, to pass a fresh resolution supporting the Bombay Union's action regarding Salivateeswaran's case and to send the same by return of post. Taking a clue from this letter, on July 24, 1959, the President of the Federation sent a copy of the resolution alleged to have been adopted by the members of the Working Committee of the Indian Federation of Working Journalists regarding Salivateeswaran's case. The draft resolution sought to support the case of the Bombay Union of Journalists before the Industrial Tribunal, Bombay, and to "direct the Union to fight the case with all its strength." This resolution is alleged to have been passed by circulation after the commencement of the adjudication proceedings. If the dispute was in its inception an individual dispute and continued to be such till the date of the reference by the Government of Bombay, it could not be converted into an industrial dispute by support subsequent to the reference even of workmen interested in the dispute. We have already held that subsequent withdrawal of support will not take away the jurisdiction of an industrial tribunal. On the same reasoning subsequent support will not convert what was an individual dispute at the time of reference into an industrial dispute. The resolution of the Indian Federation of Working Journalists, assuming that it has any value, would not be sufficient to convert what was an individual dispute into an industrial dispute."

10. In the instant case, plaintiff's case has not been taken up by the union.

11. So far as the question whether the civil court had no jurisdiction to go into the matter as argued by Mr. O.C. Sharma is concerned, the same no more ***res integra*** in view of the judgment rendered by their Lordships of the Hon'ble Supreme Court in ***Rajashtan State Road Transport Corporation and another*** versus ***Bal Mukund Bairwa*** (2), (2009) 4 SCC 299. Their Lordships have held as under:

"12. Section 9 of the Code is in enforcement of the fundamental principles of law laid down in the maxim Ubi jus Ibi remedium. A litigant, thus, having a

grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impliedly barred by any statute. Ex facie, in terms of Section 9 of the Code, civil courts can try all suits, unless bared by statute, either expressly or by necessary implication.

13. The civil court, furthermore, being a court of plenary jurisdiction has the jurisdiction to determine its jurisdiction upon considering the averments made in the plaint but that would not mean that the plaintiff can circumvent the provisions of law in order to invest jurisdiction on the civil court although it otherwise may not possess. For the said purpose, the court in given cases would be entitled to decide the question of its own jurisdiction upon arriving at a finding in regard to the existence of the jurisdictional fact.

14. It is also well settled that there is a presumption that a civil court will have jurisdiction and the ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or Tribunal acts without jurisdiction.

26. Applying the said principles to the fact of the cases wherein the plaintiffs alleged that the enquiries were conducted in violation of the Standing Orders whereas the stand taken by the Corporation was that the requirements contained in the Standing Orders were complied with, the Bench, however, noticed that no Regulation had been framed by the Corporation in terms of Section 45 of the Act insofar as the employees answering the description of `workman' as defined in Section 2(s) of the 1947 Act are concerned.

It appears that therein no dispute was raised that the provisions of the Standing Orders were applicable. The question, therefore, which inter alia arose for consideration was as to whether in holding the departmental proceeding the provisions of the Certified Standing Orders were violated

or not. While holding that Civil Court's jurisdiction to entertain the suit was bared, it was held:

> "37. It is directed that the principles enunciated in this judgment shall apply to all pending matters except where decrees have been passed by the trial court and the matters are pending in appeal or second appeal, as the case may be. All suits pending in the trial court shall be governed by the principles enunciated herein -- as also the suits and proceedings to be instituted hereinafter."

With greatest of respect to the learned judges, if a statute while creating rights and obligations did not constitute a forum for enforcing the same, plenary jurisdiction of the civil court in view of Premier Automobiles Ltd.(supra) could not be held to have been taken away. There was also no occasion to extend the scope of the dicta laid down therein. Certified Standing Orders lay down the terms and conditions of service. It did not create any new right such as Section 25F, 25G or 25H of the Industrial Disputes Act, 1947. Any new right created under a statute would ordinarily be a right in favour of an employee over and above the general law.

Let us, however, proceed on the basis that the dicta laid down therein is correct.

33. A dispute arising in between an employer and employee may or may not be an industrial dispute. The dispute may be in relation to or arising out of a fundamental right of the employee, or his right under a Parliamentary Act and the Regulations framed thereunder, and/or a right arising under the provisions of the Industrial Disputes Act or the sister laws and may relate to same or similar rights or different rights, or even may be based on common law right or contractual right. The question in regard to the jurisdiction of the civil court must, therefore, be addressed having regard to the fact as to which rights or obligations are sought to be enforced for the purpose of invoking or excluding the jurisdiction of a civil court."

12. There is a prima facie case in favour of the plaintiff and balance of convenience also lies in his favour. He would have suffered irreparable loss and injury if the transfer order was not stayed.

13. Accordingly, there is no merit in the petition and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

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

Sh. Budhi Singh & another ....Appellants.
Versus
Sh. Ashok Kumar & others. ....Respondents.

RSA No.6 of 2004
Judgment reserved on: 01.05.2015
Date of Decision: May 21 of 2015

Indian Evidence Act, 1872- Section 90- Plaintiff claimed the ownership on the basis of sale deed dated 11.1.1962 and 19.3.1965- defendant denied the execution of the sale deed dated 19.3.1965 and pleaded that document was manipulated by predecessor-in-interest of the plaintiffs who obtained thumb impression on the pretext of getting the land demarcated- it was contended that Court was bound to draw the presumption under Section 90 of the Evidence Act- held, that the power conferred upon the Court is discretionary and the Court is not obliged to draw such presumption- further, mere proof of formal execution of a document does not lead to a presumption that recitals contained therein are also correct- plaintiff has neither pleaded nor proved as to how the consideration was paid, who was the Deed Writer, before whom the document was executed- hand-writing was not proved nor anyone was called from Sub Registrar office, therefore, in these circumstances, trial Court had rightly refused to rely upon the sale deed. (Para-9 to 35)

Cases referred:

Gangamma and others Versus Shivalingaiah, (2005) 9 SCC 359
Tilak Chand Kureel Versus Bhim Raj, 1969(3) SCC 367
Lallan Singh and others Versus State of Bihar, 1969 (3) SC 765
Shiv Lal and others Versus Chet Ram and others, 1970 (2) SCC 773
Lakhi Baruah and others Versus Padma Kanta Kalita and others, 1996(8) 357
State of Andhra Pradesh and others Versus Star Bone Mill and Fertiliser Company, (2013) 9 SCC 319
Mahasay Ganesh Prasad Ray & another Vs Narendra Nath Sen and others, AIR 1953 SC 431

Harihar Prasad Singh and another Versus Deonarain Prasad and others, AIR 1956 SC 305
Madamanchi Ramappa and another Versus Muthaluru Bojjappa, AIR 1963 SC 1633
Vishwanath Bapurao Sabale Vs Shalinibai Nagappa Sabale and others, (2009) 12 SCC 101
Pavitri Devi and another Versus Darbari Singh and others, (1993) 4 SCC 392
Union of India Versus Ibrahim Uddin and another, (2012) 8 SCC 148
Sital Das Versus Sant Ram and others ,AIR 1954 SC 606
Kalidindi Venkata Subbaraju and others Versus Chintalapati Subbaraju and others, AIR 1968 SC 947
Bharpur Singh and others Versus Shamsher Singh, (2009) 3 SCC 687
M.B. Ramesh (Dead) By LRs. Versus K.M. Veeraje Urs (Dead) By LRs., (2013) 7 SCC 490
Saradamani Kandappan Versus S. Rajalakshmi and others, (2011) 12 SCC 18
Gayatri Devi and others Versus Shashi Pal Singh, (2005) 5 SCC 527
Saheb Khan Versus Mohd. Yosufuddin and others, (2006) 4 SCC 476
Sait Tarajee Khimchand and others Versus Yelamarti Satyam and others, AIR 1971 SC 1865
Bhop Ram Versus Dharam Das, Latest HLJ 2009(HP) 560.
Dalip Kumar Versus Rajesh Sahani and others, Latest HLJ 2004 (HP) 1030
Rajni Tandon Versus Dulal Ranjan Ghosh Dastidar and another, (2009) 14 SCC 782
Shyamal Kumar Roy Versus Sushil Kumar Agarwal, AIR 2007 SC 637
Union of India and others Versus A. Nagamalleshwar Rao, AIR 1998 SC 111
Madamanchi Ramappa and another Versus Muthaluru Bojjappa, AIR 1963 SC 1633
Lachhman Singh (Deceased) Through legal representatives and others Versus Hazara Singh (Deceased) Through legal representatives and others, (2008) 5 SCC 444
Shalimar Chemical Works Limited Versus Surendra Oil and Dal Mills (Refineries) and others, (2010) 8 SCC 423

For the appellants: Mr. G.D. Verma, Sr. Advocate with Mr.B.C. Verma, Advocate.
For the Respondents: Mr. Bhupinder Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate, for the LRs of respondents No.1 (a) to 1(d).

The following judgment of the Court was delivered:

Sanjay Karol, J.

This regular second appeal, filed under Section 100 of the Code of Civil Procedure, stands admitted on the following substantial question of law:-

> "Whether the two courts below have erred in not raising a presumption under Section 90 of the Indian Evidence Act in respect of two sale deeds dated 11.1.1962 and 19.3.1965"?

It be only clarified that controversy is only with regard to sale deed dated 19.03.1965. Concurrent findings of fact are challenged by the plaintiffs.

2. Budhi Singh and Jamna alias Jamna Dei as plaintiffs, set up their claim, in the suit land, on the basis of sale deeds dated 11.01.1962 (Ex.PW.1/A) and 19.03.1965 (Ex.PW.1/B), executed by Sh. Longu (defendant No.1). Challenge was laid to the entries, erroneously recording the defendants to be co-owners. Plaintiffs claimed 1/4th share in the suit land, pleading defendant No.1 to be owner only to the extent of 3/16th share and defendant No.2 to be owner of a very negligible share.

3. Suit for declaration and injunction so filed by the plaintiffs was primarily resisted by Longu, who while admitting execution of sale deed dated 11.01.1962, denied execution of any sale deed dated 19.03.1965, categorically pleading the document to have been manipulated by Brehabatu (predecessor-in-interest of the plaintiffs), who on the pretext of getting the land demarcated, so sold vide earlier sale deed obtained thumb impression on a stamp paper which was supposed to be an application for demarcation, to be presented before the Tehsildar. Bhrehabatu had called Longu to the Tehsil Headquarter for the said purpose. Thus, without disputing the share of the plaintiffs in the land sold vide sale deed dated 11.01.1962, with respect to sale deed dated 19.03.1965 defendants pleaded fraud, misrepresentation and undue influence.

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

1. Whether the plaintiffs are owners in possession of 7/16th share by way of purchase from defendant No.1, of the suit land by way of sale deeds dated 11.1.1962 & 19.3.1965? OPP.
2. Whether share in the revenue record qua the ownership of plaintiffs are wrongly recorded as alleged? OPP.
3. Whether plaintiffs are entitled for consequential relief of injunction as prayed for? OPP.
4. Whether suit of the plaintiffs is within time? OPP
5. Whether plaintiffs have no locus standi to file the present suit? OPD
6. Whether the plaintiffs are estopped from filing the present suit by their act and conduct? OPD
7. Whether sale deed dated 19.3.1965 is a result of fraud, misrepresentation & undue influence as alleged? OPD
8. Relief.

5. Appreciating the testimonies of the witnesses, trial Court, by answering the material issues, in favour of the defendants, dismissed the suit, vide judgment and decree dated 30.04.2002, passed in CS No. 111 of 2000, titled as *Budhi Singh & another Versus Sh. Longu and another.*

6. Lower Appellate Court, in the plaintiffs' appeal affirmed all findings of fact vide judgment and decree dated 06.10.2003 rendered in Civil appeal No.74-D/XIII-02, titled as *Budhi Singh & another Versus Longu & another.*

7. Hence the present appeal.

8. There is no dispute with regard to execution of sale deed dated 11.01.1962 (Ex.PW.1/A). Plaintiffs' share in the suit land, to the extent of the land sold in terms of this sale deed is also not in dispute.

9. Section 90 of the Indian Evidence Act, 1872, reads as under:-

> "90. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of

> any particular person, is in that person's handwriting, and, in the case of a document excluded or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
>
> Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable".

10. Principle behind the aforesaid provision is of necessity and convenience. The underline principle being, that if a document, private or otherwise is produced from proper custody and is on its face free from suspicion, the Court may presume that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and that it has been duly attested and executed, if it purports to be so. To raise such presumption, *prima facie* proof is necessary to show that the document is 30 years old. But however, such presumption is rebuttable. Where the party opposing the document disproves it to be so by convincing evidence, the Court is duty bound to call the party, relying on it to prove it. Where the factum of execution is not in dispute, no evidence is necessary to prove its genuineness. Proper custody under the Section would mean the custody of any person, so connected with the deed, that possession thereof, does not raise any suspicion or fraud.

11. The power conferred upon the Court is absolutely discretionary. It may or may not draw the presumption and would depend upon the factual matrix of each case. Even if the document is 30 years old, comes from the proper custody, the Court may still call upon the party to prove the same as also its contents. Court is not, under all circumstances, obliged to draw such presumption, and the Court is duty bound to consider evidence, external and internal of the document, in order to enable it to decide, whether in any particular case, it should or should not presume proper signature and execution. Age alone is not the sole criteria. However, while refusing to draw presumption, Court cannot be capricious in its attitude. But then even in the absence of any objection, taken at the time of admission of the document, Court can refuse to draw the statutory presumption. Mere tendering of a document in evidence cannot be regarded as proof of proper custody.

12. Normally Appellate Court should be loathe in interfering with the discretion exercised by the trial Court in refusing to draw the statutory presumption unless and until the discretion so exercised is arbitrary, capricious, illegal or shocks the conscious of the Court.

13. The apex Court in *Gangamma and others Versus Shivalingaiah,* (2005) 9 SCC 359, has held that even if formal execution of a document is proved, the same by itself would not lead to a presumption that recitals contained therein are also correct. Mere execution of a document does not lead to the conclusion that the recitals made therein are correct, and subject to the statutory provisions contained in Sections 91 and 92 of the Evidence Act. It is open to the parties to raise a plea contra thereto. Also the presumption enacted under the Section can be raised in relation to the original document and not copies thereof. [Also: *Tilak Chand Kureel Versus Bhim Raj,* 1969(3) SCC 367; *Lallan Singh and others Versus State of Bihar,* 1969 (3) SC 765; *Shiv Lal and others Versus Chet Ram and others,* 1970 (2) SCC 773 and *Lakhi Baruah and others Versus Padma Kanta Kalita and others,* 1996(8) 357]

14. Section 90 of the Evidence Act is based on the legal maxims: *nemo dat qui non habet* (no one gives what he has not got); and *nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself). This section does away with the strict rules, as regards the requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date i.e. the date of decision of suit or appeal. [See: *State of Andhra Pradesh and others Versus Star Bone Mill and Fertiliser Company,* (2013) 9 SCC 319.]

15. The apex Court in *Mahasay Ganesh Prasad Ray and another Versus Narendra Nath Sen and others,* AIR 1953 SC 431, had the occasion to deal with Book of Accounts which undoubtedly were 30 years old and came from the possession of its keeper. Yet Court held that:-

> "3. ... ... Exhibit 32 series as noticed by the High Court, consists of loose sheets of papers. They have not the probative force of a book of account regularly kept. Being old documents, naturally, the writer is not called and barring the fact that they were produced from the Receiver's possession there is nothing to show their genuineness. Section 90, Evidence Act, does not help the appellants because this is not a case where the signature of a Particular person is in question or sought to be established. ... ...".

16. The apex Court in *Harihar Prasad Singh and another Versus Deonarain Prasad and others,* AIR 1956 SC 305, the Court has observed as under:-

> "8. Strong reliance was placed by the respondents on Exhibits F-1 and F-1(1) which are khatians relating to the suit lands published on 7-12-1909 recording them as in the possession of the defendants of the second party as 'kaimi' and on the presumption under S. 103-B that entry is correct.
>
> This presumption, it is contended, is particularly strong in the present case, because the predecessors-in-title of the plaintiffs were parties to the proceedings and contested the same, and that the record of rights was made after considering their objections.
>
> The plaintiffs, however, denied that they were parties to the proceedings, and contended that they were taken behind their back by the mortgagees and the second party defendants acting in collusion with a view to defeat their rights. Exhibits A-1 and A-1(1) are certified copies of the objection petitions stated to have been filed by the mortgagors under S. 103-A of the Act, and they purport to have been signed by one Chulai Mahto as karpardaz of some of the mortgagors.
>
> The plaintiffs deny the genuineness of the signatures in Exhibits A-1 and A-1(1) and also the authority of Chulai Mahto to represent the mortgagors. There is no evidence that the signatures on Exhibits A-1 and A-1(1) are true, but the defendants rely on the presumption enacted in S. 90, Evidence Act, in favour of their genuineness.
>
> But Exhibits A-1 and A-1(1) are merely certified copies of the objection petitions filed before the Survey Officer and not the originals, and it was held in - 'Basant Singh v. Brij Raj Saran Singh', AIR 1935 PC 132 (C) that the presumption enacted in the section can be raised only with reference to original documents and not to copies thereof.

There is the further difficulty in the way of the respondents that the documents are signed by Chulai Mahto as agent, and there is no proof that he was an agent, and S. 90 does not authorise the raising of a presumption as to the existence of authority on the part of Chulai Mahto to represent the mortgagors. It is again to be noted that the objection on the merits raised in Exhibits A-1 and A-1(1) that the lands are bakasht lands in the possession of mortgagees is not one which it was to the interests of the mortgagors to put forward, as, if accepted, it would preclude them from admitting tenants in respect of them, without conferring on them the status of settled raiyats and occupancy rights under S. 21 of the Act.

It was only if the lands were private lands that the proprietor would be entitled to cultivate them personally, and that was the claim which they had been making consistently from 1893 onwards. The claim put forward in Exhibits A-1 and A-1(1) is destructive of the rights claimed all along by the mortgagors, and amounts to an admission that the lands are not private and raises the doubt that the petitions were not really inspired by them.

It should also be mentioned that at the hearing of the petition, no evidence was adduced by the mortgagors, and the decision of the Survey Officer was given practically 'exparte'. The mortgagees were parties to the proceedings, and they did not appear and produce the mortgage deeds, Exhibits 2 and 3, under which they got into possession, and which described the lands as sir.'

It was to the interests of the mortgagees that the lands should be held to be 'sir', and it was further their duty to defend the title of the mortgagors as against the claim made by the tenants that they were raiyati lands. Why then did they not produce Exhibits 2 and 3 at the hearing?

The recitals in the lease deed, Exhibit 2(a) which was executed by the defendants of the second party, were inconsistent with their claim that the lands were raiyati. Why did they not produce it at the hearing? There is, therefore, must to be said for the contention of the appellants that the proceedings evidenced by Exhibits A-1 and A-1 (1) were collusive in character.

9. But even assuming that they were real, that would not materially affect the result, as the true effect of a record of rights under S. 103- A is not to create rights where none existed but simply to raise a presumption under S. 103-B that such rights exist, and that presumption is one liable to be rebutted.

There is a long line of authorities that a person who attacks a record made under S. 103-A as incorrect discharges the burden which the law casts on him under S. 103-B by showing that it was not justified on the materials on which it is based. Vide - 'Bagha Mowar v. Ram Lakham', AIR 1918 Cal 807 (D) and - 'Eakub Ali v. Muhammad Ali', AIR 1929 Cal 450 (E). And where, as here, no evidence was placed before the authorities who made the record, he has only to produce evidence which satisfies the Court that the entry is erroneous.

Whether the question is considered with reference to the presumption under S. 120(2) or S. 103-B, the position is the same. The plaintiffs who claim that the lands are kamat have to establish it by clear and satisfactory evidence. If the evidence adduced by them is sufficient, as we have held it is, to establish it, the presumption under S. 103-B equally with that under S. 120(2)

becomes displaced. In the result, we are of opinion that the suit lands are the private lands of the proprietor".

17. In *Madamanchi Ramappa and another Versus Muthaluru Bojjappa,* AIR 1963 SC 1633, Court was dealing with a case where admissibility of certified copy of public document was an issue. Sale deed even if registered under the Registration Act, was not held to be a public document.

18. The apex Court in *Vishwanath Bapurao Sabale Versus Shalinibai Nagappa Sabale and others,* (2009) 12 SCC 101, has only held that there is a presumption with regard to valid execution of a registered document.

19. A private document produced from the custody from a private party, though 30 years old, cannot have the same weight as a public document. [See: *Pavitri Devi and another Versus Darbari Singh and others,* (1993) 4 SCC 392.]

20. The apex Court in *Union of India Versus Ibrahim Uddin and another,* (2012) 8 SCC 148, has held that:-

> "85.3. .....Presumption under Section 90 of the Evidence Act in respect of 30 years' old document coming from proper custody relates to the signature, execution and attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. That the contents of the documents are true or it had been acted upon, have to be proved like any other fact.....".

21. It is also a settled principle of law that a Will is required to be proved in terms of the provisions of Section 63 of the Succession Act and Section 65/68 of the Indian Evidence Act and no presumption can be drawn with regard to the said document. [See: *Sital Das Versus Sant Ram and others* ,AIR 1954 SC 606; *Kalidindi Venkata Subbaraju and others Versus Chintalapati Subbaraju and others*, AIR 1968 SC 947; *Bharpur Singh and others Versus Shamsher Singh,* (2009) 3 SCC 687 and *M.B. Ramesh (Dead) By LRs. Versus K.M. Veeraje Urs (Dead) By LRs.,* (2013) 7 SCC 490.]

22. In view of the aforesaid legal position, plaintiffs' case is considered.

23. In the instant case, there is no dispute with regard to the signature of predecessor-in-interest of the plaintiffs and thumb impression of the defendant on document in issue. What is argued is its execution by exercising fraud and misrepresentation.

24. It is a settled principle of law that whenever a party wants to put forth contention of fraud, it is to be specifically pleaded and proved**,** which in the instant case stands established by leading credible evidence, in line with the ratio of law laid down in *Saradamani Kandappan Versus S. Rajalakshmi and others,* (2011) 12 SCC 18; *Gayatri Devi and others Versus Shashi Pal Singh,* (2005) 5 SCC 527 and *Saheb Khan Versus Mohd. Yosufuddin and others,* (2006) 4 SCC 476.

25. Sale deed dated 19.03.1965 cannot be said to have been proved, in accordance with law. At the time of the document being exhibited, defendants have rightly objected to the same. This view is supported by the ratio of law laid down in *Sait Tarajee Khimchand and others Versus Yelamarti Satyam and others,* AIR 1971 SC 1865.

26. With regard to sale deed in issue, plaintiff has neither pleaded nor proved as to how the consideration was paid; who was the Deed Writer; before whom the document was executed. No evidence, worthy of credence, proving the sale deed, stands led by the

plaintiffs. Document was executed between the plaintiffs' father and defendant No.1. Even the handwriting was not proved nor was anyone called from the office of the Registrar.

27. On the other hand, defendant No.1 (DW.1), in Court, has categorically deposed that in the year 1965, he was called by Brehabatu for moving an application before the Tehsildar. The land sold in the year 1962 was sought to be demarcated. With this understanding, on the asking of Brehabatu, he put his thumb impression on the documents. Neither did he receive any sale consideration nor had he any intention of selling the land, subject matter of sale deed dated 19.03.1965. His testimony is worthy of credence and inspiring in confidence. Hence, findings returned by the Courts below, with respect to issue No.7, cannot be said to be illegal or erroneous, more so, in the light of principles reiterated by this Court in *Bhop Ram Versus Dharam Das,* Latest HLJ 2009(HP) 560.

28. In view of the aforesaid discussions, entries recording the plaintiffs to be owners, in the revenue record, would also not reflect any title of ownership to the extent of land sold in terms of sale deed dated 19.03.1965.

29. On the issue I deem it appropriate to deal with certain decisions referred to by Sh. G.D. Verma, learned Senior counsel, for the plaintiffs.

30. In *Dalip Kumar Versus Rajesh Sahani and others,* Latest HLJ 2004 (HP) 1030, Court was dealing with a case pending before the Tribunal, unlike Civil Courts, which distinction the court itself drew, with regard to the statutory restrictions and limitation, so imposed upon Civil Courts by virtue of the Code of Civil Procedure or the Indian Evidence Act.

31. Ratio in *Rajni Tandon Versus Dulal Ranjan Ghosh Dastidar and another,* (2009) 14 SCC 782, is misconceived as it deals with the object of the registration of the document. In the said case no plea of fraud unlike the instant case was taken.

32. *Shyamal Kumar Roy Versus Sushil Kumar Agarwal,* AIR 2007 SC 637, deals with the impounding of the document and also where document not proved, in accordance with law, can be looked into or not. This was so done in the given facts and circumstances unlike the present case, where objection with regard to the admissibility of the document was taken at the initial stage.

33. Reliance on the decision rendered by the apex Court in *Union of India and others Versus A. Nagamalleshwar Rao,* AIR 1998 SC 111, is misconceived as it pertains to departmental proceedings. Also reliance on *Madamanchi Ramappa and another Versus Muthaluru Bojjappa,* AIR 1963 SC 1633 is misconceived.

34. Appellants have filed an application, seeking permission to lead additional evidence to prove sale deed dated 19.03.1965. In the given facts and circumstances, no case for interference is made out by the appellants. The alleged sale deed, is an act of fraud and misrepresentation as has been concurrently held by the Courts below. As such, reliance on the decision rendered by the apex Court in *Lachhman Singh (Deceased) Through legal representatives and others Versus Hazara Singh (Deceased) Through legal representatives and others,* (2008) 5 SCC 444 and *Shalimar Chemical Works Limited Versus Surendra Oil and Dal Mills (Refineries) and others,* (2010) 8 SCC 423 is misconceived in law.

35. Consequently, I do not find any reason or ground sufficient enough to interfere with the concurrent findings of fact recorded by the Courts below. It cannot be said that learned Courts below erred in correctly and completely appreciating the testimonies of the witnesses or that findings returned are illegal, erroneous or perverse in any manner

which has resulted into miscarriage of justice. Substantial question of law is answered accordingly. The present appeal is accordingly dismissed. Pending applications, if any, also stand disposed of accordingly.

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

Kehar Singh and another ....Appellants.
versus
Ramesh Chand (dead), through LRs ...Respondent.

RSA No.115 of 2004
Reserved on : 7.5.2004
Date of Decision : May 21, 2015.

Code of Civil Procedure, 1908- Section 11- Plaintiff filed a suit for injunction which was dismissed on the ground that defendants were in possession of the suit land without any right, title or interest- plaintiff subsequently filed a suit for possession of the suit land and also for claiming damages for unauthorized use and occupation, which was decreed- held, that in earlier suit, findings were recorded regarding the defendants being in unauthorized occupation over the suit land- the plea of the defendants having become owner by way of adverse possession stood repelled – these findings were never challenged by the defendants- defendants pleaded that they had become owners on the basis of sale deed- they had also pleaded adverse possession which is not permissible- Court had rightly decreed the suit partly for possession. (Para-10 to 14)

Cases referred:
Deity Pattabhiramaswamy v. S. Hanymayya and others, AIR 1959 SC 57
Madamanchi Ramappa and another v. Muthaluru Bojjappa, AIR 1963 SC 1633

For the Appellants : Mr. Ashwani K. Sharma, Advocate.
For the Respondent : Mr. Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Defendants-appellants Kehar Singh and Simro Devi have filed the present appeal under the provisions of Section 100 of the Code of Civil Procedure, assailing the judgment and decree dated 5.12.2003, passed by the learned Additional District Judge (2), Kangra at Dharamshala, in Civil Appeal No.57-P/2000, titled as *Kehar Singh and another v. Ramesh Chand,* whereby judgment and decree dated 24.2.2000, passed by the Sub Judge 1st Class, Court No.2, Palampur, Himachal Pradesh, in Civil Suit No.257/97, titled as *Ramesh Chand v. Kehar Singh and another,* stands affirmed.

2. Plaintiff Ramesh Chand (now deceased and represented through LRs) sold part of his land to defendant Kehar Singh and his wife. Alleging interference from the defendants, with respect to the remaining land, so owned and possessed by him, plaintiff filed a suit for permanent prohibitory injunction. The suit was resisted by the defendants, pleading the land to be the one so mentioned and sold in terms of the sale deed.

3. Vide judgment and decree dated 7.8.1997 (Ex.PY), passed in an earlier suit, trial Court, finding the defendants to be in possession of the suit land, dismissed the suit, reserving right to the plaintiff to recover possession in accordance with law. Significantly, the defendants were held to be in possession, without any right, title or interest.

4. Pursuant to passing of the aforesaid judgment and decree, on 16.10.1997, plaintiff filed suit for possession of the land, subject matter of earlier suit, also claiming damages for unauthorized use and occupation. Defendants pleaded ownership, justifying their possession on the basis of sale deed.

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

1. Whether the plaintiff is entitled for the decree of possession of suit land, as prayed for? OPP
2. Whether the plaintiff is entitled for the damages to the sum of Rs.1000/- as prayed for? OPP
3. Whether the plaintiff is estopped by his act and conduct from filing the suit? OPD
4. Whether the suit is not within time? OPD
5. Whether the defendant No.1 has become owner of the suit land by way of adverse possession? OPD
6. Whether the plaintiff has no cause of action? OPD
7. Relief.

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

> "In view of the findings on aforesaid issues, the suit of the plaintiff is decreed partly to the effect that plain tiff is entitled for the relief of possession of land of khata No.4, khatoni NO.4, khasra No.269, measuring 0-37-01 Hects. And khata No.3 min, khatoni No.3 Min, khasra No.258 land measuring 0-04-16 Hects. Situated at Mohal Panapar Kholi, Mauza Panapar, Sub Teh. Bheera, Tehsil Palampur, Distt. Kangar (H.P.) and suit for damages/ compensation is dismissed. The parties are left to bear their own costs. Decree Sheet be drawn accordingly. The file after its due completion be consigned to record room."

7. Findings of fact, judgment and decree, so passed by the trial Court, stand affirmed by the lower appellate Court.

8. Present appeal stands admitted on the following substantial questions of law:

1. Whether learned Additional District Judge, being the final court of fact, erred in ignoring the report of local commissioner appointed with the consent of the parties during the pendency of the first appeal especially when no objection to the report was filed on record by either party?
2. Whether defendant No.1 being a bonafide purchaser of the land for consideration is not entitled to possession of suit land in spite of the fact that on the identification of the plaintiff, he continues to be in possession of the land since the date of its purchase in the year, 1984 and has also carried out substantial improvements over the same since thereafter?

9. Having heard learned counsel for the parties, I am of the considered view that no case for interference is made out.

10. It cannot be disputed that the subject matter of both the suits is same and similar. In the judgment and decree passed in the earlier suit, which undisputedly has attained finality, there are findings of the defendants being in unauthorized occupation over the suit land. Plea of having perfected title by way of adverse possession stood repelled by the trial Court. Findings with regard to Issue No.7, so framed therein, were never assailed by the defendants. In this view of the matter, report of the Local Commissioner, who was also not examined before the lower appellate Court, pales into insignificance.

11. Trial Court, even in the present proceedings, has decided Issue No.5, pertaining to the title so perfected by way of adverse possession, against the defendants.

12. Plea taken by the defendants is in fact contradictory. They cannot be allowed to blow hot and cold, in the same breath. They can either plead and claim ownership on the strength of sale deed or adverse possession. Any which way, findings returned by the Courts below, which are based on complete, careful and correct appreciation of the evidence, cannot be said to be erroneous or perverse.

13. It is not the defendants' case that pursuant to sale deed, so executed in their favour, they were never put in possession of any land. In the first suit, plaintiff pleaded interference on the part of the defendants and sought injunction. Only when the Court found the defendants to be in an unauthorized possession, liberty was reserved to the plaintiff to take recourse to appropriate remedy, in accordance with law. Defendants did not file any counterclaim or initiate any proceedings against the plaintiff.

14. Significantly, defendants have not placed on record or proved the sale deed, exhibiting the land sold to them. On the contrary, in Court, in his cross-examination, defendant No.1 admits that land comprising Khasra Numbers (269 and 258), subject matter of the suits, was never sold to him. All that he states is that the plaintiff had handed over these very khasra numbers to him. In view of a specific finding to the contrary, in the earlier suit, stand taken by the defendants is not factually correct, just, proper or legally sustainable.

15. The Apex Court in *Deity Pattabhiramaswamy v. S. Hanymayya and others,* AIR 1959 SC 57, has deprecated the practice, so adopted by the High Courts in disposing of second appeals as if they were to be decided as first appeals.

16. Contention, so raised by Mr. Ashwani Sharma, learned counsel for the appellant, that the appeal be decided, by balancing the equities, only needs to be repelled, in view of clear mandate of the Hon'ble Supreme Court of India, in *Madamanchi Ramappa and another v. Muthaluru Bojjappa,* AIR 1963 SC 1633, wherein it is held as under:

> "Where the Supreme Court is satisfied that in dealing with a second appeal the High Court has either unwillingly and in a casual manner or deliberately contravened the limits prescribed by S. 100 Civil P.C., by interfering with concurrent findings on simple questions of fact on ground of insufficiency of evidence, it becomes the duty of the Supreme Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by Courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however

important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the expression provisions of S. 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

17. As such, it cannot be held that findings returned by the Courts below are illegal, perverse and erroneous, warranting interference by this Court. Substantial questions of law are answered accordingly. For all the aforesaid reasons, the appeal is dismissed and disposed of, so also the pending application(s), if any.

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

Mohinder Kumar Sharma ...Appellant.
Versus
State of H.P. ...Respondent.

Cr. Appeal No. 337 of 2011
Judgment reserved on: 25.03.2015
Date of Decision: May 21, 2015

Prevention of Corruption Act, 1947- Section 13(2)- **Indian Penal Code, 1860-** Section 409- Accused had withdrawn the money for consideration of Panchayat Ghar but had not utilized the same and in this manner he had misappropriated Rs.65,000/-- held, that in order to prove criminal breach of trust, prosecution is required to prove dishonest intent, converting the property to his own use, dishonestly using or disposing of the property in violation of law or agreement – statements of witnesses showed that some money was paid for construction of Panchayat Ghar- valuation certificate showed that more amount than withdrawn was spent for consideration of Panchayat Ghar- the mere fact that Panchayat Ghar is not habitable will not establish the guilt of the accused. (Para-10 to 22)

Cases referred:
Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Aher Raja Khima Versus State of Surashtra, AIR 1956 SC 217
Abdulla Mohammed Pagarkar Versus State (Union Territory of Goa, Daman and Diu), (1980) 3 SCC 110
Radha Pisharassiar Amma Versus State of Kerala, (2007) 13 SCC 410

For the Appellant: Mr. Anoop Chitkara, Advocate.
For the Respondent: Mr. R.S. Verma, Additional Advocate General for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 374 Cr.P.C., convict Mohinder Kumar Sharma has assailed the judgment dated 17.08.2011/18.08.2011, passed by Special Judge,

(Additional Sessions Judge), Mandi, H.P., in C.C. No.2 of 2007, titled as *State Versus Mohinder Kumar Sharma*, whereby he stands convicted for having committed an offence punishable under the provisions of Section 13(2) of Prevention of Corruption Act, 1947 (hereinafter referred to as the P.C. Act) and sentenced to undergo simple imprisonment for a period of two years and to pay fine of Rs.50,000/- and in default thereof, further undergo simple imprisonment for a period of six months. Also he is convicted of having committed an offence punishable under the provisions of Section 409 of the Indian Penal Code and sentenced to undergo simple imprisonment for a period of two years and pay fine of Rs.10,000/- and in default thereof, further undergo simple imprisonment for a period of two months.

2. In brief, it is the case of prosecution that during the tenure of his posting as Naib Teshildar in Sub-Tehsil, Kotli, appellant was entrusted with public funds meant for the construction of Panchayat Ghars. Though entire money drawn by him but not fully utilized. In all he misappropriated Rs.65,000/-, thus causing loss to the State. On receipt of a complaint, inquiry was conducted by the Sub Divisional Magistrate, who submitted his report (Ex.PW.6/B), which was forwarded by the Deputy Commissioner, Mandi, to the Superintendent of Police (Vigilance), on the basis of which FIR No.2/05, dated 02.02.2005 (Ex.PW.19/A) was registered, under the provisions of Sections 13(1)(c), 13(2) of the Act and Sections 409, 467, 468 and 471 IPC at Police Station, AC Zone, Mandi, against the accused. Investigation was conducted by Gian Singh (PW.22) who seized the incriminating documents. With the completion of investigation, which revealed complicity of the accused to the alleged crime, challan was presented in the Court for trial.

3. The accused was charged for having committed offences punishable under the provisions of Sections 409, 467, 468 and 471 of the Indian Penal Code and Section 13(2) read with Section 3(d)(i)(i) of the P.C. Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as twenty eight witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:-

> "The work was carried out in time and the money more than sanctioned was used. Office kanungo maintained the record. He used to issue the bills".

In defence, accused examined one witness.

5. Trial Court framed the following points for consideration:-

> "1. Whether the accused being entrusted with Rs.40,000/- for the repair of Patwar Khana Khalanu, Khadkoh and Khad Kalyana and had committed criminal breach of trust in respect of this amount, had forged utilization certificate regarding repair of Patwar Khana Khalanu, Karkoh and Khad Kalyana intending that these shall be used for cheating and had used the utilization certificates for cheating knowing them to be forged and had misappropriated Rs.40,000/- by abusing his position as a public servant?
>
> 2. Final order".

6. Appreciating the evidence on record, trial Court found the prosecution to have established its case, beyond reasonable doubt, against the accused only in relation to offences punishable under the provisions of Section 409 IPC and Section 13(2) of the P.C. Act. In relation to other offences, accused stands acquitted, to which there is no challenge.

7. Assailing the findings of conviction and the sentence, accused has filed the present appeal. No appeal stands filed by the State.

8. Having heard Mr. Anoop Chitkara, learned counsel duly assisted by Ms.Divya Sood, Advocate, on behalf of the appellant as also Mr. R.S. Verma, learned Additional Advocate General, on behalf of the State, as also minutely examined the testimonies of the witnesses and other documentary evidence, so placed on record by the prosecution, Court is of the considered view that trial Court erred in correctly appreciating the material on record. Contradictions and improbabilities which are glaring, rendering the prosecution case to be extremely doubtful, if not true, stand ignored.

9. I*n Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "7. This Court had ever since Its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The Privy Council in Sheo Swarup v. King Emperor, AIR 1934 P. C. 227, negatived the legal basis for the limitation which the several decisions of the High Courts had placed on the right of the State to appeal under Section 417 of the Code. Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He further pointed out at p. 404 that, "the High Court should and will always give proper weight and consideration to such matters as; (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". In *Sanwat Singh and others v. State of Rajasthan*, AIR 1961 SC 715, after an exhaustive review of cases decided by the Privy Council as well as by this Court, this Court considered the principles laid down in Sheo Swarup's case (supra) and held that they afforded a correct guide for the appellate court's approach to a case against an order of acquittal It was again pointed out by Das Gupta, J., delivering the judgment of five Judges in *Harbans Singh v. State of Punjab*, AIR 1962 SC 439;
>
> > "In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on 'compelling and substantial reasons' and has expressed the view that unless such reasons are present an Appeal Court should not interfere with an order of acquittal (vide *Suraj Pal Singh v. The State,* (1952) SCR 194; *Ajmer Singh v. State of Punjab*, (1953) SCR 418; *Puran v. State of Punjab,* AIR 1953 SC 459). The use of the words 'compelling

> reasons' embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words 'compelling reasons'. In later years the Court has often avoided emphasis on 'compelling reasons' but nonetheless adhered to the view expressed earlier that before interfering in appeal with an order of acquittal a Court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable. (Vide *Chinta v. The State of Madhya Pradesh*, Criminal Appeal No. 178 of 1959 decided on 18-11-1960; *Ashrafkha Haibatkha Pathan v. The State of Bombay,* Criminal Appeal No. 38 of 1960 decided on 14-12-1960)
>
> ".....On close analysis, it is clear that the principles laid down by the Court in this matter have remained the same. What may be called the golden thread running through all these decisions is the rule that in deciding appeals against acquittal the Court of Appeal must examine the evidence with particular care, must examine also the reasons on which the order of acquittal was based and should interfere with the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the appellate court comes to the conclusion that the view taken by the lower court is clearly an unreasonable one that itself is a 'compelling reason' for interference. For, it is a court's duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established."

[See: *Aher Raja Khima Versus State of Surashtra,* AIR 1956 SC 217].

10. Fact that appellant was entrusted with Government money and that he withdrew the same from the bank is not disputed before this Court. It be only observed that trial Court, failed to take into account entire material, so produced on record by the prosecution itself, more particularly the report of valuation (Ex.PW.22/M).

11. It is undisputed that the accused withdrew a sum of Rs.10,000/- for construction of Panchayat Ghar, Khad Kalyana; Rs.45,000/-, in two installments, for construction of Panchayat Ghar, Khalanu; and Rs.10,000/- for construction of Panchayat Ghar, Karkoh.

12. It needs to be examined as to whether these amounts were actually spent by the appellant for the construction of Panchayat Ghar or not.

13. The appellant stands convicted for having committed an offence punishable under the provisions of Sections 409 of IPC and 13(2) of the P.C. Act. What needs to be considered is as to whether, in the light of the settled principles of law, prosecution has been able to establish the essential ingredients, so required for constituting an offence of criminal breach of trust and misconduct, as defined under the P.C. Act. Has the prosecution proved the essential ingredients, so required to constitute an offence of criminal breach of trust,

which are: dishonest intent, converting property to his own use, dishonestly using or disposing of the property in violation of law or agreement.

14. From the conjoint reading of testimonies of Chand Ram (PW.1), Durga Dass (PW.5), Balbir Singh (PW.10) and Gulab Singh (PW.23-A), it is evident that some money was spent for construction of Panchayat Ghar Khalanu. Balbir Singh and Chand Ram have not supported the prosecution and despite extensive cross-examination, nothing fruitful could be elicited from their testimonies. Gulab Singh is the Investigating Officer and has no personal knowledge with regard to the money which was spent for the construction of Panchayat Ghar(s). According to Durga Dass, Panchayat Ghar was not habitable. Now the issue, which arises for consideration, is as to whether in view of utilization certificate (Ex.PW.16/D) and valuation report (Ex.PW.22/M) (wrongly marked/referred to by the trial Court as Ex.PW.20/M), so prepared by Sham Lal Sharma (DW.1), an employee of the Himachal Pradesh Public Works Department, can it be said that the appellant has misappropriated the amount in question. Significantly valuation certificate itself reveals that more than Rs.45,000/- was spent for the construction of Panchayat Ghar Khalanu. True it is that Durga Dass has deposed that the Panchayat Ghar is not in a habitable condition, but then this fact itself would not establish the guilty intent or the factum of appellant having misappropriated the amount in question. The amount, so sanctioned for the construction of Panchayat Ghar, disbursed in two installments, was actually spent and utilized for such purpose.

15. With regard to construction of Panchayat Ghar Khad Kalyanu, through the testimony of witnesses Prem Singh (PW.3) and Het Ram (PW.8), it is evident that an amount of Rs.10,000/- was withdrawn by the appellant. These witnesses also state that the Panchayat Ghar could not be utilized for the reason that construction was not complete. But then Prem Singh also contradicts himself by stating that he has not visited the spot and as such, could not state with certainty the extent of construction carried out on the spot. Be that as it may, fact of the matter is that from utilization certificate (Ex.PW.16/C) and the valuation report (Ex.PW.22/M) (wrongly marked/referred to by the trial Court as Ex.PW.20/M), it is evident that the amount, so withdrawn was fully utilized even for construction of the said Panchayat Ghar.

16. In relation to Panchayat Ghar Karkoh, prosecution seeks reliance on the testimonies of Roshan Lal (PW .9), Naresh Kumar (PW.12), Jai Singh (PW.13), Krishan Chand (PW.14), Gulab singh (PW.16), Jagdish Chand (PW.21), Gian Singh (PW.22) and Arun Kumar Sharma (PW.25). Naresh Kumar and Jai Singh have not supported the prosecution case and despite their extensive cross-examination, nothing fruitful could be elicited from their testimonies. Be that as it may, factum of withdrawal of a sum of Rs.10,000/- even for construction of the said Panchayat Ghar, is not disputed by the present appellant. Roshan Lal does state that Panchayat Ghar could not be utilized as there were no doors, windows or roof, as only the room was plastered. But then, he states that repair was carried out prior to his inspecting the Panchayat Ghar. Record, so proved by him, is not prepared by him. It is not that the author of the report (Ex.PW.1/B), upon which reliance is sought by the prosecution, was not available. It is also not that report was prepared in the normal course of business and that Roshan Lal was successor in office. Reliance on the said report is thus not permissible in law.

17. Arun Kumar Sharma, SDM, only makes out a grievance that construction of Panchayat Ghar was not complete. He does not state that money withdrawn was not fully utilized for the construction of Panchayat Ghar. Testimony of remaining witnesses is also to similar effect. Noticeably even with regard to said Panchayat Ghar, there is utilization certificate (Ex.PW.16/B) and valuation report (Ex.PW.22/M), prepared by the officials of the

Department, proved, in accordance with law, evidencing the fact that the amount so withdrawn by the appellant was utilized for the construction of said Panchayat Ghar.

18. In *Abdulla Mohammed Pagarkar Versus State (Union Territory of Goa, Daman and Diu),* (1980) 3 SCC 110, the apex Court has clarified that suspicion, however strong, cannot be a substitute for proof.

19. In view of the ratio of law laid down by Hon'ble Supreme Court of India in *Radha Pisharassiar Amma Versus State of Kerala,* (2007) 13 SCC 410, it cannot be said that prosecution has been able to prove that the appellant herein dishonestly misappropriated or converted to his own use or dishonestly used the government money, in violation of any provisions of law.

20. Thus, in view of the above discussion, it cannot be said that prosecution has been able to establish the essential ingredients of criminal breach of trust or misconduct, as required in law.

21. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

22. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 17.08.2011/18.08.2011, passed by Special Judge, (Additional Sessions Judge), Mandi, H.P., in C.C. No.2 of 2007, titled as *State Versus Mohinder Kumar Sharma,* is set aside and accused Mohinder Kumar Sharma is acquitted of the charged offences. Accused is already on bail as such bonds are discharged. Amount of fine, if deposited by the accused, be refunded to him accordingly. Appeal stands disposed of, so also pending application(s), if any.

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

FAO No. 285 of 2014 alongwith FAO No.150 of 2015.
Date of decision: May 21, 2015

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1. **FAO No. 285 of 2014**
National Insurance Company Ltd. ..... Appellant
Vs.
Smt. Jhanpli Devi alias Mukka Devi and others ..... Respondents

2. **FAO No. 150 of 2015**
Smt. Jhanpli Devi alias Mukka Devi and others ..... Appellants
Vs.
Sher Singh and others ..... Respondents

Code of Civil Procedure, 1908 - Order 16- Insurance Company relied upon the verification report issued by the Licencing Authority- owner produced another driving licence which was put for the first time to RW-2 –Insurance Company filed an application to lead additional evidence by placing on record certain documents to show that licence was fake- application was allowed and last opportunity was granted to produce the witnesses on self

responsibility- adjournment prayed was declined on the ground that Petition was old and was filed in the year 2011- held, that Commissioner should not have imposed cost when Insurance Company was not at fault and the licence was produced for the first time by the claimants- further, Commissioner had refused to provide any assistance for summoning the witnesses and had directed the company to produce the witnesses from Manipur on self responsibility – order passed by the Commissioner to close the evidence of the Insurance Company was not sustainable- Petition allowed and the Commissioner directed to allow the Insurance Company to lead additional evidence. (Para-6 to 16)

For the Appellants : Mr. Ashwani K. Sharma, Advocate, in FAO No. 285 of 2014 and for respondent No.2 in FAO No. 150 of of 2015.

For the Respondents : Mr. J.L.Bhardwaj, Advocate, for respondents No.1,3 and 4, in FAO No. 285 of 2014 and for appellants in FAO No. 150 of 2015.

Mr. O.C. Sharma, Advocate, for respondent No. 5 in FAO No. 285 of 2014 and for respondent No.1 in FAO No. 150 of 2015.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Both these appeals are directed against the award dated 1.4.2014 passed by learned Commissioner, Employee's Compensation, Solan, District Solan, H.P. in WCA No. 1/2 of 2011 whereby the compensation of Rs. 7,94,212/- alongwith interest at the rate of 12% per annum has been awarded in favour of the claimants.

2. The claimants are aggrieved as no penalty as envisaged under Employee's Compensation Act (for short 'Act') has been imposed, while the insurance company is aggrieved because the liability has been fastened upon it.

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

4. Bearing in mind the nature of order I propose to pass, it is not necessary to state in detail the relevant facts. The claimants are the legal heirs of deceased Vinod Singh and have sought compensation on account of his death. The specific defence of the Insurance Company was that deceased Vinod Singh was not possessed of a valid and effective driving licence, rather his licence was fake. The Insurance Company relied upon the verification report Ex.PW-3/A issued by the Licensing Authority, Motor Vehicles Department, Dehradun in respect of driving licence Ex. RA. But the owner thereafter produced another driving licence Ex. R-1X, which for the first time was put to RW-2 Narinder Kumar, in his cross-examination held on 31.7.2013.

5. The Insurance Company immediately thereafter filed an application for grant of permission to lead additional evidence by placing on record certain documents to show that the licence i.e. Ex. R-1X was fake.

6. The application came up for consideration on 11.11.2013 and was fixed for reply and consideration on 10.12.2013. On 10.12.2013, the Commissioner passed the following order:

> *"At this stage, ld. counsel for the respondents made no objection in case the application under Section 151 CPC for production of additional evidence be allowed. In view of no objection made by the ld. counsel for the respondents,*

the petition in hand stand allowed. Subject to cost of Rs.500/-. Cost not paid. Be paid on the next date of hearing. Now to come up for cross-examination of the dealing clerk of motor vehicle authority being last date granted on self responsibility. Steps be taken within 10 days. Let the case file be put up on 12.3.2014."

7. When the matter was fixed on 12.3.2014, learned Commissioner passed the following orders:

"No RW present. One more adjournment prayed by the ld. counsel for the respondent but since it was last opportunity and petition is old one which was filed in the year 2011, hence I do not find justification to grant more opportunities for remaining respondent evidence and accordingly the remaining evidence of respondent No.2 is closed by the order of the Court. Now to come up for arguments on 14.3.2014."

On 14.3.2014, the Commissioner heard the arguments and reserved the order, which was ultimately announced on 1.4.2014.

8. Can the Courts, Tribunals and Authorities proceed rashly with the cases only because these are old and targeted ones? Is the Court rendering any favour while granting assistance to the parties by issuing process to the witnesses summoned? These are certain questions which are required to be considered in these appeals.

9. Of late, there appears to be a rising trend in the Subordinate Courts where they are totally oblivious of their duties to render not only justice but do complete justice to the parties. This is particularly so when the cases are relatively old and targeted ones.

10. Firstly, I see no reason why the Commissioner should have imposed cost while allowing the aforesaid application preferred by the Insurance Company more particularly, when the appellant/ insurance company was not at fault, because admittedly it was the claimants who for the first time had confronted RW-2 in his cross-examination with driving licence Ex.R-1X and immediately thereafter the Insurance Company had moved the application for permission to lead additional evidence.

11. Secondly, it is not understandable as to why the Court refused to render any assistance for summoning the witnesses through Court process and directed the Insurance Company to produce the witnesses from the office of District Transport Officer, Senapati District Manipur on self responsibility. It needs to be re-emphasized and re-stated that the Courts do no favour to any party by summoning witnesses through its process. The same is rather a right granted under the law to the parties in lis.

12. Order 16 of the Code of Civil Procedure casts an obligation on the Court to render all assistance to summoning of the witnesses. As a general rule, the parties are entitled as of right to obtain summons to witnesses, though in certain cases the time frame may be an exception.

13. The learned Commissioner below also appears to be totally oblivious of the provisions of Rule 19 of Order 16 CPC, because admittedly Manipur is more than 500 kilometers distance from the Court house. This Rule reads as under:

"R.19. No witness to be ordered to attend in person unless resident within certain limits. – *No one shall be ordered to attend in person to give evidence unless he resides –*

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than one hundred or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than five hundred kilometers distance from the Court-house:

Provided that where transport by air is available between the two places mentioned in this rule and the witness is paid the fare by air, he may be ordered to attend in person.

14. It is further difficult to comprehend as to how the learned Commissioner below expected the witness to present himself without process of Court when admittedly the witness was not an employee of the Insurance Company but was a government servant, who was subject to various rules including conduct rules, leave rules etc. Would a Government servant simply come to give evidence on the asking of the Insurance Company? The learned Commissioner ought to have considered all these aspects before directing the Insurance Company to produce its evidence on self responsibility.

15. In view of the aforesaid discussion, the impugned award dated 1.4.2014 passed by the learned Commissioner below in case WCA No. 1/2 of 2011 cannot be sustained and is accordingly set-aside and is remitted back to the Commissioner for deciding the same afresh after permitting the Insurance Company to lead additional evidence and needless to say the claimants and the other parties will not only have a right to cross-examine the witnesses but they shall also be at liberty to lead evidence though only with respect to licence Ex.R-1X.

16. Both the appeals are accordingly disposed of in the aforesaid terms. The parties through their counsel are directed to appear before the learned Commissioner on 01.06.2015.

The learned Commissioner shall make all efforts to decide the case as expeditiously as possible and in no event later than 30th September, 2015. The Registry is directed to send the records forthwith, so as to reach the Court below well before the date fixed. Copy dasti.

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

Pankaj Sharma son of Dina Nath .....Petitioner.

Vs.

State of Himachal Pradesh ....Non-petitioner.

Cr.MP(M) No. 425 of 2015.
Order reserved on: 15.5.2015
Date of Order: May 21, 2015.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 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- in the present case, challan has already been filed in the

Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed. (Para-7 to 9)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation, 2012 Cri.L.J 702

For the petitioner: Mr. Ajay Kochhar, Advocate.
For non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 63 of 2015 dated 2.4.2015 registered under Sections 307, 323 read with Section 34 IPC at Police Station Sadar Shimla District Shimla HP.

2. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency. It is further pleaded that investigation of the case is complete and petitioner is government employee and there is no possibility of fleeing from the proceedings of court. It is further pleaded that continue custody of the petitioner would adversely effect the career and would also effect the family members of the petitioner who are totally dependent upon him. It is further pleaded that any condition imposed by the Court will be binding upon the petitioner and petitioner will not tamper with the prosecution witness in any manner. It is further pleaded that bail petition filed by petitioner was dismissed by learned Sessions Judge Shimla on dated 10.4.2015. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. There is recital in police report that on dated 2.4.2015 information was received by way of telephone at Police Station Sadar Shimla that quarrel took place at HHH Shimla and injured person was brought for his medical treatment to IGMC Shimla. There is further recital in police report that statement of Kashish Khana was recorded. There is further recital in police report that Kashish Khana is a shopkeeper at lower market Shimla and on dated 2.4.2015 at about 8.15 night Kashish Khana along with his cousin brother Abhay Kumar went to HHH Shimla for consuming coffee and when Kashish Khana came out of the restaurant after consuming coffee one ambassador car was parked at the entrance of restaurant. There is further recital in police report that Kashish Khana told the driver of car to shift the car and in the meanwhile altercation took place and two persons came from behind and started quarreling with Kashish Khana. There is further recital in police report that one of co-accused namely Pankaj Sharma had fired from his service pistol and Kashish Khana sustained injuries in his right feet. There is further recital in police report that other co-accused namely Rakesh Kumar had inflicted injury with stick. There is further recital in police report that MLC of injured person was obtained from IGMC Shimla and the statements of the witnesses were recorded under Section 161 Cr.P.C and site plan was prepared. There is further recital in police report that co-accused Pankaj Sharma has fired from his service pistol and both accused persons were arrested on dated 3.4.2015. There is further recital in police report that sticks were recovered as per disclosure statement of co-accused Rakesh Kumar. There is further recital in police report that no

recovery is to be effected from accused persons. There is further recital in police report that challan stood filed in the Court of learned Chief Judicial Magistrate Shimla on dated 7.5.2015. There is further recital in police report that accused persons are influential persons and if bail is granted to the petitioner then petitioner would cause disappearance of the evidence and would also threat prosecution witness. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of petitioner and Court also heard learned Additional Advocate General appearing on behalf of State.

5. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after the filing of challan and after completion of investigation and after discharged of injured from hospital as alleged?.

(2) Final Order.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing 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 investigation is completed and challan stood filed in the Court and no recovery is to be effected from the petitioner and injured already stood discharged from hospital and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 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 SC titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. In the present case challan already stood filed in the Court on dated 7.5.2015, investigation is completed, no recovery is to be effected from the petitioner, injured already stood discharged from hospital and trial of the case will be concluded in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent Court of law. Court is of the opinion that if petitioner is released on bail at this stage then interests of the general public or the State will not be adversely effected keeping in view the concept that bail is rule and jail is exception.

8. Submission of learned Additional Advocate General that if the petitioner is released on bail then petitioner will induce and threat prosecution witness and on this ground bail petition be rejected is devoid of any force for the reason hereinafter mentioned.

Court is of the opinion that conditions will be imposed in the bail order that petitioner will not induce or threat prosecution witnesses. If petitioner will flout terms and conditions of bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail provided under Section 439(2) of the Code of Criminal Procedure 1973 in accordance with law. 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 is allowed. It is ordered that petitioner will be released on bail on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That petitioner will not leave India without prior permission of the Court. (iv) That petitioner will not commit similar offence qua which he is accused. (v) That petitioner will give his residential address to the Investigating Officer in written manner so that petitioner can be located after giving short notice. (vi) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of the trial. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of case in any manner. Bail petition disposed of. All pending application(s) if any also disposed of.

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

Rakesh Kumar son of Gola Ram. .....Petitioner.

Versus

State of Himachal Pradesh. ....Non-petitioner.

Cr.MP(M) No. 424 of 2015.
Order reserved on: 15.5.2015
Date of Order: May 21, 2015.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 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- in the present case, challan has already been filed in the Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed. (Para-7 to 9)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation, 2012 Cri.L.J 702 S.C

For the petitioner: Mr. Ajay Kochhar, Advocate.

For non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 63 of 2015 dated 2.4.2015 registered under Sections 307, 323 read with Section 34 IPC at Police Station Sadar Shimla.

2. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency. It is further pleaded that investigation of the case is complete and petitioner is government employee and there is no possibility of fleeing from the proceedings of court. It is further pleaded that continue custody of the petitioner would adversely effect the career and would also effect the family members of the petitioner who are totally dependent upon him. It is further pleaded that any condition imposed by the Court will be binding upon the petitioner and petitioner will not tamper with the prosecution witness in any manner. It is further pleaded that bail petition filed by petitioner was dismissed by learned Sessions Judge Shimla on dated 10.4.2015. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. There is recital in police report that on dated 2.4.2015 information was received by way of telephone at Police Station Sadar Shimla that quarrel took place at HHH Shimla and injured person was brought for his medical treatment to IGMC Shimla. There is further recital in police report that statement of Kashish Khana was recorded. There is further recital in police report that Kashish Khana is a shopkeeper at lower market Shimla and on dated 2.4.2015 at about 8.15 night Kashish Khana along with his cousin brother Abhay Kumar went to HHH Shimla for consuming coffee and when Kashish Khana came out of the restaurant after consuming coffee one ambassador car was parked at the entrance of restaurant. There is further recital in police report that Kashish Khana told the driver of car to shift the car and in the meanwhile altercation took place and two persons came from behind and started quarreling with Kashish Khana. There is further recital in police report that one of co-accused namely Pankaj Sharma had fired from his service pistol and Kashish Khana sustained injuries in his right feet. There is further recital in police report that other co-accused namely Rakesh Kumar had inflicted injury with stick. There is further recital in police report that MLC of injured person was obtained from IGMC Shimla and the statements of the witnesses were recorded under Section 161 Cr.P.C and site plan was prepared. There is further recital in police report that co-accused Pankaj Sharma had fired from his service pistol and both accused persons were arrested on dated 3.4.2015. There is further recital in police report that sticks were recovered as per disclosure statement of co-accused Rakesh Kumar. There is further recital in police report that no recovery is to be effected from accused persons. There is further recital in police report that challan stood filed in the Court of learned Chief Judicial Magistrate Shimla on dated 7.5.2015. There is further recital in police report that accused persons are influential persons and if bail is granted to the petitioner then petitioner would cause disappearance of the evidence and would also threat prosecution witness. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of petitioner and Court also heard learned Additional Advocate General appearing on behalf of State.

5. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after the filing of challan and after completion of investigation and after discharged of injured from hospital as alleged?.

(2) Final Order.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing 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 investigation is completed and challan stood filed in the Court and no recovery is to be effected from the petitioner and injured already stood discharged from hospital and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 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 S.C titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. In the present case challan already stood filed in the Court on dated 7.5.2015, investigation is completed, no recovery is to be effected from the petitioner, injured already stood discharged from hospital and trial of the case will be concluded in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent Court of law. Court is of the opinion that if petitioner is released on bail at this stage then interests of the general public or the State will not be adversely effected keeping in view the concept that bail is rule and jail is exception.

8. Submission of learned Additional Advocate General that if the petitioner is released on bail then petitioner will induce and threat prosecution witness and on this ground bail petition be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that petitioner will not induce or threat prosecution witnesses. If petitioner will flout terms and conditions of bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail provided under Section 439(2) of the Code of Criminal Procedure 1973 in accordance with law. Point No.1 is answered in affirmative.

Point No.2 (Final order).

9. In view of my findings on point No.1 bail petition filed by petitioner is allowed. It is ordered that petitioner will be released on bail on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join

investigation as and when called for by the Investigating Officer in accordance with law. (ii) That petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That petitioner will not leave India without prior permission of the Court. (iv) That petitioner will not commit similar offence qua which he is accused. (v) That petitioner will give his residential address to the Investigating Officer in written manner so that petitioner can be located after giving short notice. (vi) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of the trial. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of case in any manner. Bail petition disposed of. All pending application(s) if any also disposed of.

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

Sandeep Gupta .....Petitioner.
Versus
Indu Gupta ..... Respondent.

Cr.MMO No. 248 of 2014.
Date of decision: 21.05.2015.

Code of Criminal Procedure, 1973- Section 482- Husband was directed to pay monthly maintenance @ Rs.4,000/- to wife and minor child as well as to provide one room in the shared household – husband contended that accommodation belongs to his mother and will not fall in the definition of shared household- he is ready to hire a separate accommodation for the wife and the child- held, that wife does not have a right to reside in a particular property – she only has a right in the property of her husband - husband had failed to prove that house belongs exclusively to his mother- it has come on record that he along with his mother had taken a loan for building and he was repaying the loan – therefore, his contention that house is not shared household cannot be accepted- petition dismissed.(Para-5 to 7)

Case referred:
S.R.Batra & Anr. versus Taruna Batra AIR 2007 SC 1118

For the Petitioner : Mr.Maan Singh, Advocate.
For the Respondent : Mr.Raman Prashar and Kanwar Virender Singh, Advocates.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral).**

This petition under Section 482 Cr.P.C. is directed against the judgment passed by learned Additional Sessions Judge, Kullu, on 21.10.2014 whereby he affirmed the order passed by learned Chief Judicial Magistrate, Kullu, directing the petitioner to provide one room to the aggrieved person in the newly constructed shared household for residence purpose.

2. The matrimonial relationship interse parties is not denied. The learned Courts below have concurrently found the respondent to be the legally wedded wife of the petitioner. The

marriage between the parties had been solemnized as per Hindu rites and ceremonies on 04.11.2007 and out of this wedlock a son was born to them. On the application of the wife, the respondent was directed to pay monthly maintenance at the rate of Rs.4,000/- to her and their minor child and provide one room in the shared household.

3. The learned counsel for the petitioner has argued that instead of petitioner being compelled to provide the respondent with the shared household, he is ready to hire a separate accommodation for the respondent and their child and, therefore, the orders of the Courts below to provide a shared household be quashed and set aside. He further argued that once the accommodation belongs to his mother, the same cannot be said to be a shared household and, therefore, the respondent has no right to claim residence in such premises.

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

4. Section 19 of the Protection of Women from Domestic Violence Act, 2005 (for short the 'Act') reads thus:-

> *"**19. Residence Orders.**-(1)* While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order-
>
> *(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;*
>
> *(b) directing the respondent to remove himself from the shared household;*
>
> *(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;*
>
> *(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;*
>
> *(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or*
>
> *(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:*
>
> *Provided that no order under clause (b) shall be passed against any person who is a woman.*
>
> *(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.*
>
> *(3) The Magistrate may require from the respondent to execute a bond with or without sureties, for preventing the commission of domestic violence.*
>
> *(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly.*
>
> *(5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the Court may also pass an order directing the officer in-charge of the*

nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to."

5. Insofar as the first contention of the petitioner is concerned, it is only after the petitioner has invited adverse findings from the learned Courts below that such an offer of hiring separate premises is being made. In terms of the Act, the wife has a right of residence which does not mean a right to residence in a particular property. Though the same essentially is a right of residence in a commensurate property, but this action does not translate into a right to reside in a particular property. But, then there should be some plausible reason as to why the petitioner is not ready to provide a residence in the shared household. It is not a case where a house has been allotted to a higher functionary or that the petitioner is residing in government accommodation for which exception for providing residence in the shared household can always be carved out. Therefore, in such facts and circumstances, the wife definitely has a right in the property over which her husband has a right, title and interest to claim residence. The offer of the husband at the initial stage to provide a commensurate alternate residence could have been considered, but not now when the petitioner has lost in both the Courts below.

6. In support of his second contention regarding the household belonging to the mother and, therefore, the same being incapable of being provided as shared household, the learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in ***S.R.Batra & Anr.*** *versus* ***Taruna Batra AIR 2007 SC 1118.*** It was held therein that the claim of the wife for a shared household is only available against the husband and not against her in-laws or other relatives and in case the shared household belongs to mother-in-law, the same does not become "shared household" only because of the wife had shared that house with her husband earlier. For enforcing this claim, the house has to be owned and taken by the husband on rent or a house which belongs to a joint family of which husband is a member.

7. There can be no quarrel with the aforesaid exposition of law. But, then the petitioner has failed to prove on record that the house belongs exclusively to his mother. Rather, it has come on record that he alongwith his mother had taken a loan for building the house and he was repaying the loan amount in monthly installment of Rs.7,000/-. He also admitted that his salary was Rs.25,000/- per month, whereas, his mother had retired from a government job in the year 2010 and his father was handicapped. The petitioner himself has admitted that there are 9-10 rooms in the old and new houses and once this is the position, the petitioner cannot back out from his legal obligation of providing residence to the respondent in the shared household.

8. In view of the aforesaid discussion, there is no merit in this petition and the same is dismissed alongwith pending application(s), if any, leaving the parties to bear their own costs.

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

1. Babu Ram son of Mushu Ram
2. Hem Lata d/o Mushu Ram .....Appellants.

Vs.

State of Himachal Pradesh. .....Respondent.

Cr.Appeal No. 4230 of 2013
Judgment reserved on: 1st May, 2015
Date of Judgment: May 22, 2015

Indian Penal Code, 1860- Sections 363, 366, 376 and 120-B- Accused kidnapped the prosecutrix with an intention to force her to marry the co-accused 'B'- accused 'H' told the father of the minor prosecutrix to send her to tailoring centre- accused 'H' took the prosecutrix towards the bridge where she was pushed inside the car- accused 'H' caught the prosecutrix and threatened to kill her- minor prosecutrix was brought to the Court and her age was wrongly disclosed- the documents relating to her marriage with accused 'B' were prepared – she was kept in the house where she was raped – testimony of the prosecutrix is trustworthy, reliable and inspires confidence- it is corroborated by the medical evidence- the age of the prosecutrix was proved to be less than 16 in the certificate issued by Registrar of Birth and Death and Middle standard examination certificate- father of the prosecutrix had specifically mentioned that age of the prosecutrix was 15 years- accused 'H' had called the prosecutrix from her home and had dragged her in the vehicle- father of the prosecutrix had not consented to taking away of the prosecutrix- therefore, accused were rightly convicted- appeal dismissed. (Para-10 to 17)

Cases referred:

Rajesh Patel vs. State of Jharkhand, (2013)3 SCC 791
State of Rajasthan vs. Baboo, (2013)4 SCC 206
Deepak vs. State of Haryana, (2015)4 SCC 762
Chuni Lal and another vs. State of H.P, 1996 Cri.L.J.3864 (H.P.)
Harpal Singh vs. State of H.P. (Full Bench), AIR 1981 SC 361
Vidyadhar vs. Mohan, ILR 1978 HP 174
Murugan @ Settu vs. State of Tamil Nadu, AIR 2011 SC 1691
Chitru Devi vs. Ram Dai, AIR 2002 HP 59
Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 SC 922
Mohd. Alam vs. State (NCT of Delhi), 2007 Cri..L.J. 803 (Delhi)
State of Punjab vs. Gurmit Singh and others, (1996)2 SCC 384
State of Rajasthan vs. N.K. the accused, (2000)5 SCC 30
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Madan Gopal Kakkad Vs. Naval Dubey and another, (1992) 3 SCC 204
State of Maharashtra vs. Chander Prakash, (1990)1 SCC 550
State of U.P. vs. Chotte Lal, (2011)2 SCC 550
Pratapbhai Hamirbhai Solanki vs. State of Gujarat, 2012 (10) JT 286
Parkash vs. State of Haryana, (2004)1 SCC 339
Thakorlal D. Vadgama vs. State of Gujarat, AIR 1973 SC 2313
Kuldeep K. Mahato vs. State of Bihar, AIR 1998 SC 2694
Radha Bhallabh & others vs. State of U.P., 1995(4) JT 206

For the Appellant: Mr. S.D. Gill, Advocate & Ms. Prem Lata Negi ,Advocate.
For the Respondent: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge

Present appeal is filed against the judgment and sentence passed by learned Sessions Judge Mandi in Sessions Trial No 27 of 2007 titled State vs. Babu Ram and others decided on dated 24.4.2012.

Brief facts of the case as alleged by the prosecution:-

2. It is alleged by the prosecution that on dated 9.7.2007 at Dehar accused persons kidnapped minor prosecutrix in vehicle No. HP-03(T)-4217 with intention to force her to marry with co-accused Babu Ram. It is alleged by prosecution that in pursuance of criminal conspiracy accused persons kidnapped minor prosecutrix aged 15½ years out of lawful guardianship of father of prosecutrix without his consent. It is further alleged by prosecution that co-accused Hem Lata called father of minor prosecutrix on dated 9.7.2007 and told the father of minor prosecutrix to send minor prosecutrix to tailoring centre at Dehar. It is alleged by prosecution that co-accused Hem Lata also personally talked to minor prosecutrix and asked her to come to Dehar tailoring centre. It is alleged by prosecution that thereafter minor prosecutrix went to Dehar and co-accused Hem Lata met the minor prosecutrix at Sheetla temple and took the minor prosecutrix towards bridge. It is also alleged by prosecution that at bridge a white coloured car came and minor prosecutrix was pushed inside the car. It is alleged by prosecution that co-accused Hem Lata gagged the mouth of prosecutrix and threatened the minor prosecutrix to kill her in case she would raise hue and cry. It is alleged by prosecution that thereafter minor prosecutrix was took to Shimla and thereafter co-accused Hem Lata pursuaded the minor prosecutrix to marry with co-accused Babu Ram. It is alleged by prosecution that thereafter minor prosecutrix was brought to Court and her age was wrongly disclosed and documents relating to marriage were prepared with co-accused Babu Ram. It is alleged by prosecution that thereafter co-accused Babu Ram and Hem Lata took the minor prosecutrix to their village Barara Tehsil Sunni and prosecutrix was kept in the house w.e.f. 10.7.2007 till 15.7.2007. It is alleged by prosecution that thereafter in village Barara Tehsil Sunni minor prosecutrix was raped by co-accused Babu Ram. It is alleged by prosecution that when minor prosecutrix did not return to her residential house Hari Dass filed a criminal complaint in P.P. Salapar. It is alleged by prosecution that FIR Ext.PW19/A was recorded and thereafter investigation was started and site plan Ext.PW18/A was prepared and photographs Ext.PW7/A-1 to Ext.PW7/A-4 along with negatives Ext.PW7/A-5 to Ext.PW7/A-8 prepared. It is further alleged by prosecution that thereafter certified copy of family register Ext.PW4/A and copy of birth and deaths register Ext.PW4/B were obtained by Investigating Agency. It is alleged by prosecution that thereafter minor prosecutrix was brought to Salapar on dated 16.7.2007. It is also alleged by prosecution that medical examination of prosecutrix was conducted and as per opinion of medical officer the minor prosecutrix was exposed to sexual intercourse. It is alleged by prosecution that MLC Ext.PW12/A was obtained and thereafter minor prosecutrix was handed over to her parents vide memo Ext.PW1/C. It is alleged by prosecution that application was filed for medical examination of co-accused Babu Ram and thereafter medical examination of co-accused Babu Ram was conducted and as per medical opinion it was found that co-accused Babu Ram was capable of performing sexual intercourse. It is alleged by prosecution that thereafter prosecutrix was referred to zonal hospital Mandi for second opinion where Dr. Namita Verma had given opinion that possibility of sexual

intercourse could not be ruled out. It is alleged by prosecution that thereafter vehicle having registration No. HP-03(T)-4217 was seized along with documents vide seizure memo Ext.PW6/A. It is alleged by prosecution that spot was identified by minor prosecutrix and map Ext.PW18/F was prepared. It is alleged by prosecution that site plan of village Brara where minor prosecutrix was confined in the home Ext.PW18/G was prepared and further alleged that case property was deposited in malkhana with PW11 Raj Kumar on dated 17.7.2007. It is alleged by prosecution that articles were sent to FSL Junga through C. Sant Ram PW8 vide RC No. 8/2007 and further alleged that middle class certificate of prosecutrix Ext.PW16/A was obtained. It is also alleged by prosecution that as per chemical analyst report human semen was found on underwear of co-accused Babu Ram and shirt of minor prosecutrix. It is alleged that human blood was also found upon salwar of prosecutrix.

3. Learned trial Court on dated 2.1.2008 framed charge against co-accused Babu Ram under Section 376 IPC and learned trial Court framed charge against co-accused Devender Singh, Hem Lata and Bheem Singh under Sections 120-B, 363 and 366 IPC. All accused persons did not plead guilty and claimed trial.

4. Prosecution examined twenty one oral witnesses. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext.PW1/A	*Copy of daily diary.*
Ext.PW1/B	*Memo regarding identification*
Ext.PW1/C	*Memo*
Ext.PW3/A	*Memo*
Ext.PW3/B	*Memo*
Ext.P1	*Shirt*
Ext.P2	*Salwar*
Ext.DA	*Affidavit*
Ext.PW4/A	*Copy of birth register issued by Registrar (Births and Deaths)*
Ext.PW4/B	*Copy of birth register issued by Registrar (Births and Deaths).*
Ext.PW5/A	*Memo regarding affidavit of Maya & Babu Ram*
Ext.PW6/A	*Memo*
Ext.PW7/A-1 to Ext.PW7/_4	*Photographs*
Ext.PW7/A-5 to Ext.PW7/A-8	*Negatives*
Ext.PW10/A	*Opinion*
Ext.PW11/A	*Copy of Malkhana register*
Ext.PW11/B	*Copy of RC*
Ext.PW12/A	*MLC of prosecutrix*
Ext.PW14/A	*Report of Chemical Examiner*
Ext.PW16/A	*Middle standard certificate*
Ext.PW17/A	*MLC*
Ext.PW18/A	*Spot map*
Ext.PW18/B	*Copy of Family register*

Ext.PW18/C	*Affidavit*
Ext.PW18/D & Ext.PW18/E	*Copies of application*
Ext.PW18/F	*Spot map*
Ext.PW18/G	*Spot map*
Ext.PW18/H	*Statement of Kesar Singh*
Ext.PW18/J &Ext.PW18/K	*Statements of witnesses*
Ext.PW19/A	*FIR*

5. Learned trial Court convicted co-accused persons namely Hem Lata, Devinder and Bhim Singh under Sections 363, 366 read with Section 120-B IPC and co-accused namely Babu Ram was convicted by learned trial Court under Section 376 IPC. Learned trial Court convicted co-accused Hem Lata, Devinder and Bhim Singh to undergo rigorous imprisonment for a period of three years and fine to the tune of Rs.5,000/- (Rupees five thousand only) and in default of payment of fine to undergo simple imprisonment for six months for offence under Sections 363 read with Section 120-B IPC. Learned trial Court further convicted co-accused Hem Lata, Devinder and Bhim Singh to undergo rigorous imprisonment for a period of five years and to pay fine of Rs.5000/- (Rupees five thousand only) for commission of offence punishable under Section 366 IPC read with Section 120-B IPC and in default of payment of fine to undergo simple imprisonment for six months. Learned trial Court further directed that both substantive sentences of imprisonment shall run concurrently. Learned trial Court convicted appellant Babu Ram to undergo rigorous imprisonment for a period of seven years and fine to the tune of Rs.20,000/- (Rupees twenty thousand only) for criminal offence punishable under Section 376 IPC and further directed that in default of payment of fine the convicted shall further undergo simple imprisonment for a period of one year. Learned trial Court further directed that amount of fine so recovered would be disbursed to prosecutrix as compensation.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellants namely Babu Ram and Hem Lata filed present appeal. Court heard learned Advocate appearing on behalf of the appellants and learned Additional Advocate General appearing on behalf of the respondent-State and also perused the entire record carefully.

7. Question that arises for determination in present appeal 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 as mentioned in memorandum of grounds of appeal.

8. ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 Hari Dass has stated that he is father of three children including the prosecutrix. He has stated that age of prosecutrix is 15½ years and further stated that date of birth of prosecutrix was 15.12.1991. He has stated that prosecutrix was undergoing the training of stitching and tailoring at Tailoring Centre Dehar. He has stated that Hem Lata co-accused is resident of Shimla and further stated that on dated 9.7.2007 Hem Lata rang him at 11.45 AM and told to send the minor prosecutrix to her tailoring centre Dehar. He has stated that co-accused Hem Lata also talked with minor prosecutrix. He has stated that thereafter minor prosecutrix went to Dehar and in the evening of dated 9.7.2007 he rang up co-accused Hem Lata on her mobile phone and inquired about whereabouts of minor prosecutrix but co-accused Hem Lata replied that she did not know about minor prosecutrix. He has stated that next day he went to Salapar and reported the matter in

police station. He has stated that copy of daily diary report is Ext.PW1/A. He has further stated that thereafter after 3-4 days police officials came to his village and his statement was recorded. He has stated that about 15 days prior to incident co-accused Hem Lata came to his house with proposal to settle the marriage of prosecutrix with her brother co-accused Babu Ram but he declined the proposal because prosecutrix was minor. He has stated that he also went to residential room of co-accused Hem Lata at Dehar and came to know that co-accused Hem Lata had vacated the rented room about one week ago. He has stated that on dated 16.7.2007 co-accused Hem Lata brought the prosecutrix to police station Salapar and custody of minor prosecutrix was handed over to him. He has stated that accused persons have kidnapped the minor prosecutrix without his consent. He has denied suggestion that police officials did not come to his house. He has denied suggestion that co-accused Hem Lata did not kidnap the minor prosecutrix. He has denied suggestion that co-accused Hem Lata did not ring him and also denied suggestion that age of prosecutrix was about 18 years.

8.2 PW2 Raksha Devi has stated that she was undergoing the stitching and tailoring training at tailoring centre Dehar. She has stated that co-accused Hem Lata told that she would go to Shimla for one week and training centre would remain closed for one week. She has stated that there were only two students undergoing the training at training centre Dehar. She has stated that training centre Dehar remained closed for one week.

8.3 PW3 prosecutrix has stated that she has qualified her matriculation examination in the year 2007. She has stated that after qualifying her matriculation examination she joined tailoring and stitching centre of co-accused Hem Lata at Dehar. She has stated that on dated 1.7.2007 co-accused Hem Lata went to her home and told that she would inform her on telephone as and when she would come from her home. She has stated that on dated 9.7.2007 co-accused Hem Lata rang her father through her mobile phone and told her father to send her to tailoring centre at Dehar and thereafter co-accused Hem Lata also talked to her on mobile cell and told her to come to her tailoring centre at Dehar. She has stated that thereafter she went to tailoring centre at Dehar and co-accused Hem Lata met her at Dehar on Sheetla temple and took her towards the bridge where a white coloured car came. She has stated that thereafter co-accused Hem Lata forcibly pushed her into the car and co-accused Hem Lata gagged her mouth with scarf and also threatened that in case she would raise cry she would kill. She has stated that co-accused Bhim Singh was driving the car. She has stated that co-accused Devender was also present in car. She has stated that she was brought to Shimla in vehicle. She has stated that after reaching Shimla co-accused Hem Lata introduced the prosecutrix to her brother co-accused Babu Ram present in Court. She has stated that co-accused Hem Lata told her that she should marry her brother i.e. co-accused Babu Ram. She has stated that co-accused Hem Lata pressurized her to marry with co-accused Babu Ram and thereafter she was brought to Court and illegal documents of marriage were prepared with co-accused Babu Ram. She has stated that after marriage co-accused Hem Lata brought minor prosecutrix to her village Barara in Tehsil Sunni and kept in her house w.e.f. 10.7.2007 to 15.7.2007. She has stated that during aforesaid period co-accused Babu Ram had committed sexual intercourse with her forcibly. She has stated that thereafter on dated 16.7.2007 co-accused Hem Lata and Babu Ram brought her to police post Salapar. She has stated that her date of birth is 15.12.1991. She has further stated that her statement was recorded on dated 20.7.2007 and she was also medically examined. She has stated that thereafter she was handed over to her parents. She has stated that during investigation she was brought to Shimla and she located the house where she was kept in Shimla. She has stated that thereafter she was brought to village Barara and she located the house of co-accused Hem Lata and Babu Ram where she was kept and wherein she was subjected to sexual intercourse. She has stated that police

prepared the spot map and further stated that she handed over shirt Ext.P1 and salwar Ext.P2 to doctor at zonal hospital Mandi. She has stated that there were only two students in tailoring centre. She has stated that tailoring centre was opened in rented house. She has stated that co-accused Hem Lata came to her house to settle her marriage with her brother co-accused Babu Ram but her father declined the proposal. She has denied suggestion that she has disclosed her age in document as 19 years. Self stated that age was wrongly dictated by accused persons. She has denied suggestion that she had given consent to her marriage. She has denied suggestion that she accompanied the accused persons voluntarily with her consent. She has denied suggestion that no car came to bridge and also denied suggestion that she was not kidnapped.

8.4 PW4 Anita Devi has stated that she is posted as Secretary G.P. since 1996 and she issued copy of family register Ext.PW4/A on the request of police officials. She has stated that she had also issued birth certificate Ext.PW4/B on the request of police officials. She has stated that she has brought the births and deaths register and Ext.PW4/A and Ext.PW4/B are true copies of original record. She has denied suggestion that entries in family register and births and deaths register are not correct.

8.5 PW5 Jai Lal has stated that on dated 16.7.2007 he was called by one boy to P.P. Salapar. He has stated that prosecutrix along with 2/3 persons were sitting in police post. He has stated that co-accused Babu Ram was one of them. He has stated that document Ext.PW1/B was prepared which was signed by him and further stated that thereafter prosecutrix was handed over to her father. Witness was declared hostile by prosecution. He has admitted that affidavit was took into possession vide memo Ext.PW5/A.

8.6 PW6 Lekh Ram has stated that he is posted as Constable and on dated 27.7.2007 driver Bhim Singh handed over esteem car No. HP-03(T)-4217 along with documents which were took into possession vide memo Ext.PW6/A.

8.7 PW7 Devinder Kumar has stated that he is running the studio shop at Salapar. He has stated that on dated 10.7.2007 he was associated in investigation of case and he took photographs Ext.PW7/A-1 to Ext.PW7/A-4 and negatives of photographs are Ext.PW7/A-5 to Ext.PW7/A-8.

8.8 PW8 Sant Ram has stated that he is posted as Constable in P.S. Sundernagar. He has stated that on dated 25.7.2007 MHC Raj Kumar No. 920 handed over to him one sealed parcel containing plastic container sealed with seal of Civil Hospital Sundernagar, one sealed envelope, one parcel sealed with seal impression NSCB vide RC No. 60 of 2007 and he took the aforesaid parcels to FSL Junga and deposited there. He has stated that receipt issued by office of chemical examiner was deposited with Additional MHC and further stated that parcels remained intact in his custody.

8.9 PW9 Sukhchain Singh has stated that during investigation of case he along with police officials and prosecutrix went to Shimla in vehicle Tata Sumo and prosecutrix identified the room. He has stated that thereafter he along with police officials and prosecutrix went to Tatapani side to a village and prosecutrix located the house where she was raped in the room. He has stated that one bed sheet was also seen and identification memo Ext.PW3/B was prepared at the spot. He has denied suggestion that he did not go with police officials and also denied suggestion that house was not located by prosecutrix.

8.10 PW10 Dr. Namita Verma medical officer zonal hospital Mandi has stated that she is posted in zonal hospital for the last two years and prosecutrix was referred to her for opinion and on the basis of clinical examination she has given the opinion that possibility of sexual intercourse with prosecutrix could not be ruled out. She has stated that she had given opinion Ext.PW10/A and also stated that she has given the opinion on the basis of

medical examination of prosecutrix and on the basis of clinical examination of prosecutrix. She has stated that Dr. Renu Behl was bed ridden. She has denied suggestion that victim was habitual of sexual intercourse.

8.11 PW11 Raj Kumar has stated that he is posted as MHC in P.S. Sundernagar since June 2007 and on dated 17.7.2007 MHC Krishan Chand deposited with him parcels and thereafter he sent the aforesaid parcels vide RC No. 60/2007 to FSL Junga. He has stated that parcels remained intact in his custody. He has denied suggestion that parcels were not deposited with him and also denied suggestion that he did not send the aforesaid parcels to FSL Junga.

8.12 PW12 has stated that she is posted as medical officer in Zonal Hospital Mandi since September 1993 and further stated that she had worked with Dr. Renu Behl who conducted the medical examination and she was conversant with hand writing and signatures of Dr. Renu Behl. She has stated that Dr. Renu Behl was bed ridden and was unable to attend the Court. She has brought original MLC conducted by Dr. Renu Behl. She has stated that signatures of Renu Behl are Ext.PW12/A.

8.13 PW13 C. Gopal Singh has stated that he is posted as MHC in P.P. Salapar since 2006 and he brought the original daily diary Ext.PW1/A of rapat No. 10 dated 10.7.2007 which is correct as per original record.

8.14 PW14 Inspector Dilshad Mohammad has stated that he remained as Inspector/SHO in P.S. Sundernagar w.e.f. March 2007 to March 2008. He has stated that on completion of investigation he prepared challan and further stated that thereafter he received the chemical examiner report Ext.PW4/A and prepared the supplementary challan.

8.15 PW15 Kesar Singh has stated that he is owner of esteem vehicle. He has stated that he does not remember the number of vehicle. He has stated that he does not know who was driver of vehicle during the year 2007. He has stated that his statement was not recorded by police officials on dated 10.10.2007. Witness was declared hostile. He has admitted that he is owner of vehicle No. HP-03(T)-4217. He has stated that vehicle was took into possession by police officials relating to offence under Section 376 IPC. He has stated that vehicle was released in his favour by order of Court and co-accused Bhim Chand was driving the vehicle who is co-accused in present case. He has stated that he does not know who used to drive the vehicle as he had given the vehicle to his son.

8.16 PW16 Om Parkash Headmaster of school has stated that he is working as Headmaster in Senior Secondary School Dawal since the year 2005. He has stated that he had attested the middle standard examination certificate of prosecutrix which is Ext.PW16/A after comparing with original and thereafter handed over the same to police.

8.17 PW17 Dr. Jatinder Singh has stated that he is working as eyes specialist in Zonal Hospital Sundernagar since June 2006 and on dated 16.7.2007 at about 10 PM co-accused Babu Ram was brought to hospital for his medical examination. He has stated that on examination co-accused Babu Ram was found conscious well oriented to time place and person. He has stated that co-accused Babu Ram was capable of performing sexual intercourse. He has stated that he issued MLC Ext.PW17/A which is in his hands and bears his signatures. He has stated that he has also brought original MLC in Court.

8.18. PW18 Ami Chand has stated that he is posted as Incharge of P.P. Salapar and on dated 10.7.2007 Hari Dass filed report in P.P. Salapar. He has stated that thereafter same was recorded in roznamcha and thereafter FIR was registered and he conducted investigation of case. He has stated that on dated 11.7.2007 he went to spot at village Jaho and took photographs through photographer Devinder Kumar and prepared spot map Ext.PW18/A. He has stated that thereafter he recorded statements of Hari Dass, Soma Devi

and Raksha Devi under Section 161 Cr.P.C. He has stated that thereafter he moved an application to Secretary G.P. Kangu to issue certificate Ext.PW4/B and also copy of family register Ext.PW18/B which were took into possession. He has stated that on dated 16.7.2007 co-accused Hem Lata and Babu Ram and one driver and Som Kali brought prosecutrix to police post Salapar and he prepared memo Ext.PW1/B. He has stated that prosecutrix was handed over to her parents. He has stated that he also recorded statement of prosecutrix and further stated that thereafter he took the prosecutrix and co-accused Babu Ram to Civil Hospital Sundernagar for their medical examination. He has stated that medical examination of Babu Ram was conducted in civil hospital Sundernagar and thereafter prosecutrix was referred to Zonal Hospital Mandi for her medical examination. He has stated that thereafter he arrested co-accused Babu Ram and Hem Lata. He has stated that thereafter on 17.7.2007 prosecutrix was took to Zonal Hospital Mandi for her medical examination and her medical examination was conducted and MLC was also collected from medical officer. He has stated that thereafter on dated 27.7.2007 co-accused Bhim Singh driver and Devinder Kumar came to police post Salapar with vehicle No. HP-03(T)-4217 along with driving licence and RC and they were also took into possession. He has stated that on dated 20.9.2007 prosecutrix identified the place from where she was kidnapped and place at Shimla where she was kept. He has stated that spot map Ext.PW18/F was prepared and he also prepared spot map of house of accused at village Brara where prosecutrix was confined and further stated that thereafter he handed over the file to SHO P.S. Sundernagar who prepared challan and filed in Court. He has stated that he recorded statements of prosecution witnesses correctly as per their versions. He has stated that he also received report of FSL Junga Ext.PW14/A and thereafter prepared supplementary challan and filed in Court. He has identified the accused in Court. He has denied suggestion that prosecutrix did not identify the place at Sanjauli and Barara. He has denied suggestion that spot maps Ext.PW18/F and Ext.PW18/G were not prepared as per location shown by prosecutrix. He has denied suggestion that he did not visit the spot and also denied suggestion that false case filed against accused persons. He has denied suggestion that he did not record the statements of prosecution witnesses as per their versions. He has denied suggestion that age of prosecutrix was 19 years. He has denied suggestion that prosecutrix has voluntarily consented for marriage with co-accused Babu Ram. He has denied suggestion that prosecutrix was not kidnapped in vehicle. He has denied suggestion that prosecutrix has left her father's house with her own sweet will.

8.19 PW19 ASI Amar Nath has stated that he remained posted in P.S. Sundernagar in the year 2006 and further stated that HHC Krishan Lal came to police station on dated 10.7.2007 and presented copy of entry No. 10 dated 10.7.2007 on which FIR Ext.PW8/A was registered. He has stated that he made the endorsement in the copy of rapat and handed over the case file to SHO Krishan Lal to take the same to spot.

8.20 PW20 Jitender Thakur has stated that stamp paper of affidavit Ext.PA was sold by him to co-accused Babu Ram on dated 10.7.2007. He has stated that anybody can buy the stamp paper in the name of any person.

8.21 PW21 Bishamber has stated that he remained posted as Naib Tehsildar (Urban) w.e.f July 2005 till July 2007 and he attested affidavit Ext.DA. He has stated that both parties came to him along with Advocate Hardev Singh and further stated that both parties disclosed their age and there was no influence of any person.

9. Statements of accused persons recorded under Section 313 Cr.P.C. They have stated that they are innocent. Accused persons did not lead any evidence in defence.

10. Submission of learned Advocate appearing on behalf of appellants that learned trial Court had convicted co-appellant Babu Ram under Section 376 IPC contrary to

law and contrary to oral as well as documentary evidence placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimony of minor prosecutrix PW3. Minor prosecutrix has specifically stated in positive manner that on dated 9.7.2007 co-accused Hem Lata telephoned her father to send minor prosecutrix to tailoring centre Dehar. Minor prosecutrix has stated that co-accused Hem Lata sister of co-accused Babu Ram also telephoned minor prosecutrix and told the minor prosecutrix to come to tailoring centre and thereafter minor prosecutrix was dragged into vehicle No. HP-03(T)-4217 and thereafter minor prosecutrix was brought to Barara and thereafter in village Barara co-accused Babu Ram kept co-accused Hem Lata w.e.f. 10.7.2007 to 15.7.2007 and co-accused Babu Ram had committed sexual intercourse with minor prosecutrix at village Barara during the period when minor prosecutrix was kept in house at village Barara. Testimony of minor prosecutrix is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of minor prosecutrix.

11. Testimony of minor prosecutrix is corroborated with medical evidence Ext.PW12/A wherein it has been specifically mentioned that minor prosecutrix was exposed to sexual intercourse. Testimony of minor prosecutrix is further corroborated by medical evidence of co-accused Babu Ram Ext.PW17/A wherein it has been specifically mentioned that co-accused Babu Ram was capable of performing sexual intercourse. It was held in case reported in ***(2013)3 SCC 791 titled Rajesh Patel vs. State of Jharkhand*** that the testimony of prosecutrix is sufficient to convict accused if it inspires confidence. ***(Also see (2013)4 SCC 206 titled State of Rajasthan vs. Baboo. Also see (2015)4 SCC 762 titled Deepak vs. State of Haryana)***

12. Submission of learned Advocate appearing on behalf of appellants that present case is a case of consent in view of affidavit Ext.DA placed on record and on this ground appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused affidavit Ext.DA placed on record. There is recital of word “attested” in Ext.DA by Executive Magistrate. There is no endorsement in affidavit Ext.DA that contents of document were read over and explained to deponent who admitted the contents as correct. It is held that affidavit Ext.DA was not attested in accordance with law in absence of endorsement that it was read over and explained to deponent who admitted the contents as correct. In view of defective attestation of affidavit Ext.DA no benefit can be given to accused persons on the basis of affidavit Ext.DA. ***(See 1996 Cri.L.J.3864 (H.P.) titled Chuni Lal and another vs. State of H.P.)***

13. Another submission of learned Advocate appearing on behalf of the appellants that age of prosecutrix was more than 16 years and on this ground appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused certificate Ext.PW4/A placed on record issued by the Registrar (Births and Deaths) wherein date of birth of prosecutrix has been shown as 15.12.1991. Even in document Ext.PW4/B issued by Registrar (Births and Deaths) under Section 12/17 of Births and Deaths Registration Act 1969. date of birth of prosecutrix has been shown as 15.12.1991. Even as per middle standard examination certificate placed on record Ext.PW16/A date of birth of prosecutrix has been shown as 15.12.1991. Even, as per family register certificate Ext.PW18/B date of birth of prosecutrix has been shown as 15.12.1991. Above said documents have been prepared by public servants in discharge of their official duties and are relevant facts as per Section 35 of Indian Evidence Act. Entries in above said documents are made prior to the incident. Appellants did not adduce any positive cogent and reliable evidence on record in order to rebut the above said documents. It was also held in case reported in ***AIR 1981 SC 361 titled Harpal Singh vs. State of H.P. (Full Bench)*** that entry made by public officials in discharge of official duty in public

record is relevant fact under Section 35 of Indian Evidence Act. ***(Also see ILR 1978 HP 174 titled Vidyadhar vs. Mohan)*** Even entry in birth register is much prior to incident of rape. It was held in case reported in ***AIR 2011 SC 1691 titled Murugan @ Settu vs. State of Tamil Nadu*** that document made *ante litem motam* can be relied upon safely when such document is admissible under Section 35 of Indian Evidence Act 1872. It was held in case reported in ***AIR 2002 HP 59 titled Chitru Devi vs. Ram Dai*** that entries in birth register kept by competent authority under Birth and Death Registration Act 1969 is admissible in evidence. Rape is not only a crime against a person of a victim but it is a crime against the entire society. It destroys the entire psychology of woman and pushed the woman into deep emotional crisis. Rape is a crime against the basic human rights and is violative of the victim's most cherished fundamental rights as mentioned in Article 21 of Constitution of India. ***(See AIR 1996 SC 922 titled Bodhisattwa Gautam vs. Miss Subhra Chakraborty)*** It is well settled law that sole testimony of prosecutrix is enough to convict the person if the testimony is free from blemish reliable. ***(See 2007 Cri..L.J. 803 (Delhi) titled Mohd. Alam vs. State (NCT of Delhi).*** It is well settled law that testimony of prosecutrix must be appreciated in the background of entire case and Courts should be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. ***(See (1996)2 SCC 384 titled State of Punjab vs. Gurmit Singh and others, See (2000)5 SCC 30 titled State of Rajasthan vs. N.K. the accused, See (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another, (1992) 3 SCC 204 Madan Gopal Kakkad Vs. Naval Dubey and another. Also see (1990)1 SCC 550 titled State of Maharashtra vs. Chander Prakash. Also see (2011)2 SCC 550 titled State of U.P. vs. Chotte Lal*)**

14. In present case PW1 Hari Dass father of prosecutrix has specifically mentioned that age of prosecutrix was 15 years. Even prosecutrix when appeared in witness box has stated that she was born on dated 15.12.1991. Testimony of PW1 Hari Dass and prosecutrix are corroborated by documentary evidence i.e. certificate Ext.PW4/A placed on record issued by the Registrar (Births and Deaths) wherein date of birth of prosecutrix has been shown as 15.12.1991, document Ext.PW4/B in which date of birth of prosecutrix has been shown as 15.12.1991, middle standard examination certificate placed on record Ext.PW16/A in which date of birth of prosecutrix has been shown as 15.12.1991, family register certificate Ext.PW18/B in which date of birth of prosecutrix has been shown as 15.12.1991. There is no positive cogent and reliable evidence on record to rebut the above said public documents prepared by public officials while discharging their official duty. Hence it is held that prosecutrix was minor at the time of incident and it is further held that consent of minor prosecutrix is immaterial in present case because theory of consent is not applicable upon minor prosecutrix according to law as per description number six mentioned in Section 375 of Indian Penal Code 1860 as amended up to date.

15. Another submission of learned Advocate appearing on behalf of appellants that conviction of co-accused Hem Lata under Section 120-B IPC is contrary to law and contrary to proved facts is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that element of criminal conspiracy is a crime to do illegal act and can be proved either by direct evidence or by circumstantial evidence or by both. It is well settled law that direct evidence to prove conspiracy is rarely available and thereafter circumstances proved before, during and after the incident have to be considered to decide about the complicity of accused. ***(See 2012 (10) JT 286 titled Pratapbhai Hamirbhai Solanki vs. State of Gujarat.)*** In present case it is proved beyond reasonable doubt that co-accused Hem Lata telephonically called minor prosecutrix from her residential house and thereafter dragged the minor prosecutrix in vehicle No. HP-03(T)-4217 and thereafter took minor prosecutrix to place Barara and thereafter kept the prosecutrix at Barara w.e.f. 10.7.2007 to 15.7.2007 and thereafter brother of co-accused Hem Lata namely co-accused

Babu Ram forcibly committed sexual intercourse with minor prosecutrix. It is held that criminal offence under Section 120-B of Indian Penal Code is proved against co-accused Hem Lata beyond reasonable doubt in criminal case as per oral as well as documentary evidence placed on record.

16. Another submission of learned Advocate appearing on behalf of the appellants that no offence under Sections 363 and 366 IPC is proved against co-accused Hem Lata in present case is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that kidnapping is of two types. (1) Kidnapping from India as defined under Section 360 of Indian Penal Code. (2) Kidnapping from lawful guardianship, as defined under Section 361 of Indian Penal Code 1860. It is well settled law that whoever takes or entices any minor girl below 18 years out of custody of lawful guardian of minor is liable to be punished in accordance with law. In present case it is proved on record that age of minor prosecutrix was below 16 years at the time of incident of kidnapping and it is also proved on record beyond reasonable doubt that PW1 Hari Dass was natural guardian of minor prosecutrix. PW1 Hari Dass natural guardian of minor prosecutrix when appeared in witness box has specifically stated in positive manner that minor prosecutrix was kidnapped by co-accused Hem Lata without his consent. Testimony of PW1 Hari Dass is corroborated by PW2 Raksha Devi, PW3 prosecutrix and other corroborative witnesses namely PW4 Anita Devi, PW5 Jai Lal, PW6 Lekh Raj, PW7 Sant Ram, PW8 Sukhchain, PW10 Dr. Namita Verma, PW11 Raj Kumar. PW13 C. Gopal, PW14 Dilshad Mohammad, PW15 Kesar Singh, PW16 Om Parkash, PW17 Dr. Jatinder Singh, PW18 Ami Chand, PW19 Amr Nath, PW20 Jitender Thakur. Kidnapping of minor prosecutrix without consent of lawful guardianship is proved on record beyond reasonable doubt against co-accused Hem Lata in present case. It is well settled law that offence under Sections 363 and 366 IPC is primarily an offence committed against the guardian. ***(See (2004)1 SCC 339 titled Parkash vs. State of Haryana. See AIR 1973 SC 2313 titled Thakorlal D. Vadgama vs. State of Gujarat. See AIR 1998 SC 2694 titled Kuldeep K. Mahato vs. State of Bihar. See 1995(4) JT 206 titled Radha Bhallabh & others vs. State of U.P.)***

17. In view of above stated facts and case law cited supra appeal filed by appellants is 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 and it is further held that no miscarriage of justice has been caused to appellants in present case. File of learned trial Court be sent back forthwith along with certified copy of judgment. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Courts on its own motion .....Petitioner.

Versus

State of H.P. & others ..... Respondents.

CWPIL No.14 of 2014.
Judgment reserved on : 12.05.2015.
Date of decision: May 22,2015.

Constitution of India, 1950- Article 226- The newspaper reported that the shopkeepers in the lower bazaar had encroached upon the road and as against the time of five minutes, it

was taking more than one hour fifteen minutes to cover the distance from one corner of the Lower Bazaar to the another - this news item was treated as a Public Interest Litigation- M.C. Shimla admitted the contents of the news item and stated that shopkeepers re-encroach soon after the removal of the encroachment- Chief Fire Officer also pointed out that it took more than 40 minutes to ply the vehicle from one corner to another, whereas, it should not take more than 6 minutes in any case- fire tenders faced difficulties in reaching at the spot where the fire had broken out due to encroachment made by shopkeepers - held, that shopkeepers did not have any right to encroach upon the public street and the Corporation is duty bound to remove all the encroachments- the Government was bringing out the policy of regularization which increases the encroachment- further, Shimla falls in a high Seismic Zone and it would be improper for the Government to regularize the deviation and to put the life of citizens in danger- therefore, direction issued to remove encroachment, to implement the provisions of law and to remove the illegal projections. (Para-9 to 43)

Cases referred:

Yoginder Lal Sharma versus Municipal Corporation, Shimla and others, 1983 (12) ILR 457

Municipal Board, Manglaur Vs. Mahadeoji Maharaj, AIR 1965 SC 1147

Olga Tellis and others Vs. Bombay Municipal Corporation and others, AIR 1986 SC 180,

Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38

Ahmedabad Municipal Corporation Vs. Dilbag Singh Balwant Singh and others, 1992 Supp.(2) SCC 630,

M/s Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee, AIR 1993 SC 2313

Maharashtra Ekta Hawkers Union and another Vs. Municipal Corporation, Greater Mumbai and another, AIR 2004 SC 416

For the Petitioner : Mr.Vinay Kuthiala, Senior Advocate, as Amicus Curiae with Mr.Gaurav Sharma, Advocate.

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 to 7, 9 and 11.
Mr.Hamender Chandel, Advocate, for respondent No.8.
Mr.Satyen Vaidya, Advocate, for respondent No.10.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Spread across seven hills in the northwest Himalayas among lush valleys and forests of oak, rhododendron and pines is 'Shimla' the capital of Himachal Pradesh that once was the summer capital of colonial India.

2. The Town and Country Planning Department introduces heritage of Shimla in the following manner:-

> "Perceived and established by the British during colonial period in first half of 19th century as their Summer Capital, Shimla acquired global fame by the time they left in the year 1947. At the dawn of independence, Shimla was known as '**Capua of India**', the Indian Mount Olympus, the Viceroy's "shooting box" "Home of the heaven born", "abode of little tingods". It was popularly known as "**Jewel of Orient**", "**Queen of Hill Stations**", "**Star of**

> **Hill Resorts**" and "**Town of Dreams**". Located at a commanding site in the interior Himalayas, connected by road, rail and air, it has traditionally been a preferred destination for tourists from all over the world. Thousands of miles away from their mother land, amidst picturesque Himalayan environs, Shimla can be called 'a Wonder of Colonial Era'. The British established many architectural masterpieces such as Vice Regal Lodge, Gorton Castle, Railway Board Building, Gaiety Theatre, Town Hall, Auckland House, Ellerglie, Barnes Court, Bungalows, Churches and Challet Day School. Shimla also has a building called North Bank where in 1907 Nobel Laureate writer Rudyard Kipling lived in 1907. It was a dreamland of cool comfort in a very hot land, and full of promise of fun and frivolity. The 96.5 kilometre section of Kalka-Shimla railway line with 103 tunnels is an engineering feat and provides unique experience to those who travel by this historic route. It is the most spectacular narrow gauge railway line in the world. The city possesses distinct British heritage including institutional buildings, bungalows, churches, socio-cultural spaces, hotels, cemeteries, coffee houses, clubs, theatres, schools, hospitals, street pattern and street furniture, immensely add to grace of the city with their distinct expressions. The facades of buildings, sloping roofs, dormers, windows, doors, entrances and chimneys of numerous types replicated from European buildings leave an ever-lasting impact on one's mind and provide an opportunity to understand the Western saga of art and architecture. Shimla has become a multifunctional city alongwith dominance of tourism, administration and institutional activities."

3. A popular holiday destination not only for domestic but overseas tourists also, Shimla is a place where one would love to visit any time of the year and it is for this reason that Shimla finds a place in the global tourists map. Why then is the Administration permitting it to be converted into a slum? Why have the authorities at the helm of affairs turned a blind eye to the encroachments being made and have not cared to remove the same in the Bazars of Shimla despite repeated directions issued by this Court.

4. More than three decades back, this Court on 28th September, 1983, in the case of ***Yoginder Lal Sharma*** *versus* ***Municipal Corporation, Shimla and others, 1983 (12) ILR 457*** had passed the following directions:-

> *"21.A grievance has been made that the Corporation has failed to ensure that the Lower Bazar is kept free from various types of projections, obstructions and encroachments with the result that during the day even the ambulances cannot move in that Bazar to help the sick. Of this fact we can take judicial notice. This Bazar is the one which is frequented by everyone in Shimla. The shopkeepers are in the habit of displaying their goods on a part of the street. Some of them are in the habit of setting up projections during the day for the same purpose. Some also store their goods on the road. Unauthorized hawkers are in such abundance that at places it becomes difficult even to walk. We were informed that some of the shopkeepers have the backing of some political persons and, therefore, nothing can be done. It is unfortunate indeed that the Corporation has failed to keep this Bazar clear of the encroachments etc. The authorities must remember that a very substantial part of population of Shimla lives near about this Bazar and in case of need it is impossible for the needy to be removed to the hospital etc. God forbid if at any time a fire breaks out in this overcrowded place since all the houses and shops are of wood and there will be a very heavy loss of life. It is, therefore, necessary to keep this Bazar*

clear in order to ensure that the ambulances as well as the fire brigade can easily move. We have already referred to section 242 of the Act which prohibits projections upon the streets and the powers of the Commissioner to remove all obstructions. We direct the Commissioner to start performing his duties to keep this Bazar clear of all projections etc. in order to ensure the free movements of ambulances and the fire brigade. Again, since the malady has existed for a long time, we will expect the commissioner to ensure that within the next one month this Bazar is cleared of all obstructions."

"It seems that the Municipal Corporation has forgotten that such directions were issued by this Court. In fact the position has worsened in the last few years. The unauthorized hawkers have now invaded the Mall Road also. Unscrupulous shopkeepers are projecting their goods and storing their goods on the Mall Road. We reiterate the directions given by this Court in Yoginder Lal Sharma's case (supra) and direct the Commissioner, Municipal Corporation to ensure that all obstructions and over-hanging projections and unauthorized covering on the drains on the Mall Road and in the Lower Bazar are removed positively by 28th February, 2008. The Commissioner, Municipal Corporation shall also ensure that in future no such projections are allowed and unseemly display of goods is not permitted especially on the Mall Road.

We are well aware that some shopkeepers do not mind paying fines off and on and continue to violate the law with impunity. We would therefore impress upon the Municipal Corporation to consider framing some bye-laws where if any shopkeeper continues to violate such directions his license to run the shop can be suspended for some period and in case of repeated violations can be cancelled permanently. It is only if such deterrent punishment is provided that the traditional glory of Shimla can be revived."

5. The aforesaid directions were conveniently forgotten by all stakeholders including the Municipal Corporation till the time a public interest litigation again came to be filed at the instance of one Smt. Neelam Sharma, who as a probono publico complained about the encroachments made in Shimla town, she also complained about the alleged inaction on part of the Municipal Corporation to remove the encroachments. She specifically alleged that the shopkeepers had extended their shops over the road and were displaying their goods on road and placing overhangings over the roads and public drains. This petition was registered as CWP No.300 of 2006 and this Court on 02.01.2008 passed a detailed order, the relevant portion whereof reads as follows:-

"Another prayer made in this application is that in the markets of Shimla some shopkeepers are in the habit of projecting their goods for sale on to the road and over the drains. The petitioner complains that in fact these shopkeepers are encroaching upon the Mall Road and have covered the drains which leads to blockage of the drains. Some photographs have been attached along with this application which show that the projections have been made by a number of shopkeepers over the drains as well as the public street including the Mall Road & Lower Bazar.

Section 227 of the H.P. Municipal Corporation Act, 1994 reads as follows:

"227.(1)Except as provided in section 228, no person shall erect, setup, add to or place against or in front of any premises any structure or fixture which will---

(a) overhang, jut or project into, or in anyway encroach upon and obstruct in any way the safe or convenient passage of the public along, any street; or

(b) jut or project into or encroach upon any drain or open channel in any streets so as in any way to interfere with the use or proper working of such drain of channel or to impede the inspection or cleansing thereof.

(2)The Commissioner may by notice require the owner or occupier of any premises to remove or to take such other action as he may direct in relation to any structure or fixture which has been erected, set-up, added to or placed against, or in front of the said premises in contravention of this section.

(3)If the occupier of the said premises removes or alters any structure or fixture in accordance with such notice, he shall be entitled, unless the structure or fixture was erected, set-up or placed by himself, to credit into account with the owner of the premises for all reasonable expenses incurred by him in complying with the notice."

A bare perusal of this section clearly shows that no person can erect, setup or place any structure or fixtures which will overhang, jut out or project on or in any way encroach upon the passage of any public path or drain. Any construction which can impede the inspection or cleansing of a drain is also not permitted.

Shimla has a hoary past. The Mall Road of Shimla is the prime attraction of Shimla. Visitors from all over the world visit Shimla. It should be the endeavour of all, including the residents, the shopkeepers, the Municipal Corporation as well as the State Government to ensure that the pristine glory of Shimla is maintained. The Mall Road has buildings built in a traditional style of architecture. We feel that there should be some uniformity in the way the shops are designed so that the whole Mall Road gives a uniform look. This should make the market look neat and clean. This would also result in preserving the heritage of Shimla. We, therefore, direct the Commissioner, Municipal Corporation to frame a policy in consultation with the Mayor for maintaining uniform and proper façades of the buildings on the Mall Road.

As noted by us above many shopkeepers on the Mall Road as well as the Lower Bazar are hanging their articles meant for sale in such a manner that they project and jut out on to the road. This mars the beauty of the market and also impedes the free flow of the pedestrian traffic in these markets. This also prevents the effective cleansing of the drains. As already pointed out above no person can even raise or place any "fixture" in such a manner. This practice must be got stopped immediately since it is against the law.

In respect of the Lower Bazar this Court as far back as 28th September, 1983 in case Yoginder Lal Sharma vs. Municipal Corporation Shimla and others, 1983 (12)ILR 457, had given the following directions: ……" (quoted supra).

6. Subsequently, when this petition came up for consideration on 03.08.2009, a detailed order to the following effect was passed:-

"On 6.5.2008, the Commissioner, Municipal Corporation filed an affidavit in which it was stated that the policy for maintaining uniform and

proper facades of the buildings on the Mall Road has been referred to the Heritage Advisory Committee. We had directed the Heritage Advisory Committee to finalise the entire guidelines within a period of six weeks and the Commissioner was directed to convey the order of this Court to the members of the Heritage Advisory Committee. Notices to 118 persons, who had either engaged in overhanging or encroachment in lower bazaar, were issued and all those 118 persons have been served personally or by affixation. A large number of shopkeepers had filed undertakings that they will not violate the municipal laws and shall not encroach upon or raise any overhanging on the public drains and streets.

Now, an application has been filed before us being CMP No. 3026 of 2007. Alongwith this application photographs have been annexed which show that both on the Mall Road as well as in the Lower Bazar people have not only encroached upon the road but they have also displayed their wares/goods for sale by putting platforms over the municipal drains and some of them on the road itself. The petitioner is directed to co-relate the photographs with the names of the persons and inform us whether such persons have filed any affidavit before us or not.

We can also take notice of the fact that despite the orders passed by this Court, the encroachments by the shopkeepers on the roads and municipal drains have become rampant and the time has now come when we may have to use the powers vested in us under Article 215 of the Constitution of India and the Contempt of Courts Act to take action against those persons who violate our orders.

Before we do so, we would like to give one last opportunity to the persons who have violated the orders of this Court. We direct the Commissioner, Municipal Corporation and all functionaries of the Corporation to ensure that the orders of this Court passed from time to time in this writ petition especially the order dated 2.1.2008, quoted here-in-above, are complied with in letter and spirit. We shall hold the Commissioner, Municipal Corporation personally liable for the implementation of these orders. We had also requested the Heritage Advisory Committee to decide the matter regarding uniform and proper facades on the Mall Road within six weeks. We direct the Secretary (Town and Country Planning) as well as the Secretary of the Heritage Advisory Committee to file their affidavits in this regard within two weeks from today.

We had in our earlier orders noted that the shopkeepers are willing to pay small fine of Rs.50/- and Rs.100/- for encroaching on the road and the time has now come to ensure that more serious penalties are levied upon them, such as, penal provision like being sent to jail or canceling of the license to run a shop. If a person does not run a shop in a manner which is convenient to the general public, in our opinion, he has no business to run such a shop and his license should be revoked. People, who have shops on the Mall and on the lower bazaar, put their wares and goods on the roads, obstructing the public street, which makes it very difficult for the pedestrians to even cross the markets. The situation in the lower bazaar is very deplorable and it is difficult for any person, especially ladies, to cross the bazaar. There is another human angle involved. In case of disaster, like fire, etc. the fire brigade or ambulance cannot even reach the scene of occurrence because by the time the wares are taken away and encroachments are removed, the damage is done. This Court

is concerned with the larger public interest. This Court also wants to ensure that the rule of law prevails and bye-laws, etc. framed by the Corporation are not flouted by the shopkeepers and other persons who are doing so right now.

We may make it clear that the Commissioner, Municipal Corporation can approach the Superintendent of Police, for police assistance, if required to remove the encroachments/over-hangings on the Mall Road/Lower Bazar. We further direct the Superintendent of Police to ensure that the requisite police force is made available to the Municipal Corporation for ensuring the compliance of the orders of this Court.

The Commissioner, Municipal Corporation, Shimla, the Principal Secretary (Town and Country Planning) and the Secretary of the Heritage Advisory Committee are directed to file their respective affidavits giving the latest status regarding the compliance of these orders latest by 20th August, 2009.

List the matter on 26th August, 2009. Affidavits by all concerned, be filed by 24th August, 2009. We may make it clear that after today any citizen of the city can bring to our notice the fact that any person has disobeyed our orders and has encroached upon the Municipal street or drain or displayed his goods in such a manner as to overhang on the Municipal drain/street, by writing a plain letter alongwith photographs giving the date of encroachment to the Registrar General of this Court and this Court shall take action on the basis of the same.

We direct the Commissioner, Municipal Corporation, to ensure that the gist of this order is published and circulated widely in the town of Shimla as well as broadcast on the radio and cable T.V. network within four days from today to make the general public as well as the shopkeepers aware of their rights and duties."

7. When the matter came up again on 28.08.2009, this Court passed further directions, relevant portion whereof reads as under:-

"We have passed a detailed order on 3.8.2009 directing the Municipal Corporation, Shimla to remove the encroachments/over-hangings made by the Shopkeepers on the roads and municipal drains on the Mall Road and Lower Bazaar in Shimla. We are happy to note that the Municipal Corporation, Shimla has earnestly and sincerely complied with the directions given by us and there is a visible impact of this drive in Shimla town. We place on record our appreciation for the work done by the Officers and staff of the Municipal Corporation, Shimla. We are satisfied with the action taken by the Municipal Corporation and the affidavit of Sh.A.N. Sharma, Commissioner, Municipal Corporation in this regard.

Having said so, we are also firmly of the view clear that such a drive to keep public property free from encroachments and the streets clean should not be a one time affair. This effort must continue and in future also no encroachment should be permitted. In fact, the time has now come to extend the orders passed by us to the entire Municipal area falling within the jurisdiction of Municipal Corporation, Shimla. We therefore direct that the Municipal Corporation in a phased manner, keeping in view the staff available with it, shall take action to remove encroachments and over-hangings etc. as detailed in our previous order in the entire Shimla Town.

Section 227 of the H.P. Municipal Corporation Act prohibits any person from erecting, setting up or placing any structure or fixture which overhangs, juts out or projects on or in any way encroaches upon the passage on any public path or drain. We therefore, direct that now the Municipal Corporation may enforce the provisions of this Section in the entire municipal area of Shimla. Though it is for the Municipal Corporation to prioritize the areas, we may at the outset mention a few of the areas where such action is immediately required:

1) Sanjauli bazaar
2) Ram Bazaar and Bus Stand Shimla
3) Boileauganj
4) Totu Bazar
5) Khalini
6) Chhota Shimla Bazaar
7) Kasumpti Bazaar
8) Lakkar Bazar

In addition thereto the roads connecting the circular roads to the Mall Road shall also be taken up on priority basis.

It has been brought to our notice at the Bar that when the Officers/officials of the Municipal Corporation were implementing

our orders certain persons objected to the same by raising slogans etc. We may make it clear that if any person is aggrieved by any portion of our order and has a genuine grievance he is free to approach this Court for modification/ clarification of the orders passed by us by filing an appropriate application. However, no person can be permitted to take the law in his own hands. When the Officers and staff of the Municipal Corporation are implementing the orders of this Court they are acting on our behalf i.e. under the orders of the Court and in case any person raises slogans or causes obstruction to the implementation of our orders we may be compelled and would not hesitate to take action under the Contempt of Courts Act against such person(s).

At the same time we expect the Officers of the Municipal Corporation to act fairly treating all persons equally. They should also not be unnecessarily harsh. It has been contended before us that sometimes while removing the encroachment/obstruction/over-hanging, damage is caused to the property of the shop owners. We therefore direct that in case the Municipal Corporation finds some encroachment, over-hanging etc. of a type which has to be removed by breaking it, then if the person concerned files an undertaking with the Municipal Corporation undertaking to remove the encroachment, over-hanging etc. himself within a period of 48 hours the officials of the Municipal Corporation will grant such time to the person concerned to remove the encroachment. However, in case such a person does not remove the encroachment within the aforesaid period then the Officers of the Municipal Corporation shall take immediate action thereafter to remove the encroachment.

We also direct that no Civil court in Shimla shall entertain any proceedings or pass any stay order in any proceedings filed in regard to encroachments which are being removed under the orders of this Court. The persons aggrieved can approach this Court. A copy of this order be sent to the

District Judge, Shimla and to all the courts subordinate to him for information and necessary action.

We further direct that the Municipal Corporation shall not permit unauthorized hawkers to sell their goods/wares in any bazaar in Shimla town. The Municipal Corporation may before the next date identify certain spots where fruit venders can be relocated.

It has been brought to our notice that a number of shopkeepers allow hawkers to sit outside their shops and in fact some of them charges money from the hawkers on daily basis. We make it clear that it shall be the responsibility of the Shopkeeper in front of whose premises the hawker is doing business, to inform the Municipal Corporation immediately to take appropriate steps to remove him and deal with him in accordance with law. In case the shopkeeper fails to do so it shall be presumed that the hawker is working with his approval and on his behalf and therefore such shopkeeper may be liable for having disobeyed our orders under the Contempt of Courts Act. However, this portion of the order shall not be applicable in respect of Sundays when the market is closed.

The Municipal Corporation shall also ensure that under the garb of removing the encroachments the shopkeepers do not raise the height of their buildings or add mezzanine floor to their buildings/premises. Such floors are not only illegal but also a fire hazard and cannot be permitted.

We had in our orders requested the "Heritage Advisory Committee" to decide the matter regarding the maintenance of uniform and proper facades within six weeks. All that has been done in response is that the "Heritage Advisory Committee" in its meeting reiterated its guidelines. We are unhappy with the manner in which the Members of the "Heritage Advisory Committee" treated the orders of this court. They have made no effort whatsoever to suggest some proper façades for the shops. We again direct the "Heritage Advisory Committee" to consider this matter in another meeting. Their job is not only to reiterate the guidelines given but to make a positive suggestion with regard to the maintenance of the façades of the shops. Some of the facades have already been changed and the Advisory Committee should make specific suggestions with regard to each block of shops starting from the CTO Building till the shops near the Combermere Bridge. The mere reiteration of the guidelines is not sufficient. The "Heritage Advisory Committee shall consider this matter and make necessary recommendations by 30th September, 2009 on the affidavit of the Secretary of the "Heritage Advisory Committee."

Ms.Sarojini Ganju Thakur, Principal Secretary, Town and Country Planning has filed an affidavit that the Government has taken up a proposal with the Director, 'Kamla Raheja Vidyanidhi Institute for Architectural & Environmental Studies' to take up a project and develop a proposal for uniform shop frontages on the Mall. We hope and expect that such a proposal is ready by the next date. The Principal Secretary (TCP) shall file her affidavit on or before the next date giving latest status in this regard.

We have impleaded the Beopar Mandal Shimla as a party respondent in this case. We may make it clear that in case all the shopkeepers comply with the law and the orders passed by this Court then on special occasions such as Diwali etc. if appropriate application is moved we may permit certain shopkeepers to display their goods outside their shops for a short period up to a limited extent. We may make it clear that in case in regular course

encroachments are found and the goods are displayed on the roads and drains then we shall not grant such permissions even during festivals.

We further direct the Special Magistrate and other officials of the Municipal Corporation, Shimla to ensure that they visit the areas in question especially the Lower Bazaar, Ram Bazaar etc. on regular basis at random at least twice in a week. Some of these visits can be made in the evening hours also. If they find violation of these orders or violation of the Municipal Laws they shall take action against the offending persons and also bring the same to the notice of this Court.

We reiterate our earlier directions that the Superintendent of Police, Shimla shall provide adequate police force to the Municipal Corporation as and when required."

8. It appears that certain difficulties regarding implementation of the aforesaid orders during festival days were being faced by the shopkeepers which led to the impleadment of the 'Beopar Mandal', Shimla and on their application this Court on 29.09.2009 passed the following orders:-

"*Keeping in view all these factors in mind, we are of the view that even during these festival days if the Shopkeepers are to be permitted to display their goods/items outside the shops, the projection on the road should not be more than two feet in any event. In case the road is narrow, the projection can be less than two feet. To ensure that on the spot this is actually done, we hereby direct the Assistant Commissioner, Municipal Corporation Shimla to visit the Lower Bazar. He will after measuring the road, in case the same is wide enough, earmark a space of two feet in front of the shop for the shopkeeper(s) to display their goods/items for the short period when the Courts specifically permits the shopkeepers to do so. It is for him to decide whether the space to be granted is two feet or less, keeping in view the total width of the Lower Bazar at the particular point. In case there are shops on both sides and it is not possible to permit any display of goods/items on the road, he shall also indicate accordingly in his report to be submitted to us. The Assistant Commissioner Shimla shall submit his report to us within the next one week, in which he shall clearly indicate that in front of which shops display of goods can be allowed during the festival season. He will also clearly indicate where display can be of two feet and also the shops where the display is to be less than two feet. He shall also clearly state where the road is narrow and no permission can be granted."*

9. The petition filed by Smt.Neelam Sharma came to be closed by the order of this Court dated 09.12.2013. However, it appears that the orders passed by this Court from time to time for some reason did not expressly form part of the final order. Resultantly, certain unscrupulous encroachers taking advantage of this fact had again resorted to encroachment and this fact was highlighted in the news item carried out in the Hindi daily 'Amar Ujala' in its edition dated 30th October 2014. It is reported that as against the time of five minutes, it took Fire Brigade more than one hour fifteen minutes to cover the distance from one corner of the Lower Bazar to the other corner. This Court took suo motu cognizance of the news item and issued notice to the respondents.

10. In response to the notice issued by this Court, the Municipal Corporation, Shimla, in its reply admitted the contents of the news item and pointed out that during removal of encroachments/ overhanging projections, it had been observed that certain shopkeepers/hawkers are in the habit of encroachment/overhanging projections on the

streets and drains. These hawkers immediately remove overhanging projections and temporary encroachments before the entry of Corporation Staff in the area and start re-encroaching the drains/streets immediately after the Corporation Staff leave the market. This practice is common in Lower Bazar and Ram Bazar, especially, in odd hours.

11. It was further pointed out that the Corporation had identified certain points in Lower Bazar area where the problem of overhanging projection and temporary encroachment on the street was required to be dealt with on top priority as in this area the movement of unauthorized hawkers was frequent and the shopkeepers had been violating the directions of this Court.

12. It was also averred that certain shopkeepers had extended foldable tarpaulin outside their shops by projecting the same towards street/road and certain shopkeepers are putting articles for sale in a hanging position under the said tarpaulin which are causing un-necessary hindrance to the general public as well as free flow of emergency vehicles.

13. The Chief Fire Officer in compliance to the orders of this Court on 24.11.2014 filed a status report wherein he not only pointed out obstruction points in the Lower Bazar but he also made certain startling disclosures. It was pointed out that fire vehicles were plied from D.C. Office to 'Sher-e-Punjab' on 23.08.2013, 19.10.2013, 29.10.2014, 27.11.2014 and it took about 40 minutes, 50 minutes, 40 minutes and 53 minutes respectively, whereas, the reasonable time to reach at the scene of fire incidence from Fire Station Office, on the Mall Road, should be 3-6 minutes or to say should not be more than six minutes in any way. It was also pointed out that a fire broke out in Lower Bazar in a liquor shop on 28.01.2014 and the fire tenderers faced a lot of difficulties and obstructions to reach the spot due to the material displayed by the vendors and shopkeepers outside the shops and also because of the permanent projection of angle iron outside the shops.

14. It is well settled that the hawkers have no fundamental right under Article 21 of the Constitution of India to carry on business at the place of their choice and convenience. The rights of hawkers, kiosk- users and vendors can never be absolute, but have to be limited and subservient to over all public interest.

15. In the ***Municipal Board, Manglaur Vs. Mahadeoji Maharaj, AIR 1965 SC 1147***, the Hon'ble Supreme Court observed that the roads and its sidewalks are laid for passage only and for no other purpose.

16. In ***Bombay Hawkers' Union and others Vs. Bombay Municipal Corporation and others, AIR 1985 SC 1206***, the Hon'ble Supreme Court has held that:

> *"8……No one has any right to do his or her trade or business so as to cause nuisance, annoyance or inconvenience to the other members of the public. Public streets, by their very nomenclature and definition, are meant for the use of the general public. They are not laid to facilitate the carrying on of private trade or business. If hawkers were to be conceded the right claimed by them, they could hold the society to ransom by squatting on the center of busy thoroughfares, thereby paralyzing all civic like. Indeed, that is what some of them have done in some parts of the city. They have made it impossible for the pedestrians to walk on footpaths or even on the streets properly so-called."*

17. In the case of ***Olga Tellis and others Vs. Bombay Municipal Corporation and others, AIR 1986 SC 180***, the Hon'ble Supreme Court has held that a municipality is empowered to cause to be removed encroachments on footpaths or pavements over which

the public have a right of passage or access. In the said case, the Hon'ble Supreme Court also observed that:-

> *"43.....In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets....."*

18. The Hon'ble Supreme Court rejected the misplaced arguments resting on life and liberty by those who were claiming occupation of the public streets. In this regard, it was observed that:

> *"43.....There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up construction on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that the former should be preferred to the latter....."*

19. In ***Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38***, the Hon'ble Supreme Court reiterated the law that to remove an encroachment to the public road is the obligation of the municipality and that an injunction could not be granted to suffer an encroachment of a public place like a street which is meant for the use of the pedestrians. The Hon'ble Supreme Court rejected the plea of life and liberty raised in the context of carrying on trade or business on a public road. The Hon'ble Supreme Court further held that there can be no fundamental right of a citizen to occupy a particular place where he can squat and engage in trading business.

20. In ***Ahmedabad Municipal Corporation Vs. Dilbag Singh Balwant Singh and others, 1992 Supp.(2) SCC 630***, the Hon'ble Supreme Court negatived the plea of a occupier of a public street when he obtained an injunction in a suit to prevent the removal of an encroachment. Reaffirming and reiterating its earlier decision, the Hon'ble Supreme Court upheld the removal of encroachment.

21. In ***M/s Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee, AIR 1993 SC 2313***, the Hon'ble Supreme Court while dealing with a case where the verandah in front of the shop had been for long used for passing and re-passing by the public, it was held that this space could be held to be a street under the Municipal Act.

22. In ***Maharashtra Ekta Hawkers Union and another Vs. Municipal Corporation, Greater Mumbai and another, AIR 2004 SC 416***, the Hon'ble Supreme Court while holding that every municipal corporation has a statutory obligation to provide free flow of traffic and pedestrians to pass and re-pass freely and safely; as its concomitant, the corporation/municipality have a statutory duty to have the encroachments removed.

23. On the basis of the aforesaid exposition of law, it can safely be concluded that the respondent Corporation is expected to be vigilant and cannot and should not allow encroachments in any form, be it the illegal extension of shops, its projections, eaves, the pavements or even the footpaths. Public streets and road cannot be blocked or encroached by any one, not even by the government and they are to be kept clear for the purposes of passage only and for no other purpose.

24. It appears that the temptation and enticement to indulge in lateral, vertical and horizontal illegal expansion of structures is on account of the retention/regularization policy introduced by the successive governments which in the teeth of the judgment

rendered by this Court in ***CWP No.122 of 1995*** titled ***Raj Kumar Singla versus State of Himachal Pradesh and another,*** decided on 16.09.1997 wherein this Court held as under:-

> *"18. It is rather surprising that the State Government should think of legalizing an illegal act and part with the government property or public property in favour of those persons, who are guilty of committing such illegal acts. It is the duty of the government to prevent encroachment on public property. If the government decides to make a gift of the public property to those, who have encroached thereon it will tantamount to the government accepting and admitting its inability to prevent the encroachment....."*

25. It was further held that:-

> *"20.Though in this case, the State Government has not expressly pleaded its inability to prevent encroachments on government land and the public property and the encroachment policy issued by the State Government would only show that the government is not in a position to handle the situation. It is a pity that the government with its powerful machinery is not in a position to protect its property, which is really a property of the people of the State and goes to the extent of making a gift of the property on which unscrupulous people have encroached by violating the provisions of law. We cannot but express our anguish and exclaim woe unto the government which seeks to legalize an illegality by an executive action."*

26. Lastly, it was held that:-

> *"28. On the facts of the case, it is evident that the encroachment policy issued by the government cannot minimize the vice of encroachment on the government land or other public property, but on the other hand, it will only encourage the members of the public to encroach upon such land and wait for regularization or legalization of such encroachments. It will also lead to corruption among the officials of the State Government."*

27. Further, the respondents do not seem to have learnt any lesson from the recent earthquakes which have devastated the Himalayan region, particularly, Nepal. As per the latest studies, majority of Himachal Pradesh falls in Seismic Zone-V and the remaining in region-IV and yet this fact has failed to shake the authorities in Shimla out of their slumber. The quake-prone erstwhile summer capital of Raj cannot avert a Himalayan tragedy of the kind that has killed thousands and caused massive destruction in Nepal.

28. It has been reported that Shimla's North slope of Ridge and open space just above the Mall that extends to the Grand Hotel in the West and Lower Bazar in the East is slowly sinking. We can only fasten the blame on the haphazard and illegal construction being carried out and all out efforts being made for converting the once scenic seven Himalayas of this Town into a concrete Jungle. A high intensity quake can turn Shimla into a tomb of rubble as it falls in its Seismic Zone IV-V.

29. Fourteen major localities in Shimla are located at 70-80 degree slope, whereas, the majority of the buildings infringe byelaws and building norms and have not even adhered to the seismic building norms. Most buildings are precariously hanging on the steep slopes and clinging to one another. A moderate and high intensity temblor can be catastrophic for congested settlements with no escape routes and they are likely to collapse like a pack of cards, more particularly, when none of the authorities has ever cared to carry out the seismic pounding effects in buildings aimed at studying seismic gap between

adjacent buildings by dynamic and push over analysis. No particular parametric study has been conducted to investigate the minimum seismic pounding gap between two adjacent structures.

30. According to the report prepared by the Himachal Pradesh State Disaster Management Authority, seismically, the State lies in the great Alpine-Himalayan seismic belt running from Alps Himalayan through Serbia, Croatia, Turkey, Iran, Afghanistan, Pakistan, India, Nepal, Bhutan and Burma.

31. On April 4, 1905, an earthquake of 7.8 magnitude hit Kangra killing 20,000 people, 53,000 domestic animals while one lakh houses were destroyed. Economic Cost of recovery was estimated at Rs.29 lakhs during that time. On January 19, 1975, a quake of 6.8 magnitude hit Kinnaur killing 60 people while 100 others were badly injured. About 2,000 dwellings were devastated and more than 2,500 people were rendered homeless. On April 26, 1986 in Dharamshala a tremor of 5.5 magnitude had killed six people and caused extensive damage to buildings and the loss was estimated at Rs.65 crore. In Chamba, on March 24, 1995, an earthquake of 4.9 magnitude had left over 70% houses with cracks. Similarly, on July 29, 1997, a quake of 5.0 magnitude had left around 1,000 houses damaged in Sundernagar.

32. Once such gruesome realities exist, can the unauthorized structures still be regularized by encouraging violators only to contribute to the rapid haphazard urban growth in the hope that the government will finally regularize the structures? This simply cannot be done. It cannot be denied that haphazard, unplanned and illegal constructions have marred the beauty of hill towns in Himachal Pradesh, more particularly, its capital Shimla. It is high time that the building byelaws are suitably amended by taking into consideration the recent seismic activity that has taken place in the entire Himalayan region.

33. It has been noticed that even though the buildings are connected by road, yet no provision for parking even for one vehicle has been kept. In many cases, building or part thereof is put to commercial use, while the vehicles are parked on the roadside that too without paying for the same. Therefore, it becomes imperative that the byelaws be suitably amended by making it mandatory for all the buildings connected by road to have parking space for atleast one vehicle that too without permitting encroachment upon public property.

34. Despite the settled legal position and repeated directions from this Court, the respondents have failed to take care of these problems and the only reason which can be ascribed for such failure is lack of will to efficiently implement the directions as passed by this Court from time to time.

35. The Criminal Procedure Code, 1973, the Indian Penal Code and the Himachal Pradesh Police Act, 2007, apart from the Municipal Corporation Act, all contain provisions for removal of obstruction on a street, or committing a nuisance or obstruction in general. There are penalties provided like simple fine or even arrest or imprisonment for non-appearance before the Court.

36. Section 133 of the Code reads as follows:-

> *"133. Conditional order for removal of nuisance.---(1) Whenever a District Magistrate or a Sub- Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-*

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order---

(i) to remove such obstruction or nuisance; or
(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or
(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or,

if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the Order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.- A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

37. Section 268 IPC reads as follows:-

"268. Public nuisance.- A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

A common nuisance is not excused on the ground that it causes some convenience or advantage."

38. Similarly, Section 114 of the Himachal Pradesh Police Act, 2007 reads as follows:-

"114. Powers of Police Officers in respect of certain offences on roads or public places.

(1) It shall be lawful for any Police Officer in uniform to take into custody, without warrant, any person who within his personal view, has committed any of the following offences on any road, public place or thoroughfare causing obstruction, annoyance, risk, danger or damage to residents or passersby, namely :—

(i) slaughters or wantonly commits cruelty to any animal: or

(ii) drives or rides furiously any cattle or horses; or

(iii) obstructs the taking up or setting down of passengers at a public transport halting place; or

(iv) exposes any good for sale; or

(v) is found drunk and incapable or riotous; or

(vi) indecently exposes himself, urinates or defecates in a public place or in public view; or

(vii) unauthorizedly affixes any bill, notice or other paper to, or defaces, any property belonging to the State or Central Government or any public authority; or

(viii) commits willful trespass into any property belonging to the State or Central Government or any public authority; or

(ix) willfully damages any public alarm or any other public emergency assistance system; or

(x) harasses or stalks a woman or makes indecent advances or makes obscene remarks or gestures to a woman; or

(xi) begs or seeks alms."

(2) Any person, so arrested, if not immediately released on bail, shall be produced as soon as possible, but not later than 24 hours, before the nearest Judicial Magistrate having jurisdiction."

39. Section 396 of the Himachal Pradesh Municipal Corporation Act, 1994, reads as follows:-

"*396. Penalty for breaches of bye-laws. [1](1) Any bye-law made under this Act may provide that a contravention thereof shall be punishable,-*

(a) with fine which may extend to [2] [fifty thousand] rupees; or

(b) with fine which may extend to [fifty thousand] rupees and in the case of continuing contravention, with an additional fine which may extend to [five thousand] for every day during which such contravention continues after conviction for the first contravention; or

(c) with fine which may extend to [five thousand] for every day during which the contravention continues, after the receipt of a notice from the Commissioner or any Corporation Officer duly authorized in that behalf by the person contravening the bye-law requiring such person to discontinue such contravention.

(2) Any such bye-law may also provide that a person contravening the same shall be required to remedy, so far as lies in his power, the mischief, if any, caused by such contravention."

40. During the course of arguments, the learned Amicus Curiae has pointed out that it is not streets in the bazar area of Shimla which alone have been encroached, but even public roads have been choked making it difficult for the emergency vehicles like ambulance, fire brigade etc. to reach their destination on time.

41. After decades of haphazard development (if at all it can be called development) and environmental degradation-destroying activities, both by the Municipal Corporation as also the residents of Shimla, there is finally a ray of hope in the prospects of Shimla getting the "UNESCO World Heritage Site Tag". We have learnt that US Government Agencies for international development has selected three cities from across the world as resource cities for development- Town Ville in Australia, Summer Ville at Massachusetts and Shimla, the only city in the entire South area, but can the city get the status in the current scenario where the encroachers are having a heyday and the roads are completely choked?

42. Law breakers and law abiders cannot be placed at an equal pedestal. It is unfortunate that despite repeated directions passed by this Court in more than three decades back in ***Yoginder Lal Sharma's*** case (supra) and thereafter in ***Neelam Sharma's*** case, the same has not had the desired effect upon the encroachers. It, therefore, makes it imperative that we issue certain stringent directions.

43. Accordingly, the following directions are issued which shall apply to the entire Municipal Area of Shimla:-

i) That no shopkeeper(s)/hawker(s) throughout Shimla irrespective of its locality would be permitted to display his/their goods on the drains and the sides of the streets.

ii) No shop will be permitted to have overhanging projections including collapseable tarpaulin.

iii) No unauthorized hawkers shall be permitted to sit outside a shop by encroaching upon the public drain or sell their goods/wares in any bazaar in Municipal area of Shimla.

iv) The Municipal Corporation shall strictly implement the provisions of Section 227 of the Himachal Pradesh Municipal Corporation Act, 1994, as also byelaws called "Overhanging Project Byelaws" and in case of first three violations, the fine as envisaged under the aforesaid provisions shall be levied. But, in case of fourth default, the licence to run the shop shall be suspended for one month and in case of another default for another six

months and in case there is yet another default, then his licence shall be permanently revoked.

v) It is only once that the action would be taken against the encroachers under Section 133 Cr.P.C., Section 283 IPC or Section 114 of the H.P. Police Act or Section 396 of the Himachal Pradesh Municipal Corporation Act, 1994 and thereafter recommendations for suspension of licence shall be made and the Municipal Corporation shall thereafter act in accordance with the direction No.(iv).

vi) The persistent defaulters already identified by the Corporation shall be given only one chance to improve and thereafter their licences shall be suspended in a manner set out in direction No.iv.

vii) The Municipal Corporation shall demolish within a period of six weeks all illegal projections including projections in the form of collapseable tarpaulin as have come to the notice of the Corporation including those projections as mentioned in the affidavit of the Chief Fire Officer. After demolition of the illegal structure, the Corporation would conduct G.P.S. demarcation of the entire area so that the same works as a ready referencer in dealing with fresh encroachments.

viii) It is made clear that during the festival days, the order passed by this Court on 29.09.2009 in ***Neelam Sharma's*** case shall be applicable.

ix) The Special Magistrate and Officials of the Municipal Corporation, Shimla shall visit the areas in question, especially, Lower Bazar, Ram Bazar etc. on regular basis at random atleast in a week.

x) The Municipal Corporation in light of the observations made in this judgment shall suitably frame/amend its byelaws, till and so long the respondents do not frame the byelaws, no building or part thereof which is unauthorized shall be permitted to be regularized under any policy, guidelines or instructions. Till the building byelaws are not framed, the Municipal Corporation will be authorized to have the electricity and water connections of these illegal structures disconnected and any instruction issued on behalf of the Corporation to the HPSEBL or the IPH will be imperative and mandatory.

xi) The Chief Fire Officer shall carry out an unscheduled and unannounced mock-drill every month where the Fire Brigade shall be made to pass through the entire length and breadth of the Lower Bazar and any hindrance in its movement shall be dismantled and demolished there and then at the spot.

xii) The respondents are directed to ensure that there is no undue let, obstruction or hindrance in plying of emergency vehicles like the fire brigade, ambulance etc. It is clarified that any vehicle carrying a serious patient would be treated as an ambulance for all intents and purposes.

xiii) While implementing the orders of this Court, the Officers of the Municipal Corporation shall act uniformly and fairly by treating all persons equally.

xiv) We also direct that no Civil Court in Shimla shall entertain any proceedings or pass any order in any proceedings filed with regard to encroachments which are being removed under the orders of this Court. However, the person(s) aggrieved is/are free to approach this Court.

xv) The respondents shall ensure that no unauthorized construction is carried out within the Municipal limits of Shimla.

xvi) The Commissioner, Municipal Corporation and Superintendent of Police, Shimla, shall work in tandem to give effect to the aforesaid orders and quarterly status reports shall be submitted by them to the Registry of this Court.

xvii) Any violation of this order needless to say shall be viewed seriously and any person is free to approach this Court by addressing a letter and appending therewith his name and permanent address as also the photographs of the encroacher alongwith his other details like name, address etc. etc.

xviii) It shall be the personal responsibility of the Collector, Superintendent of Police and the Commissioner, Municipal Corporation, Shimla that the directions issued hereinabove are carried out in their letter and spirit.

xix) The respondents are further restrained from introducing any retention/regularization policy, guidelines or instructions thereby permitting regularization of unauthorized structures.

xx) The respondents shall not permit any free parking on the main public road and it is only after proper identification the parking would be permitted that too subject to payment.

xxi) We direct that henceforth no new vehicle which is intended to be plied primarily within Shimla Municipal area will not be registered in the State unless the intending purchaser produces a certificate from the Collector, Shimla that he has a parking space and the said certificate shall be issued only after a report to this effect that too after physical inspection and verification is issued by the SHO of the Police Station in whose jurisdiction the area falls.

xxii) We also direct that our directions should be implemented in letter and spirit and any dereliction of duty or negligence on the part of the authorities concerned will amount to contempt of this Court's orders for which necessary action shall be initiated.

44. The petition is accordingly disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Dharma Devi ...Appellant.

Versus

State of H.P. ...Respondent.

Criminal Appeal No.333 of 2011
Reserved on : 29.4.2015
Date of Decision : May 22, 2015.

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was carrying a rucksack on her back- she tried to throw away the rucksack and run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of

police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court. (Para-10 to 37)

Cases referred:
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
Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427
Ravindra Shantram Savant v. State of Maharashtra, (2002) 5 SCC 604
Girija Prasad (dead) by LRs v. State of M.P., (2007) 3 SC (Cri) 475
Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450
State of Rajasthan v. Bhawani, (2003) 7 SCC 291
State of U.P. v. Krishna Gopal and another, (1988) 4 SCC 302,
State of Punjab v. Baldev Singh, (1999) 6 SCC 172,

For the Appellant	:	Mr. Anoop Chitkara, Advocate.
For the Respondent	:	Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Dharma Devi, hereinafter referred to as the accused, has assailed the judgment dated 28.10.2010/29.10.2010, passed by Special Judge Kullu, Himachal Pradesh, in Sessions Trial No.51 of 2009, titled as *State v. Dharma Devi*, whereby she stands convicted of the offence punishable under the provisions of 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default of payment thereof, to further undergo simple imprisonment for a period of six months.

2. It is the case of prosecution that on 29.3.2009, HC Om Parkash (PW-3), alongwith police officials Parveen Kumar (PW-1) and Bahadur Singh (PW-2), was on a patrol duty near village Chohki and Malana Dam. At about 5.30 p.m., they noticed a lady carrying a rucksack on her back. Seeing the police party, she got perplexed and tried to throw away the rucksack so carried by her. She also tried to flee, but was apprehended. On questioning, she disclosed her name as Dharma Devi. Om Parkash suspected that she may be carrying some contraband substance. After complying with the statutory provisions and obtaining her consent vide memo (Ex. PW-1/D), he searched the bag, from which six packets containing Charas, in the shape of sticks, were recovered. Same were weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams, were drawn and sealed with seal impression 'H'. Remaining bulk parcel was also sealed with the very same seal impression. Sample of the seal was taken on a piece of cloth (Ex. PW-1/E). NCB forma (Ex. PW-3/A) were filled up in triplicate. Ruka (Ex. PW-3/B) was taken by Bahadur Singh, on the basis of which FIR No.133, dated 29.3.2009 (Ex. PW-8/B), under the provisions of Section 20 of the

Act, was registered at Police Station, Sadar, Kullu, by SHO Prem Dass (PW-8). After the file was taken back to the spot, accused was arrested and remaining formalities completed. HC Om Parkash produced the contraband substance before SHO Prem Dass, who resealed the same with his seal impression 'T', whereafter it was handed over to MHC Roop Singh (PW-6), who deposited the same in the Malkhana. Om Parkash deposited the sealed samples with the Forensic Science Laboratory, Junga. Report (Ex. PA) of the laboratory revealed the contraband substance to be Charas. 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 she did not plead guilty and claimed trial.

4. During the pendency of trial, entire bulk parcel was also sent for analysis. HC Ram Krishan (PW-9) handed over the same to HHC Tek Singh (PW-10), who deposited it with the Forensic Science Laboratory, Junga and report (Ex. PB) was produced before the Court.

5. 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 she took the following defence:

> "I am innocent. On 29.3.2009 I along with Smt. Kekti Devi and her minor son were waiting for a bus in the rain shelter at Jari in order to go CHC Jari as on that day I was suffering from fever due to chickenpox. The son of Smt. Kekti was also suffering from fever due to chickenpox. Smt. Kekti Devi wife of Hej Raj was suffering with fracture in her arm. At about 10.00 a.m. 2-3 police personnels came in the rain shelter. They noticed an unclaimed bag lying in the rain shelter. The ownership of the said bag was ascertained from the persons who were sitting in the rain shelter. Every body denied to owe the said bag. Thereafter, those police officials opened the said back and some black coloured substance was found in it wrapped in 15-16 different packets. On 1-2 packets the words "Malana Cream" was printed. Thereafter, our names and addresses were ascertained by those police officials, upon which I and Smt. Kekti Devi disclosed our names and addresses and also disclosed that we are the residents of Malana. Thereafter I alongwith Smt. Kekti Devi and minor son were taken to PP Jari. When our conditions deteriorated due to the said diseases, we were taken to CHC Jari, where Dr. was not present the police summoned the Doctor from his residence who had given us treatment. Thereafter the police again took up to police post Jari and child of Smt Kekti Devi wife of Hem Raj was handed over to my father who was also summoned in the police post and thereafter I and Kekti Devi were falsely implicated by the police."

No evidence in defence was led.

6. Based on the testimonies of witnesses and the material on record, trial Court convicted and sentenced the accused, as aforesaid.

7. It is contended by Mr. Chitkara, learned counsel for the accused that the accused stands falsely implicated and the defence set up by her stands probablized. In this connection, he also invites our attention to document (Ex. PW-5/A), revealing the fact that accused Dharma Devi was suffering from chickenpox.

8. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General, has supported the judgment and findings so rendered by the trial Court for the reasons contained therein.

9. Having heard learned counsel for the parties, we are of the considered view that no case for interference is made out in the present appeal.

10. We find from the testimony of Bahadur Singh that father of Dharma Devi was asked to come to Odidhar. We also find from the testimony of Sher Singh (PW-4) that a lady Constable was also called on the spot. But then these facts would, in no manner, probablize the defence of the accused or render the prosecution version to be false. Significantly, when the accused was produced before the Magistrate, no protest was made. Also, there is no suggestion, much less proof of the custody of the child of Kekti Devi being handed over to the father of Dharma Devi, who also has not been examined as a defence witness. It is not the case of the accused that she and Kekti are close relatives or there was none in the family of Kekti, who could have looked after the child. Also, there is no positive evidence that in fact father of Dharma Devi did come to Odidhar. In fact Bahadur Singh states that till such time he remained on the spot, such persons had not come. It is not that the rain shelter of Jari was located at an isolated place, having no habitation around. Accused admits presence of other persons on the spot, as she states that "every body denied to owe the said bag". Now, who is this 'every body'? who are these persons present on the spot? Why is it that the ladies did not protest against their false implication? Why would police take them to the Police Post? Now, all these questions remain unanswered by the accused. It has not come on record that police harboured any animosity or on suspicion had taken them to the Police Post.

11. It is true that the accused is only to probablize his defence and not prove his case beyond reasonable doubt. But then, in the instant case, there is nothing on record to this effect.

12. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on prosecution and 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 but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. 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.

13. 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.

14. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (See also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139).

15. In the present case, not only possession but conscious possession has been established. It has not been shown by the accused that the possession was not conscious in the logical legal backdrop of Sections 35 and 54 of the Act.

16. 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]

17. In the instant case, no independent witness has been associated by the police party, while carrying out the search and seizure operations. Thus, the prosecution case rests on the testimony of police officials.

18. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. However, the rule of prudence demands that the Court should be conscious before putting blind reliance upon the testimonies of police officials. Thus, if the testimony of the police official is consistent and credible in nature and satisfies the trust of truthfulness, there is no bar to base conviction upon such testimony of the police officials.

19. In *Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427,* the Court held that the evidence of police witnesses cannot be rejected on the ground that they are police witnesses and were members of the raiding party. Also, the Court held that evidence of police officer cannot be discarded merely because he is police official, in absence of hostility to the accused. In the present case also, there is no enmity between the Investigating Officer and the accused. Had there been any intention of the Investigating Officer to plant the contraband substance on the accused, then he might have planted small quantity of Charas.

20. It was further held by the Hon'ble Supreme Court of India in *Ravindra Shantram Savant v. State of Maharashtra,* (2002) 5 SCC 604, that Court need not seek corroboration of evidence of the police officer who conducted search. But then, given facts have to be kept in mind.

21. In *Girija Prasad (dead) by LRs v. State of M.P.,* (2007) 3 SC (Cri) 475, the Hon'ble Supreme Court of India, held that the presumption that people act honestly apply to police officer also.

22. We find the prosecution to have established its case, beyond reasonable doubt, through the testimonies of police officials Parveen Kumar (PW-1), Bahadur Singh (PW-2) and Om Parkash (PW-3), who conducted the search and seizure operations. Their testimonies are clear, consistent, cogent and the witnesses reliable. There is nothing in their testimonies, which would render their testimonies to be doubtful or the witnesses to be unreliable or not worthy of credence.

23. Om Parkash (PW-3) states that on 29.3.2009, he alongwith Bahadur Singh and Parveen Kumar was present at Odidhar. At about 3.30 p.m., a lady came from Malana side, carrying a pithu (rucksack) on her back. Seeing the police party, who were in uniform, the lady turned back and tried to throw away the bag which she was carrying. She was apprehended and on query disclosed her name to be Dharma Devi, so identified as the accused in the Court. He clarifies that the place was lonely, and no independent witness was either available or could be associated. As such, he associated his companions. Since he suspected the accused to have carried some contraband substance, in her bag, after informing her of her statutory rights and obtaining her consent (Ext. 1/D) for searching the bag, he searched the same. He states that from the bag (Ext. P-3) on which 'North Face' was written, six packets of khaki colour were recovered, which contained Charas. Contraband substance was weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams (Ext. P-2), were drawn and sealed with four seal impression of seal 'H' and remaining bulk parcel (Ext. P-2) was sealed with six seals of the very same seal impression. Samples of the seal were taken on a piece of cloth (Ex. PW-1/E). NCB form (Ex. PW-3/A) was filled up in

triplicate. Ruka (Ex. PW-3/B) was sent through Bahadur Singh to the Police Station for registration of the FIR. He completed proceedings on the spot and sent Special Report (Ex. PW-3/E) to the Deputy Superintendent of Police. At the Police Station, he deposited the contraband substance with the SHO, who resealed the same with four seals of impression 'T'. Despite extensive cross-examination, we do not find his testimony to have been shattered or rendered doubtful, in any manner. In fact, his version stands duly corroborated by Parveen Kumar and Bahadur Singh, on material points.

24. There is some variation and discrepancy with regard to the time within which accused was apprehended. But then, this fact alone would not render the witnesses to be unreliable, their testimonies unbelievable or the prosecution case to be doubtful. In our considered view, presence of the accused, recovery of the contraband substance from her conscious possession, stands proved, beyond reasonable doubt.

25. In *Radha Mohan Singh v. State of U.P.*, (2006) 2 SCC 450, the Court further held that it is for the Judge to consider in each case whether the witness stands thoroughly discredited or can be still believed in regard to a part of his evidence. If the evidence is not completely shaken, the Court may after considering the evidence as to whole with due care and caution except in the light of other evidence on the record. That part of his evidence which is found creditworthy and act upon it, the testimony of such witness may not be rejected out rightly. Also in *State of Rajasthan v. Bhawani*, (2003) 7 SCC 291, the Court held that corroboration is rule of prudence for satisfying test of reliability. That part of witness's evidence found believable can be used for the purpose of corroborating the evidence of other witnesses. Evidence which is not shaken by the cross-examination cannot be brushed aside.

26. There can be no dispute with the proposition that benefit of every doubt has to go to the accused, but before such a benefit can be extended, the doubt must be reasonable and not each and every doubt, which may arise. Explaining this principle, the Hon'ble Supreme Court of India, in *State of U.P. v. Krishna Gopal and another,* (1988) 4 SCC 302, has held that:

> "Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. *To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehension. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."* (Emphasis supplied).

27. As pointed out by the Hon'ble Supreme Court of India in *State of Punjab v. Baldev Singh,* (1999) 6 SCC 172, drug abuse is a social malady. While drug addiction casts into the vitals of the society, drug trafficking not only casts into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to certain Conventions of the United Nations against illicit trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage.

28. Applying the test laid down by the Hon'ble apex Court in the present case, there is nothing on record, which can be called as a reasonable doubt. On the other hand, the prosecution evidence has been corroborated in material particulars both by ocular version and documentary proof, including the report(s) of the chemical analyst.

29. We find the prosecution case to have been established even by way of link evidence. SHO Prem Dass is categorical in his deposition that on the basis of ruka, so received at the Police Station, FIR was registered and file handed over to Bahadur Singh. Also, when Om Parkash produced the case property before him, he resealed the same with seal impression 'T'. Necessary entries were made in the NCB form (Ext. PW-3/A) and the case property deposited, alongwith the NCB form, in the Malkhana. Till such time, the case property remained with him, it was not tampered with.

30. Testimony of Roop Singh (PW-6), MHC, is also to the effect that entry of the contraband substance was made in the Malkhana Register (Ex. PW-6/A) and the sealed samples were handed over by him, alongwith the Road Certificate (Ex. PW-6/B) to be taken to the Forensic Science Laboratory. Om Parkash (PW-7), after depositing the case property at the Laboratory, deposited the receipt, copy of which is Ex.PW-7/C. Version of this witness also stands corroborated by Om Parkash (PW-3), both of whom have also deposed that so long as the property remained in their possession, it was not tampered with. The witnesses have deposed truthfully. Their depositions are clear, consistent and there is nothing which would render the same to be doubtful. Bulk parcel was also deposited with the Forensic Science Laboratory for analysis. HC Ram Krishan (PW-9), who was posted as MHC at the relevant time, sent the same through Tek Singh (PW-10) to the Laboratory. Even they have deposed that so long as the parcel remained with them, it was kept in safe custody and not tampered with.

31. Reports of the Forensic Science Laboratory (Ex. PA & PB) reveal the contraband substance, so recovered from conscious possession of the accused, to be charas.

32. It be also observed that before leaving the Police Post, entry of departure was made by the police party, which stands proved by the prosecution witnesses. Thus, genesis of the prosecution story also cannot be said to be false.

33. Also, we find that Special Report (Ex. PW-5/A) was promptly sent to the superior Officer, which fact is evident from the testimony of HC Harbans Kumar (PW-5).

34. So, in view of the above discussion, evidence in hand and the law laid down by the Hon'ble Supreme Court of India, the prosecution has successfully proved beyond all reasonable doubt that accused was in conscious and exclusive possession of Charas.

35. 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 she 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.

36. In our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

37. 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 MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 386 of 2014 & 157 of 2015.
Date of decision: 22.05.2015.

1. FAO No.386 of 2014.

Joginder Singh & another .....Appellants
Versus
Chanan Ram and others ...Respondents.

2. FAO No 157/2015.

ICICI Lombard General Insurance Co. Ltd .....Appellant
Versus
Joginder Singh and others ...Respondents.

Motor Vehicle Act, 1988- Section 166- MACT treated income of the deceased as Rs. 15,000/-, deducted 50% and assessed loss of dependency as Rs. 7,500/-- applying multiplier of 11, assessed the loss of income as Rs. 9,80,000/- and awarded total compensation of Rs. 10,40,000/- which cannot be said to be excessive or meager- appeal dismissed. (Para-7)

For the appellant(s): Mr. Raman Sethi, Advocate, in FAO No. 386 of 2014 and Mr. Jagdish Thakur, Advocate, in FAO No. 157 of 2015.

For the respondent(s): Mr.Ankur Sood, Advocate, for respondents No. 4 and 5 in FAO No. 386 of 2014.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP(M) No.60 of 2015 in FAO No. 157/2015.

This application has been filed in FAO No. 157 of 2015, for condonation of 55 days' delay, which has crept-in in filing the appeal. For the reasons stated in the application, the application is granted and the delay in filing the appeal is condoned. The application stands disposed of.

2. These two appeals are outcome of a common judgment and award dated 15.7.2014, passed by the Motor Accident Claims Tribunal Shimla, H.P. Circuit Court Theog in MAC Petition No.43-T/2 of 13/10, whereby compensation to the tune of Rs.10,40,000/-

alongwith 7.5% interest came to be awarded in favour of the claimants and insurer came to be saddled with the liability.

3. Both these appeals are being taken up together for disposal in order to avoid conflicting judgments.

4. The claimants have filed FAO No. 386 of 2014 for enhancement of compensation and the insurer has filed appeal No.157 of 2015, for exonerating them from the liability and saddling the insured with the liability.

5. The insured and driver have not questioned the impugned on any ground, thus it has attained finality so far as it relates to them.

6. The questions to be determined in these appeals are whether the amount awarded is excessive and whether the insurer has been rightly saddled with the liability?

7. I have gone through the impugned award. The Tribunal has awarded the just and appropriate compensation, which cannot be said to be meager in any way. It is apt to reproduce paras 39 and 40 of the impugned judgment and award herein:

> *"39. Therefore, in the totality of the facts and circumstances, it is presumed that had Miss Ambika been alive, she would have got job and earned at least Rs.15,000/- per month as salary. The plea of the petitioners that deceased had 100% chances of placement, cannot be accepted in view of clause No.23 of the agreement Ext. PW3/A which clearly stipulates that after completion of course, there is "NO JOB GUARANTEE".*
>
> *40.The prospective monthly income of the deceased on the basis of course being perused by her is assessed to Rs.15,000/- per month. Therefore, in view of the ratio laid down by the Hon'ble Supreme Court in* ***Sarla Verm's*** *case supra, sum of Rs.7500/- per month can be taken as contribution to the family. Hence annual income would be Rs.7500x12=Rs.90,000/-. Having considered age of the parents and accepting the fact that age of mother was between 45 to 50 years and of father more 50 years at the time of accident, the appropriate multiplier would be 11 (eleven). Therefore, the compensation works out to Rs.90,000/- x11=Rs.9,90,000/-. Apart from this, the petitioners are also entitled for a sum of Rs.25,000/- for loss of love and affection and additional sum of Rs.25,000/- as funeral expenses in view of the ratio laid down by the Hon'ble Supreme Court in* ***Rajesh & others vs. Rajbir Singh & Ors., 2013 (3) Civil Court Cases 015 (S.C.).*** *Therefore, actual calculation of compensation under different heads is as under:-*
>
> *(i) Loss of dependency to the family Rs.9,90,000/-*
> *(ii) Loss of love and affection Rs.25,000/-*
> *(iii) Funeral Expenses Rs.25,000/-*
> *Total compensation Rs.10,40,000/-*
> *(Rupees ten lacs, forty thousand only)."*

8. The compensation awarded can neither be said to be excessive nor meager at all. Keeping in view the facts and circumstances of the case, I hold that the compensation awarded is just and appropriate.

9. The insurer, through the medium of appeal filed by them, has sought exoneration on the ground which stands already discussed by the Tribunal in para 42 of the impugned award. It is apt to reproduce para 42 of the impugned award herein:

> *"42.Admittedly, respondent No. 3 is the insurer of Tempo No.PB-03T-4804 as per goods carrying package policy Ext. RW-1/B. The vehicle was duly insured w.e.f 25.3.2009 to 24.3.2010. The accident took place on 10.9.2009 during subsisting period of the insurance. There is nothing on record to infer that offending vehicle was being plied in contravention of the insurance policy Ext. RW-1/B and against the provisions of Motor Vehicle Act, 1988. Therefore, the respondent No.3, being the insurer of Tempo No. PB-03T-4804 is liable to indemnify the compensation award."*

10. I have gone through the findings returned by the Tribunal, which are legal one, need no interference.

11. Accordingly, both the appeals are dismissed along with pending applications, if any. The impugned award is upheld.

12. The insurer is directed to deposit the amount within six weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award. Send down the record forthwith.

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

Kekti Devi ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.87 of 2011
Reserved on : 29.4.2015
Date of Decision : May 22, 2015.

run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court. (Para-10 to 37)

Cases referred:
Dharampal Singh v. State of Punjab, (2010) 9 SCC 708
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
Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427
Ravindra Shantram Savant v. State of Maharashtra, (2002) 5 SCC 604
Girija Prasad (dead) by LRs v. State of M.P., (2007) 3 SC (Cri) 475
Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450
State of Rajasthan v. Bhawani, (2003) 7 SCC 291
State of U.P. v. Krishna Gopal and another, (1988) 4 SCC 302
State of Punjab v. Baldev Singh, (1999) 6 SCC 172

For the Appellant : Mr. Anoop Chitkara, Advocate.
For the Respondent : Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Kekti Devi, hereinafter referred to as the accused, has assailed the judgment dated 28.10.2010/29.10.2010, passed by Special Judge Kullu, Himachal Pradesh, in Sessions Trial No.50 of 2009, titled as *State v. Kekti Devi*, whereby she stands convicted of the offence punishable under the provisions of 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default of payment thereof, to further undergo simple imprisonment for a period of six months.

2. It is the case of prosecution that on 29.3.2009, ASI Bhup Singh (PW-2), alongwith Constable Sohan Singh (PW-1) and lady Constable Veena Devi (not examined), was on a patrol duty. At about 4 p.m., when they reached near a place known as Jari Ban Jungle (near Baladhi bridge), the noticed a lady, carrying a rucksack on her back, coming from Baladhi side. Seeing the police party, she got perplexed and tried to throw away the rucksack. She also tried to flee, but was apprehended. On questioning, she disclosed her name as Kekti Devi. ASI Bhup Singh suspected that she may be carrying some contraband substance. After complying with the statutory provisions and obtaining her consent vide memo (Ex. PW-1/A), he searched the bag, from which five stick like (Gullanuma) packets, wrapped in polythene, which contained Charas, were recovered. Same were weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams, were drawn and sealed with seal impression 'A'. Remaining bulk parcel was also sealed with the very same seal impression. NCB forma (Ex. PW-2/B) were filled up in triplicate. Ruka (Ex. PW-2/C) was taken by Constable Sohan Lal, on the basis of which FIR No.134, dated 29.3.2009 (Ex. PW-5/A), under the provisions of Section 20 of the Act, was registered at Police Station, Sadar, Kullu, by SHO Prem Dass (PW-5). After the file was taken back to the spot, accused was arrested and remaining formalities completed. ASI Bhup Singh produced the contraband substance before SHO Prem Dass (PW-5), who resealed the same with his seal impression 'H', whereafter it was handed over to MHC Roop Singh (PW-9), who deposited the same in the Malkhana. HHC Om Parkash (PW-4) deposited the sealed samples with the Forensic Science Laboratory, Junga. Report (Ex. PA) of the laboratory revealed the contraband substance to be Charas. 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 she did not plead guilty and claimed trial.

4. During the pendency of trial, entire bulk parcel was also sent for analysis. HC Ram Krishan (PW-6) handed over the same to HHC Tek Singh (PW-7), who deposited it with the Forensic Science Laboratory, Junga and report (Ex. PB) was produced before the Court.

5. In order to establish its case, prosecution examined as many as 9 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which she took the following defence:

> "I am innocent. Last year on 29.3.2009 alongwith my minor son and one Dharma Devi were sitting in the rain shelter at a place known as Jari. We were waiting for the bus in order to reach C.H.C. Jari. At about 9.30 AM some policemen came there. They found an unclaimed bag containing some black substance in it. Police enquired about the ownership of the said bag. When nobody claimed the said bag, the police opened the said bag and found some black substance which was wrapped in polythene paper. The police also found the word "Malana Cream" printed on some of the packets. Our name and addresses were ascertained. We disclosed to the policemen that we both are residents of Malana. Thereafter, the said policemen took us to P.P. Jari. On that day my son was suffering from fever and my arm was also fractured, whereas, Dharma Devi was down with chicken pox. On the same evening the police called father of Dharma Devi and handed over my minor son to him. We both have been falsely detained in the case and two different cases have been foisted against us."

No evidence in defence was led.

6. Based on the testimonies of the witnesses and the material on record, trial Court convicted and sentenced the accused, as aforesaid.

7. It is contended by Mr. Chitkara, learned counsel for the accused, that the accused stands falsely implicated and the defence set up by her stands probablized. In this connection, he also invites our attention to document (Ex. D-1), revealing the fact that accused Dharma Devi was suffering from chickenpox.

8. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General, has supported the judgment and the findings so rendered by the trial Court, for the reasons contained therein.

9. Having heard learned counsel for the parties, we are of the considered view that no case for interference is made out in the present appeal.

10. Significantly, when the accused was produced before the Magistrate, no protest was made. Also, there is no suggestion, much less proof of the custody of the child of Kekti Devi being handed over to the father of Dharma Devi, who also has not been examined as a defence witness. It is not the case of the accused that she and Dharma Devi are close relatives or there was none in the family of Kekti, who could have looked after the child. Also, there is no positive evidence that in fact, father of Dharma Devi did come to Odidhar. It is not that the rain shelter of Jari was located at an isolated place, having no habitation around. Accused admits presence of other persons on the spot, as she states that "police enquired about the ownership of the said bag". Now, who are these persons? Why is it that the ladies did not protest against their false implication? Why would police take them to the

Police Post? Now, all these questions remain unanswered by the accused. It has not come on record that police harboured any animosity or on suspicion had taken them to the Police Post.

11. It is true that the accused is only to probablize his defence and not prove his case beyond reasonable doubt. But then, in the instant case, there is nothing on record to this effect.

12. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 708, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on prosecution and 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. But what is required to prove innocence by the accused would be preponderance of probability. Once plea of the accused is found probable, discharge of initial burden by the prosecution will 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.

13. 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.

14. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (See also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139).

15. In the present case, not only possession but conscious possession has been established. It has not been shown by the accused that the possession was not conscious in the logical and legal backdrop of Sections 35 and 54 of the Act.

16. It is a settled position of law that the prosecution has to prove its case beyond reasonable doubt and what is "beyond reasonable doubt", 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]

17. In the instant case, no independent witness has been associated by the police party, while carrying out the search and seizure operations. Thus, the prosecution case rests on the testimony of police officials.

18. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. However, the rule of prudence demands that the Court should be conscious before putting blind reliance upon the testimonies of police officials. Thus, if testimony of the police official is consistent and credible in nature and satisfies the trust of truthfulness, there is no bar to base conviction upon such testimony of the police officials.

19. In *Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427,* the Court held that the evidence of police witnesses cannot be rejected on the ground that they are police witnesses and were members of the raiding party. Also, the Court held that evidence of police officer cannot be discarded merely because he is police official, in absence of hostility to the accused. In the present case also, there is no enmity between the Investigating Officer and the accused. Had there been any intention of the Investigating Officer to plant the contraband substance on the accused, then he might have planted small quantity of Charas.

20. It was further held by the Hon'ble Supreme Court of India in *Ravindra Shantram Savant v. State of Maharashtra,* (2002) 5 SCC 604, that Court need not seek corroboration of evidence of the police officer who conducted search. But then given facts have to be kept in mind.

21. In *Girija Prasad (dead) by LRs v. State of M.P.,* (2007) 3 SC (Cri) 475, the Hon'ble Supreme Court of India, held that the presumption that people act honestly apply to police officer also.

22. We find the prosecution to have established its case, beyond reasonable doubt, through the testimonies of police officials ASI Bhup Singh (PW-2) and Constable Sohan Singh (PW-1), who conducted the search and seizure operations. Their testimonies are clear, consistent, cogent and the witnesses reliable. There is nothing in their testimonies, which would render their testimonies to be doubtful or the witnesses to be unreliable or not worthy of credance.

23. ASI Bhup Singh (PW-2) states that on 29.3.2009, he alongwith Constable Sohan Singh(PW-1) and a lady Constable Veena Devi was on patrol duty. At about 4 p.m., a lady came from village Baladhi side, carrying a pithu (rucksack) on her back. Seeing the police party, who were in the uniform, the lady turned back and tried to throw away the bag, which she was carrying. She was apprehended and on query disclosed her name to be Kekti Devi, so identified as the accused in the Court. He clarifies that the place was lonely and no independent witness was either available or could be associated. As such, he associated his companions. Since he suspected the accused to have carried some contraband substance, in her bag, after informing her of her statutory rights and obtaining her consent (Ex. PW-1/A) for searching the bag (Ex. P-3), he searched the same. He states that from the bag on which 'One Polar' was written, so searched her bag, from which five stick like packets, wrapped in polythene, containing Charas were recovered. Contraband substance was weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams (Ex.P-2), were drawn and sealed with four seal impression of seal 'A' and remaining bulk parcel (Ex.P-1) was sealed with the very same seal impression. NCB form (Ex. PW-2/B) was filled up in triplicate. Ruka (2/C) was sent through Sohan Singh to the Police Station for registration of the FIR. He also completed proceedings on the spot and sent Special Report (Ex. PW-2/F) to the Deputy Superintendent of Police. At the Police Station, he deposited the contraband substance with the SHO, who resealed the same with four seals of impression 'H'. Despite extensive cross-examination, we do not find his testimony to have been shattered or rendered doubtful, in any manner. In fact, his version stands duly corroborated by Constable Sohan Singh, on material points.

24. There is some variation and discrepancy with regard to the time within which accused was apprehended. But then, this fact alone would not render the witnesses to be unreliable, their testimonies unbelievable or the prosecution case to be doubtful. In our considered view, presence of the accused, recovery of the contraband substance from her conscious possession, stands proved, beyond reasonable doubt.

25. In *Radha Mohan Singh v. State of U.P.*, (2006) 2 SCC 450, the Court further held that it is for the Judge to consider in each case whether the witness stands thoroughly discredited or can be still believed in regard to a part of his evidence. If the evidence is not completely shaken, the Court may after considering the evidence as to whole with due care and caution except in the light of other evidence on the record. That part of his evidence which is found creditworthy and act upon it, the testimony of such witness may not be rejected out rightly. Also in *State of Rajasthan v. Bhawani*, (2003) 7 SCC 291, the Court held that corroboration is rule of prudence for satisfying test of reliability. That part of witness's evidence found believable can be used for the purpose of corroborating the

evidence of other witnesses. Evidence which is not shaken by the cross-examination cannot be brushed aside.

26. There can be no dispute with the proposition that benefit of every doubt has to go to the accused, but before such a benefit can be extended, the doubt must be reasonable and not each and every doubt, which may arise. Explaining this principle, the Hon'ble Supreme Court of India, in *State of U.P. v. Krishna Gopal and another,* (1988) 4 SCC 302, has held that:

> "Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. *To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehension. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."* (Emphasis supplied).

27. As pointed out by the Hon'ble Supreme Court of India in *State of Punjab v. Baldev Singh,* (1999) 6 SCC 172, drug abuse is a social malady. While drug addiction casts into the vitals of the society, drug trafficking not only casts into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to certain Conventions of the United Nations against illicit trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage.

28. Applying the test laid down by the Hon'ble apex Court in the present case, there is nothing on record, which can be called as a reasonable doubt. On the other hand, the prosecution evidence has been corroborated in material particulars, both by ocular version and documentary proof, including the report (s) of the chemical analyst.

29. We find the prosecution case to have been established even by way of link evidence. SHO Prem Dass is categorical in his deposition that on the basis of ruka, so received at the Police Station, FIR was registered and file handed over to Sohan Singh. Also, when ASI Bhup Singh produced the case property before him, he resealed the same with seal impression 'H'. Necessary entries were made in the NCB form (Ex.PW-2/B) and the case property deposited, alongwith the NCB form, in the Malkhana. Till such time, the case property remained with him, it was not tampered with.

30. Testimony of Roop Singh (PW-9), MHC, is also to the effect that entry of the contraband substance was made in the Malkhana Register (Ex. PW-9/A) and the sealed samples were handed over by him, alongwith the Road Certificate (Ex. PW-9/B) to be taken to the Forensic Science Laboratory. Om Parkash (PW-4), after depositing the case property at the Laboratory, deposited the receipt with the MHC. He states that so long as the samples remained in his possession, the same were not tampered with. Their depositions are clear, consistent and there is nothing which would render the same to be doubtful. Bulk parcel was also deposited with the Forensic Science Laboratory for analysis. HC Ram Krishan (PW-6), who was posted as MHC at the relevant time, sent the same through Tek Singh (PW-7) to the Laboratory. Even they have deposed that so long as the parcel remained with them, it was kept in safe custody and not tampered with.

31. Reports of the Forensic Science Laboratory (Ex. PA & PB) reveal the contraband substance, so recovered from the conscious possession of the accused, to be charas.

32. It be also observed that before leaving the Police Post, entry of departure was made by the police party, which stands proved by the prosecution witnesses. Thus, genesis of the prosecution story also cannot be said to be false.

33. Also, we find that Special Report (Ex. PW-2/F) was promptly sent to the superior Officer, which fact is evident from the testimony of HC Harbans Kumar (PW-3).

34. So, in view of the above discussion, evidence in hand and the law laid down by the Hon'ble Supreme Court of India, prosecution has successfully proved beyond all reasonable doubt that the accused was in conscious and exclusive possession of Charas.

35. 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.

36. In our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

37. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Cr. Appeal No. 469 of 2012 with
Cr. Appeal No. 4029 of 2013.
Reserved on: May 20, 2015.
Decided on: May 22, 2015.

1. Cr. Appeal No. 469 of 2012

Mandeep .....Appellant.

Versus

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

2. **Cr. Appeal No. 4029 of 2013**

Yog Raj alias Raju .....Appellant.

Versus

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

Indian Penal Code, 1860- Sections 302 and 120-B – Construction work of IPH Sub Division at Village Gharyana Brahmana, District Hamirpur was allotted to the deceased- deceased had engaged accused as a sub-contractor to execute the electrical fitting and paint work- accused was not carrying out the work to the satisfaction of the deceased and due to the deficiency, payment of the accused was withheld by the deceased- deceased visited the construction site to supervise the work where he expressed his dissatisfaction with the work done by the accused- he also refused to make the payment till the deficiency was removed- accused left the spot - he returned with the co-accused armed with a baseball bat and hit the deceased due to which the deceased became unconscious and died- witnesses duly proved the presence of the accused at the spot- accused made a disclosure statement on the basis of which baseball bat was recovered- keys of the vehicle, clothes and danda were also recovered- medical evidence proved that deceased had died due to the head injury and injury to brain leading to neurogenic shock and death- injury could have been caused by means of baseball bat- held, that in these circumstances, guilt of the accused was duly proved.

For the appellant(s): M/S. A.K.Vashista and Chaman Negi Advocates for respective accused.
For the respondent: Mr. P.M.Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since both the appeals have arisen from a common judgment, the same were taken together for hearing and are being disposed of by a common judgment.

2. These appeals are directed against the common judgment dated 19/30.10.2012, rendered by the learned Addl. Sessions Judge, Hamirpur, H.P., in Sessions Trial No. 16 of 2011, RBT No. 7 of 2012, whereby the appellants-accused (hereinafter referred to as the "accused"), were charged with and tried for offence punishable under Sections 302 and 120-B IPC. Appellant Mandeep, in Cr. Appeal No. 469 of 2012 was convicted and sentenced to undergo imprisonment for life and to pay fine of Rs. 25,000/- under Section 120-B IPC. Appellant Yog Raj alias Raju in Cr. Appeal No. 4029 of 2013 was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/- for the offence punishable under Section 302 IPC and to further undergo imprisonment for life and fine of Rs. 25,000/- for the offence punishable under Section 120-B IPC.

3. The case of the prosecution, in a nut shell, is that deceased Subhash Verma son of Sh. Shingar Singh Verma was a Govt. Contractor and executing construction work of IPH Sub Division Office Building at Village Gharyana Brahmana, Distt. Hamirpur, H.P. pursuant to an award of construction by the Ex. Engineer, Hydrology Construction and Maintenance Division, Chakkar, Distt. Shimla, H.P. The construction work commenced w.e.f. 13.5.2010. The deceased Subhash Verma had engaged accused Mandeep as a sub-contractor to execute the electrical fitting and paint work in the building. The accused Mandeep was not performing the job to the satisfaction of the deceased and due to deficiency in his work, his payment had been withheld by the deceased, due to which he was nursing grudge against him. Accused Mandeep on the basis of telephonic conversation with the deceased, knew that he will be visiting the construction site to supervise the work on 12.5.2011. On 11.5.2011, the accused persons hatched a criminal conspiracy to eliminate

the deceased and in pursuance of the agreement, committed his murder on 12.5.2011 at 8:45 AM inside the under-construction building. The accused Mandeep visited the construction site on 12.5.2011, at about 7:00 AM to confirm the visit of the deceased where he met the complainant Dhani Ram being a mason who was working overtime in the building. The deceased Subhash Verma came to the construction site in his Car No. DL-6CG-5791 at about 8:15 AM and met the complainant Dhani Ram, who told him about the visit of accused Mandeep in the morning. At about 8:33 AM, the deceased and the accused Mandeep had a telephonic conversation and after about 10 minutes, he came on the spot on his motorcycle. The deceased Subhash Verma expressed his dissatisfaction with the electrical fitting and paint work done by the accused Mandeep. The deceased also refused to make the payment till the deficiency was made good. Thereafter, the accused Mandeep left the spot angry. Accused Mandeep shortly thereafter returned back alongwith accused Yog Raj alias Raju duly armed with a baseball bat. The mason Dhani Ram (complainant) had left the spot by that time. On reaching the construction site, the accused Mandeep stood guard outside near the Santro Car of the deceased and accused Yog Raj went inside the building armed with the baseball bat and hit the contractor Subhash Verma on his head, due to which he fell down unconscious and sustained fatal injuries. The accused Yog Raj alias Raju took out the keys of the Car and purse from the pocket of the deceased and thereafter came out of the building running towards the vehicle. The accused Yog Raj tried to start the Car of the deceased but on seeing the complainant Dhani Ram and one Sanjeev Kumar coming on the spot, both the accused left the vehicle and ran towards the path through the bushes alongwith the weapon of offence. The complainant Dhani Ram and Sanjeev Kumar on seeing the accused persons running from the spot alongwith the baseball bat, went inside the building and saw the contractor Subhash Verma lying unconscious and injured inside the room with head injuries. The complainant immediately called for the Ambulance and took the injured Subhash Verma to RH Hamirpur. Injured Subhash Verma was examined by Dr. Sanjeev Krishan Dhiman. Subhash Verma died due to injury received by him at 12:05 PM. Inquest papers were prepared. Viscera for chemical examination was preserved. The dead body was handed over to the relative Pankaj Dhadwal. Statement of Dhani Ram under Section 154 Cr.P.C. was recorded, on the basis of the disclosure of facts by the complainant, case under Section 302/34 IPC at PS Hamirpur Sadar was registered vide FIR No. 105/11 dated 12.5.2011. The spot was visited and photographs were taken by the police. Blood stains from the room were preserved. Santro Car was taken into possession. The accused were arrested. On 13.5.2011, accused Yog Raj made disclosure statement to the effect that he had concealed the baseball bat and could facilitate its recovery. The baseball bat was recovered at Garne-Da-Galu. It was measured and taken into possession by the police. The baseball had blood stains. On 14.5.2011, accused Yog Raj made another disclosure statement to the effect that he had concealed the keys of Car and clothes worn by him at the time of murder in his house and could facilitate its recovery. The clothes and keys were recovered vide separate memos. On 16.5.2011, accused Mandeep made disclosure statement to the effect that purse (wallet) of deceased Subhash Verma containing documents etc. has been concealed in his residence and he could facilitate its recovery therefrom. The same was recovered. It was sealed and taken into possession. The memo was signed by accused and two independent witnesses R.S.Chandel and Baljeet Singh. The test identification parade of the accused Yog Raj was conducted by the learned Judicial Magistrate, Ist Class (III), Hamirpur at Sub Jail, Hamirpur, H.P., on 25.5.2011. The police also procured the details of mobile numbers 91293-64695 (used by accused Yog Raj), 98167-93665 (used by accused Mandeep) and 93187-33777 (used by deceased Subhash Verma). The subscriber record with respect to mobile Nos. 98167-93665 and 91293-64695, was also procured. The post mortem examination was got conducted. The report of the FSL

was received. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 33 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, these appeals on behalf of the accused persons.

5. Mr. A.K.Vashista, Advocate and Mr. Chaman Negi, Advocate for the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, learned Dy. AG, for the State has supported the judgment of the learned trial Court dated 19/30.10.2012.

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

7. PW-1 Sanjeev Kumar, deposed that he used to do work of shuttering of contractor Subhash Verma. Subhash Verma met him at Vill. Gharyana Brahmana on 8.5.2011 and told to meet him on 12.5.2011 at Daryana Brahmana. On 12.5.2011, he went to Village Gharyana Brahmana and reached there at 9:00 AM. There was a temple on left side of the path. He offered prayers in the temple and there was also a tiala and he went to the tiala of tree of 'but'. There was a Santro Car parked on right side on the road. Mandeep Singh was standing adjoining the said vehicle. Mandeep Singh accused was standing nearby the vehicle. Mandeep Singh was seeing towards all sides. There was DL number on the said Santro Car. In the meantime, one young boy came running to the spot from the side of under construction building towards the Car. He identified him as Raju in the Court. He was carrying a baseball bat in his hand. Raju immediately sat in the Car. As soon as Raju sat in the Car, one person came from upper side shouting as Contractor-Contractor and on hearing so, both Raju as well as Mandeep Singh ran towards the path through bushes. He came to know that the person who came from upwards and calling Contractor-Contractor was Dhani Ram, mason. He immediately went inside the under construction building. He alongwith Dhani Ram mason saw Subhash Verma, Contractor lying injured inside a room of the building and there were injuries on his head. Villagers including 3-4 ladies also came on the spot. Subhash Verma was lying unconscious. After about 20 minutes, Ambulance came and Subhash Verma was taken to the hospital. He identified accused Raju in District Jail, Hamirpur. He also identified base ball bat Ext. P-1. He denied the suggestion in his cross-examination that he was shown the bat by the police earlier. He did not raise hue and cry. He did not remember the number of Santro Car. He did not run after Raju and Mandeep Singh nor he attempted to chase them. Volunteered that he never knew about the occurrence initially and he did not raise hue and cry. The accused, according to him, ran away from the spot. He also went to the Jail for identification. He came to Police Station about 5 days after the occurrence. Dhani Ram did not meet him when he came to the police station after the occurrence. Dhani Ram did not accompany him when he went to District Jail, Hamirpur, for identification. When they went to the Jail, they sat at the main Gate and made entry in the register. There were 10-12 persons when he identified the accused. All were standing in a line. They were not asked to walk or run. He did not come to Hamirpur after identification parade in the jail. He went to jail for identification after lunch hours. His statement was recorded on 12.5.2011. He did not see who attached Subhash Verma.

8. PW-2 Ail Kumar deposed that at about 8:30 AM, accused Mandeep came on his bullet motorcycle. He stopped it and had a talk with him. Mandeep told him that he was executing work of the building and then he also went with him on his motorcycle to the

under construction house of a Govt. building at Village Gharyana. He was introduced to Contractor Subhash Verma and then he also started talking to Dhani Ram Mason. Mandeep and Contractor Subhash Verma were talking about the construction work of the building. Contractor and Mandeep were having normal talk about work of the window. They were saying that work of the window was not satisfactory. Thereafter, he and Mandeep came from there on the motorcycle of Mandeep. He was declared hostile and cross-examined by the learned P.P. He admitted that when they came from the spot, they met a person on the road. That person was not personally known to him. He could not say that his name was Yog Raj alias Raju. He did not identify Raju in the Court.

9. PW-3 Gurdev Jagota, deposed that he alongwith Up Pradhan Baljeet Singh went to the spot. On reaching, they saw that the Contractor was lying unconscious in a room of the under construction building. The employees of I & PH department told him that the name of Contractor was Subhash Verma. Ambulance came on the spot. Dhani Ram was working as labourer in the building. The police came to the spot and collected blood stains from the spot and put the same in a vile and the vile was sealed. Memo Ext. PW-3/A was prepared and signed by him alongwith Baljeet Singh and Tara Singh. He was again called by the police to the spot on 13.5.2015. Raju made disclosure statement that he would get danda recovered vide Ext. PW-3/C. It was signed by him as well as Baljeet Singh, Up Pradhan. Accused got the danda recovered from behind the bushes. It was taken into possession vide memo Ext. PW-3/D. It was sealed in a cloth parcel. He signed the same. On 14.5.2011, Raju made another disclosure statement that he would get recover key of vehicle and clothes which he had kept in his house vide Ext. PW-3/E.

10. PW-4 Tara Chand, deposed that the accused got the danda recovered vide memo Ext. PW-3/B. The danda is Ext. P-1.

11. PW-5 Ashwani Kumar, deposed that the accused Raju handed over the keys which were taken from the house on 14.5.2011.

12. PW-6 Rasam Singh Chandel deposed that Mandeep made disclosure statement vide Ext. PW-6/A. It was signed by him and Baljeet. They went to the Village Kohli. Mandeep opened the gate of the house and went into a room and got recovered one purse from below the mattresses from a double bed.

13. PW-7 Kusum Lata Verma is the widow of late Subhash Verma. According to her, on 11.5.2011, her husband came from Shimla in Santro Car. He was executing construction work of I & PH department in Distt. Hamirpur. He came to make payment to the labourers. Her husband was having mobile phone No. 93187 33777.

14. PW-8 Swarup Chand deposed that he was going on the road at Gharyana Brahmana towards I & PH Tank and in the meantime, Dhani Ram was coming running on the road from the tank side shouting that they had to chase the killers of the Contractor.

15. PW-9 Ajay Kapoor deposed that the deceased was his brother-in-law. He had given Car No. DL-6CG-5791 to his brother-in-law.

16. PW-12 Ramesh Chand, has proved report Ext. PW-12/A qua the Car.

17. PW-14 Dhani Ram, deposed that he was employed as mason with I & PH department in construction of a building near Village Gharyana Brahmana. Subhash Verma was executing the construction work as Contractor. He had further assigned the work of electric fitting to some other person and he did not remember his name. On 12.5.2011, he went at about 7:00 AM at the site of construction of the building in order to make holes in the stairs. At that time the person who was executing electric fitting work came there. That

sub-contractor asked him about his working there at the early hours and he told him that he was working as over time as he was to go somewhere else to work after 9:00 AM. The paint work was also being done by the same person and he told him that the contractor was not making payment of the work done by him. Thereafter, that sub-contractor went away from the site. Contractor Subhash Verma came at the site at about 8:30 AM. After Subhash Verma came there, he was talking to someone on his mobile phone. Sub contractor alongwith another person came there on a bullet motorcycle. He identified the accused in the Court. Thereafter, Subhash Verma and sub-contractor went inside the building. Subhash Verma asked the sub contractor to execute the electricity fitting work correctly as the electricity wires were hanging from the ceiling and then the sub contractor did not say anything. Thereafter, sub contractor alongwith the second person went away on the bullet motorcycle and the contractor Subhash Verma was at the construction site and he went to take meals. After taking meals, when he was going to attend the second work and when he was walking near the water tank, he saw a person alighting from the car of Subhash Verma. He could see that person from his back, who was wearing white shirt and he asked him to stop, but he ran away. He was holding something in his hand, but he could not see his face. He was declared hostile and cross-examined by the learned P.P. In his cross-examination, he deposed that he had went inside the under construction building and saw Subhash Verma lying injured. He shouted that the contractor has been killed. Then, he rushed towards the village and he met a fitter Swarup of IPH department and he told him that one person wearing white shirt had injured Subhash Verma contractor, who was lying inside the building. He also went to village and told Daulat Ram Sharma and other villagers about the incident. The villagers appeared on the spot. He admitted that accused Mandeep was executing electrical work of the building. He identified him in the Court. In his cross-examination by the Advocate on behalf of the accused, he admitted that Mandeep along with other person went away from the site of work at 8:30 AM. He saw only white shirt person for the second time. He came to know about the name of Raju only at the Police Station.

18. PW-15 Rajeev Sharma, told that Subhash Verma asked him to execute the electrical work in the building being constructed by him at different places. He was already over busy and then he introduced Mandeep to Contractor Subhash Verma.

19. PW-16 Dr. Sanjeev Krishan Dhiman examined the deceased on 12.5.2011 at 10:15 AM. He also conducted the post mortem examination. The MLC is Ext. PW-16/B. The post mortem examination report is Ext. PW-16/C. According to his opinion, the deceased died due to head injury (depressed fracture of skull) and injury to brain leading to neurogenic shock and death. He gave his opinion after examining the base ball bat. The depressed fracture could be possible with Ext. P-1 and the injury was sufficient in ordinary course to cause death.

20. PW-17 Bhagirath deposed that his no relative remained subscriber of phone No. 91293 64695. He never filled the form Ext. PW-17/A to become subscriber.

21. PW-18 Kanta Devi deposed that she has not filled form Ext. PW-18/A.

22. PW-20 Const. Anil Kumar has taken the case property to RFSL, Gutkar.

23. PW-21 Devender Verma, deposed that on the request of the police, he issued call details of mobile No. 98167 93665 w.e.f. 1.5.2011 to 12.5.2011 vide Ext. PW-21/A. It was computer generated.

24. PW-22 Madan Lal Sharma, has proved original computerized record of mobile No. 93187 33777 w.e.f. 2.5.2011 to 12.5.2011 vide Ext. PW-22/A.

25. PW-23 Vishal Thakur has proved computerized record of mobile No. 91293-64695 w.e.f. 11.5.2011 to 12.5.2011 vide Ext. PW-23/A.

26. PW-24 Const. Suresh Kumar deposed that at 12:05 PM, an information was received from RH Hamirpur through ASI Bhup Singh, that Subhash Verma Contractor who was brought to the hospital has died.

27. PW-25 HC Sunil Kumar deposed that the case property deposited with him was sent to RFSL Gutkar, Mandi by him.

28. PW-26 ASI Bhup Singh deposed that he moved an application for preparation of MLC vide Ext. PW-16/A.

29. PW-27 Const. Raj Kumar deposed that the motorcycle was taken into possession alongwith its key vide memo Ext. PW-27/A.

30. PW-28 HC Amar Nath deposed about the articles recovered from the possession of accused Mandeep.

31. PW-29 Yashwant Singh deposed about the articles recovered from the possession of accused Yog Raj.

32. PW-30 ASI Jai Dev deposed that Const. Anil Kumar has brought one statement of Dhani Ram Ext. PW-14/A to the PS, on the basis of which computerized FIR was registered.

33. PW-31 ASI Parveen Kumar deposed that he has collected the information in respect of mobile numbers 98167 93665, 93187 33777 and 91293 64695 from the concerned Nodal Officer of the Airtel.

34. PW-32 SI Rajinder Kumar has recorded the statement of Hari Dass, Sr. Assistant, IPH Office, Shimla.

35. PW-33 Insp. Anant Ram deposed that on 12.5.2011, M.O. R.H. Hamirpur formed PS Hamirpur that a person in an injured and unconscious condition had been brought to the hospital. He visited the spot in a private vehicle. At 12:05 PM, ASI Bhup Singh informed the PS Hamirpur that the person named Subhash Verma has died. Rapat to this effect was registered. The statement of Dhani Ram Ext. PW-14/A was recorded. FIR Ext. PW-30/A was registered. He collected blood stains from the room of Subhash Verma deceased with the help of cotton. Car was taken into possession. The post mortem of the dead body was got conducted. The photographs of the deceased were taken in the hospital. On 12.5.2011, he recorded the supplementary statement of Dhani Ram. He interrogated the accused. The accused Yog Raj made disclosure statement Ext. PW-3/C on the basis of which, baseball bat was recovered. He observed blood on the baseball bat. It was taken into possession. On 14.5.2011, accused Yog Raj made disclosure statement Ext. PW-3/E that he has concealed the keys of car and pants worn by him. These were got recovered by him. Accused Mandeep also made disclosure statement on 16.5.2011 that he could get recover the purse vide Ext. PW-6/A. The purse was got recovered at his instance. The case property was sent to RFSL, Gutkar, Mandi on 18.5.2011. He also got vehicle mechanically examined. During investigation, on 20.5.2011, an application was moved for test identification parade of Yog Raj alias Raju before JMIC, Court No. 3, Hamirpur. It was held on 25.5.2011 in Sub Jail, Hamirpur. In his cross-examination, he deposed that Dhani Ram was first person to reach on the spot. Sanjeev Kumar told him at 3:30 PM on 12.5.2011 that he was eye witness to the occurrence. He recorded the statement of Sanjeev Kumar on 12.5.2011 in his own hand writing. He also deposed that prior to conducting of test

identification parade on 25.5.2011, accused Yog Raj remained under muffled face. The identity of the accused was kept secret while taking him at various places.

36. PW-1 Sanjeev Kumar has identified accused Mandeep in the Court. According to him, one young boy came running to the spot from the side of under construction building towards the Santro Car. He identified him as Raju in test identification parade held in the Sub Jail, Hamirpur. According to him, when the accused saw him and heard Dhani Ram, they ran towards the path through the bushes. He and Dhani Ram immediately went inside the under construction building. He alongwith Dhani Ram mason saw Subhash Verma, Contractor lying in injured condition inside a room of the building. He was carrying a baseball bat in his hand. He identified baseball bat Ext. P-1. The test identification report is Ext. PA. It is duly signed by the Judicial Magistrate Ist Class, Court No. 3, Hamirpur. PW-2 Anil Kumar also deposed that at about 8:30 AM, accused Mandeep came on his bullet motorcycle. Mandeep told him that he was executing work of the building and then he also went with him on his motorcycle to the under construction house of a Govt. building at Village Gharyana. He was introduced to Contractor Subhash Verma and then he also started talking to Dhani Ram Mason. Mandeep and Contractor Subhash Verma were talking about the construction work of the building. They were saying that work of the window was not satisfactory. Thereafter, he and Mandeep came from there on the motorcycle of Mandeep. It, thus, conclusively proves the presence of accused Mandeep at 8:30 AM at the construction site. Though, he was declared hostile and cross-examined by the learned Public Prosecutor, but in his cross-examination, he admitted that when they came from the spot, they met a person on the road.

37. PW-3 Gurdev Jagota has proved disclosure statement Ext. PW-3/C made by accused Yog Raj alias Raju on 13.5.2011, on the basis of which baseball bat was recovered vide Ext. PW-3/D. He has also proved disclosure statement Ext. PW-3/E dated 14.5.2011 made by accused Yog Raj alias Raju, on the basis of which keys of vehicle and clothes were recovered. The memo of recovery Ext. PW-3/B was signed by PW-4 Tara Chand. He also identified the danda Ext. P-1, which was recovered from the spot and his signatures on danda Ext. P-1. PW-5 Ashwani Kumar has identified signatures on Ext. P-5 parcel. He identified the keys alongwith rings vide Ext. P-6, shirt Ext. P-7 and clothes Ext. P-8 and P-9, which were recovered from the house of the accused Yog Raj. The recovery of purse of deceased from the house of accused Mandeep has been proved on the basis of disclosure statement made by accused Mandeep, vide Ext. PW-6/A. PW-8 Swarup Chand has corroborated the statement of Dhani Ram that Dhani Ram was coming down from the tank road side shouting that they had to chase the killers of the Contractor.

38. PW-14 has supported the case of the prosecution, though declared hostile. He has made statement about the presence of accused Mandeep on the spot on 12.5.2011. He has identified him in the Court. He had seen the other person alighting from the Car of Subhash Verma. The person was wearing white shirt. He asked him to stop but he ran away. In his cross-examination by the learned Public Prosecutor, he deposed that he could not say that the person running downward was holding danda but volunteered that he was holding something in his hand.

39. According to the post mortem report proved on record by PW-16 Dr. Sanjeev Krishan Dhiman, the deceased died due to head injury (depressed fracture of skull) and injury to brain leading to neurogenic shock and death. According to him, injury could be caused with the baseball bat shown to him. It has come on record that the accused were in conversation before and after the incident but they had used telephones which were not in their names, as per the statement of PW-17 Bhagi Rath and PW-18 Kanta Devi. Neither PW-17 Bhagi Rath nor PW-18 Kanta Devi have filled in the subscription forms for telephone

numbers 91293 64695 and 98167 93665. The call details of mobile numbers 91293 64695 and 98167 93665 w.e.f. 1.5.2011 to 12.5.2011 have been duly proved by PW-21 Devender Verma, PW-22 Madan Lal Sharma and PW-23 Vishal Thakur.

40. The case property and viscera were sent for chemical examination at RFSL, Gutkar, Mandi. The report is Ext. PW-33/P. According to the report, human blood group "B" was found on the exhibit-1 (baseball bat), exhibit-2b (pant, Yog Raj), exhibit 3A (blood lifted from the spot), exhibit 3B (blood lifted from the spot), exhibit 4a (T shirt, Subhash Verma), exhibit 4b (vest, Subhash Verma), exhibit 4d (pant Subhash Verma) and exhibit 6 (blood sample, Subhash Verma). The report has been proved by PW-33 Insp. Anant Ram. The recovery of base ball bat and clothes of accused Yog Raj alias Raju have been proved in accordance with law by the prosecution. The blood group "B" was found on base ball bat and clothes of Yog Raj alias Raju. The blood was also found on the clothes of Subhash Verma deceased. The accused Yog Raj alias Raju has been identified by PW-1 Sanjeev Kumar in the Court as well as during the test identification parade and he has seen both the accused running from the Car. The test identification parade has been proved vide Ext. PA. The deceased died due to head injury received as per the final opinion given by PW-16 Dr. Sanjeev Krishan Dhiman. The presence of the accused has been proved on the spot by PW-1 Sanjeev Kumar, PW-2 Anil Kumar and PW-14 Dhani Ram. When Dhani Ram PW-14 was shouting and chasing the accused, he was seen doing so by PW-8 Swarup Chand. The presence of the accused on the spot coupled with the alleged recoveries made at their behest conclusively point towards their guilt. The prosecution has proved the entire chain of events, which conclusively proves the guilt of the accused persons.

41. The learned Advocates, appearing on behalf of the accused, have vehemently argued that the case is squarely based on circumstantial evidence and the prosecution has not attributed any motive. However, the fact of the matter is that accused Mandeep was engaged as sub-contractor by deceased Subhash Verma. He was not happy with the work executed by the sub contractor towards electrical fittings and paint. Deceased Subhas Verma had withheld his payment. Thus, the accused have hatched criminal conspiracy, which led to the murder of deceased Subhash Verma on 12.5.2011. The prosecution has proved the case against the accused persons beyond reasonable doubt.

42. Accordingly, there is no occasion for us to interfere with the well reasoned judgment of the learned trial Judge, who has correctly appreciated the evidence. Consequently, there is no merit in these appeals and the same are dismissed.

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

National Insurance Company Limited ...Appellant.

Versus

Smt. Anu Devi & others ...Respondents.

FAO No. 242 of 2008
Decided on: 22.05.2015

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that it was wrongly saddled with liability and the owner had committed willful breach- insurer had not led any evidence to prove that owner/insurer and driver of the offending vehicle had committed any willful breach- a batch of claim petitions was filed in Utarakhand where insurer was saddled with liability- this award was questioned before the Apex Court by filing SLP which was

dismissed- therefore, the plea of the Insurance Company that it was wrongly saddled with liability cannot be accepted. (Para-3 to 5)

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. Kulbhushan Khajuria, Advocate, for respondents No. 1 to 5.
Mr. G.D. Sharma, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this appeal is to the award, dated 31.12.2007, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba (H.P.) (for short "the Tribunal") in MAC Petition No. 56 of 2005, titled as Smt. Anu Devi and others versus Sh. Ganesh Singh Bargali, whereby compensation to the tune of Rs. 8,40,000/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants-respondents No. 1 to 5 herein and against the appellant-insurer (for short "the impugned award").

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

3. Appellant-insurer has questioned the impugned award on the grounds that the Tribunal has fallen in error in saddling it with liability as the owner-insured has committed a willful breach, thus, it was not liable to satisfy the award and the amount awarded is excessive.

4. Ms. Devyani Sharma, learned counsel for the appellant-insurer, frankly conceded that so many persons died in the same accident and a batch of claim petitions were filed in Uttrakhand and the insurer was saddled with liability, were questioned before the Apex Court by the medium of the SLPs by the insurer, came to be dismissed and the said findings recorded by the Tribunal in Uttrakhand have attained finality.

5. I deem it proper to record herein that the appellant-insurer has not led any evidence to prove that the owner-insured and the driver of the offending vehicle have committed any willful breach, which would have been a ground for the appellant-insurer to seek exoneration. Only on this count, the appeal merits to be dismissed. The Apex Court has also upheld the award whereby the insurer came to be saddled with liability, thus, the insurer has to satisfy the award in this case also.

6. The second ground of attack is the adequacy of compensation. It is worthwhile to record herein that compensation to the tune of Rs.8,40,000/- has been awarded in favour of the claimants, who are five in number, claimant No. 1 has lost her husband, which has affected her matrimonial home; claimants No. 2 & 3 are the minor sons, who have been deprived of the love and affection of their father and claimants No. 4 & 5 have lost their son, who was 35 years of age at the time of the accident. The parents have been deprived of their source of help in their old age. Thus, it cannot be said that the amount awarded is excessive in any way.

7. Viewed thus, the impugned award merits to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

8. 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.

9. The appeal is disposed of, as indicated hereinabove, alongwith all pending applications.

10. 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. 133 of 2008 a/w
a/w FAOs No. 379 of 2007
and 18, 19 & 20 of 2008
Reserved on: 15.05.2015
Decided on: 22.05.2015

1. FAO No. 133 of 2008
National Insurance Company Ltd. ...Appellant.
Versus
Smt. Kaushlaya & others ...Respondents.

2. FAO No. 379 of 2007
National Insurance Company Ltd. ...Appellant.
Versus
Smt. Lalita Devi & others ...Respondents.

3. FAO No. 18 of 2008
National Insurance Company Ltd. ...Appellant.
Versus
Sh. Madan Singh & others ...Respondents.

4. FAO No. 19 of 2008
National Insurance Company Ltd. ...Appellant.
Versus
Sh. Madan Singh & others ...Respondents.

5. FAO No. 20 of 2008
National Insurance Company Ltd. ...Appellant.
Versus
Smt. Kanta Devi & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Insurance Company contended that driver did not have a valid driving licence and the owner had committed willful breach by employing a driver having a fake licence- held, that Insurance Company has to prove that owner knew that licence was fake- mere evidence that licence was fake is not sufficient to absolve the Insurance Company of its liability- Insurance Company had failed to lead the evidence to prove that owner knew that licence was fake and it was rightly held liable. (Para-11 to 16)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505

Oriental Insurance Company Ltd. Vs. Pratibha Devi and others, ILR, 2014 (IX) HP 1, Page-705

FAO No. 133 of 2008

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. Ramesh Sharma, Advocate, for respondents No. 1 to 4.
Nemo for respondents No. 5 to 7.

FAO No. 379 of 2007

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. V.S. Chauhan, Advocate, for respondents No. 1 to 3.
Mr. Neeraj Gupta, Advocate, vice Ms. Jyotika Gupta, Advocate, for respondents No. 4 and 5.
Nemo for respondent No. 6.

FAO No. 18 of 2008

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. V.S. Chauhan, Advocate, for respondent No. 1.
Ms. Charu Gupta, Advocate, for respondent No. 3.
Nemo for other respondents.

FAO No. 19 of 2008

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. V.S. Chauhan, Advocate, for respondent No. 1.
Ms. Charu Gupta, Advocate, for respondent No. 3.
Nemo for other respondents.

FAO No. 20 of 2008

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. V.S. Chauhan, Advocate, for respondents No. 1 to 4.
Mr. Hoshiar Kaushal, Advocate, vice Mr. Karan Singh Kanwar, Advocate, for respondent No. 6.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This judgment shall govern all the five appeals because these are outcome of one motor vehicular accident.

2. The claimants in all the five claim petitions, which are subject matters of these appeals, filed separate claim petitions, four claim petitions before the Motor Accident Claims Tribunal, Fast Track Court, Shimla (for short "the Tribunal-I) and one claim petition before Motor Accident Claims Tribunal (II), Shimla (for short "the Tribunal-II") on the grounds that they became the victims of the vehicular accident, which was allegedly caused by the driver, namely Shri Sushil Kumar, while driving the offending vehicle, i.e. passenger bus, bearing registration No. HP-07-5186, rashly and negligently on 30.10.2000, near Banol, P.S. Kotkhai, caused the accident, in which five persons sustained injuries and succumbed to the injuries.

3. All the five claim petitions were resisted by the legal representatives of the owner-insured and the insurer on the grounds taken in the respective memo of objections.

4. It is apt to record herein that the driver of the offending vehicle did not choose to contest the claim petitions and was set ex-parte in all the five claim petitions.

5. Issues came to be framed in all the five claim petitions. Claimants in all the claim petitions, the insurer and the legal representatives of the owner-insured examined witnesses, details of which are given in the impugned awards.

6. After scanning the evidence, oral as well as documentary, both the Tribunals determined the claim petitions, awarded compensation vide separate awards of different dates, held that the appellant-insurer is liable to satisfy the awards and saddled it with liability (for short "the impugned awards") .

7. The claimants and the owner-insured have not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

8. Appellant-insurer has questioned the impugned awards by the medium of these appeals on the following grounds:

(i) that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time and was possessing a fake licence;

(ii) that the owner-insured has committed willful breach by employing a driver, who was having a fake licence; and

(iii) that the amount awarded is excessive.

9. The owner-insured died during the pendency of the claim petitions and his legal representatives have been brought on record, who have contested the claim petitions and led evidence in support of their case.

10. The legal representatives of the owner-insured have led evidence and have specifically stated that the owner-insured had taken all precautions at the time of employing the driver of the offending vehicle. He had also perused his driving licence. The evidence led by the legal representatives of the owner-insured has remained unrebutted.

11. It was for the appellant-insurer to prove that the owner-insured of the offending vehicle was in the know of the fact that the driving licence of the driver was fake one and he has committed a willful breach. The appellant-insurer has led evidence to the effect that the driving licence of the driver of the offending vehicle was fake one, but has not led any evidence to prove that the owner-insured has committed any willful breach. Thus, the appellant-insurer has failed to discharge the onus.

12. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531,** held that the insurer has not only to prove that the driver of the offending vehicle was not having a valid driving licence, but has to prove that the owner-insured has committed a willful breach.

13. 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."

14. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** held that the owner-insured is not supposed to go beyond verification to the effect that the driver was having a valid driving licence and the competence of the driver. It is profitable to reproduce para 10 of the judgment herein:

"9. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go

beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."

15. The same principle has been laid down by this Court in a series of cases including **FAO No. 427 of 2006,** titled as **Parveen & another versus Chetan Sood & others,** decided on 21.03.2014 and **FAO No. 166 of 2007,** titled as **Oriental Insurance Company Ltd. versus Smt. Pratibha Devi and others,** decided on 10.10.2014.

16. Applying the test to the instant case, I am of the considered view that the appellant-insurer has failed to discharge the onus and both the Tribunals have not fallen in an error in saddling it with liability.

17. It appears that the Tribunal-I has awarded interest @ 9% per annum from the date of the claim petitions till its realization in four claim petitions, i.e. M.A.C.s No. 72-S/2 of 2005/2001, 65-S/2 of 2005/2000, 61-S/2 of 2005/2000 and 9-S/2 of 2005/2000 (subject matters of FAOs No. 133, 18, 19 and 20 of 2008, respectively) and Tribunal -II has awarded interest @ 7.5% per annum from the date of the claim petition till its realization in M.A.C. Petition No. 13-S/2 of 2001 (subject matter of FAO No. 379 of 2007).

18. Keeping in view the facts of the case read with the mandate of Section 171 of the Motor Vehicles Act, 1988 (for short "the MV Act"), I deem it proper to modify the rate of interest awarded in the four claim petitions, which are subject matters of FAOs No. 133, 18, 19 & 20 of 2008, and hold that the claimants in all the five claim petitions are entitled to interest @ 7.5 per annum from the date of the respective claim petitions till its realization.

19. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned awards after proper identification. Excess amount, if any deposited by the appellant-insurer, be released in its favour through payee's account cheque.

20. Having said so, all the appeals are disposed of and the impugned awards in M.A.C.s No. 72-S/2 of 2005/2001, 65-S/2 of 2005/2000, 61-S/2 of 2005/2000 and 9-S/2 of 2005/2000 (subject matters of FAOs No. 133, 18, 19 and 20 of 2008, respectively) are modified, as indicated hereinabove.

21. 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 Limited ...Appellant
Versus
Arvind Pal and others ...Respondents.

FAO No.275 of 2007.
Reserved on: 15.05.2015.
Pronounced on: 22.05.2015.

Motor Vehicle Act, 1988- Section 167- Labrourers/employees have a remedy to obtain compensation under Workmen Compensation Act, 1923- if a claim made under Workmen Compensation Act, the claimant will get compensation as per scheduled attached to the Act, however, claimants can seek higher compensation under Motor Vehicle Act- insurer pleaded that it is liable to pay compensation as per its liability- held, that insurance policy does not restrict the liability of the insurer- claimants are entitled to the compensation under law and the Insurance Company was rightly held liable to pay compensation to the claimants.

(Para-8 to 13)

For the Appellant: Mr.Ashwani K. Sharma, Advocate.
For the Respondents: Mr.Ramakant Sharma, Advocate, for respondents No.1 to 4.
Nemo for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

The question involved in this appeal is – Whether the Motor Accident Claims Tribunal has rightly asked the insurer to satisfy the award.

2. In order to settle the issue (supra), a brief reference may be made to the facts of the case, the womb of which has given birth to the present appeal.

3. It is averred that the offending truck bearing No.PAT-6462, which was being driven by the deceased Surjit Singh, rolled down the road on 3.9.2003 near village Khangral, Police Station, Kargil, Jammu and Kashmir, as a result of which the said Surjit Singh died on the spot. The Claimants (respondents No.1 to 4 herein), being the dependants/legal representatives of the deceased Surjit Singh, have invoked the jurisdiction of the Motor Accident Claims Tribunal, Fast Track Court, Kangra at Dharmshala, (hereinafter referred to as the Tribunal), by the medium of Claim Petition No.100-N/II/05/04, titled Arvind Pal and others vs. Darshna Kumari and others, for grant of compensation to the tune of Rs.50.00 lacs, as per the break-ups given in the Claim Petition.

4. The owner/insured and the insurer resisted the Claim Petition by filing separate replies.

5. On the pleadings of the parties and the documents available on record, the following issues were framed by the Tribunal:

"1. Whether the deceased Surjeet Singh died during use of the vehicle and the petitioners being his dependants are entitled for compensation, if so, the amount thereof and from whom? OPP

2. Whether the petition is not maintainable in the present form, as alleged? OPR-2

3. Whether the vehicle was not insured with the respondent No.2 if so its effect? OPR.

4. Whether the State of J&K is responsible for the improper and bad shape of the roads and there was cause of accident, if so, its effect thereof? OPR

5. Whether the vehicle was being plied in violation of the terms of the insurance Policy at the time of accident, if so, its effect? OPR

6. Whether the deceased Surjeet Singh was not having valid and effective driving licence? OPR

7. Relief."

6. The Claimant Arvind Pal stepped into the wittiness box as PW-1, while the owner and the insurer have not led any evidence.

7. The Tribunal after scanning the evidence held the claimants entitled for compensation to the tune of Rs.6,10,000/- with interest at the rate of 9.5% per annum from the date of filing of the petition till final realization, vide award dated 30th April, 2007, subject matter of the present appeal, (hereinafter referred to as the impugned award).

8. The concept of granting compensation is the outcome of law of torts. Before the enactment of the provisions of the Motor Vehicles Act, (for short, "M.V. Act), for grant of compensation, the claimants/victims were seeking compensation by invoking jurisdiction of Civil Courts in terms of law of torts. In order to provide compensation to the victims and to reach them as early as possible, the M.V. Act was made, which provides remedy to the claimants to seek compensation in terms of Chapters X, XI and XII, contained in the M.V. Act. The aim and object of the said legislation is to provide compensation as early as possible so that the victims of a vehicular accident may not fall prey to social evils.

9. The Government has also provided remedy to the labourers/employees for obtaining compensation in terms of the mandate of Workmen's Compensation Act,1923, (for short, the Act).

10. Section 167 of the M.V. Act provides an option to the victims of a vehicular accident to seek compensation either by invoking the remedy in terms of the Act or in terms of the M.V. Act. The only difference is that if a claim is made in terms of the Act, the claimants will get the compensation as per the Schedule attached with it. However, in order to seek higher compensation, the claimants can exercise option under Section 167 of the M.V. Act.

11. This Court in **FAO No.183 of 2006, titled New India Assurance Company Limited vs. Chanchal Devi and others, decided on 14th March, 2014**, and **FAO No.530 of 2009, titled Oriental Insurance Company Ltd. vs. Smt.Kamlo & others, decided on 25th July, 2014**, has laid down the same principle.

12. The claimants in the instant case, perhaps after obtaining legal advice, have invoked the jurisdiction provided under the M. V. Act, and thus, have exercised the *doctrine of election* by resorting to the remedy available under Section 167 read with Section 166 of the M. V. Act. The Tribunal after examining the insurance policy and the mandate of the provisions, contained in Chapters X, XI and XII, of the M. V. Act, granted the compensation.

13. According to the learned counsel for the insurer, the compensation granted by the Tribunal is on the higher side and the insurer was liable to pay compensation only to the extent of its liability. The arguments, though attractive, are devoid of any force for the reason that the insurance policy nowhere restricts the liability of the insurer. The claimants, being the third parties, are the sufferers and have rightly invoked the jurisdiction

of the Tribunal for grant of compensation and despite the fact that a meager amount of compensation has been awarded, the claimants are not able to reap the fruits of the litigation and have virtually been deprived of the benefit of social legislation, which speaks volume as to how the Insurance Companies are dragging the poor victims from pillar to post and post to pillar.

14. Having said so, I am of the considered view that the Tribunal has not fallen in error in saddling the insurer with the liability.

15. In view of the above discussion, the appeal merits to be dismissed and the same is dismissed accordingly. Consequently, the impugned award is upheld.

16. The Registry is directed to release the award amount in favour of the claimants through payees' account cheque, strictly in terms of the impugned award.

****

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

Oriental Insurance Company Ltd. .....Appellant.

Versus

Sh.Krishan Dev and others ...Respondents

FAO (MVA) No. 476 of 2007.
Judgment reserved on 15th May,2015
Date of decision: 22nd May, 2015.

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not have a valid driving licence as he possessed a learner licence- owner had committed willful breach of terms and conditions of the policy- held, that a person having a learner licence is competent to drive the motor vehicle for which he was given the licence - therefore, Insurance Company was rightly held liable. (Para- 11 to 17)

Cases referred:

Anuj Sirkek Vs. Neelma Devi and Ors., I L R 2014 Vol. XLIV (VI), HP 1 Page, 1242

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181

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

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

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

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. Tara Singh Chauhan, Advocate, for respondent No.1.
Mr. Vivek Singh Thakur, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to the judgment and award dated 18.7.2007, made by the Motor Accident Claims Tribunal, Bilaspur, H.P. in MAC No. 112 of 2004 titled *Krishan Dev versus Rattan Chand and others,* whereby compensation to the tune of Rs.9,23,861/- with 7.5% interest was awarded in favour of the claimant and insurer/appellant 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 claimant, owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on three counts, i.e., (i) that the driver was having learner's license, thus was not having a valid and effective driving license to drive the offending vehicle, (ii) the owner has committed willful breach in terms of the mandate of the insurance contract read with Sections 146, 147 and 149 of the Motor Vehicles Act, for short "the Act, and (iii), the compensation awarded is excessive.

4. Thus, the questions to be determined in this appeal are whether the Tribunal has rightly saddled the insurer with the liability and whether the insurer can question the award on the ground of adequacy of compensation.

5. In order to determine these issues, the brief facts of the case, the womb of which has given birth to the present appeal, are to be noticed.

6. The claimant being the victim of a vehicular accident had filed claim petition before the Tribunal for the grant of compensation to the tune of Rs. 20 lacs as per the break-ups given in the claim petition on the ground that on 25.2.2004 he was on his way to his house on the scooter and that at about 8.15 a.m., when he reached near Kanchimor towards Kiratpur, the Jeep bearing registration No. HP-12-2970, which was being driven by Shri Sat Pal respondent No. 3 herein in a rash and negligent manner, who was overtaking another vehicle, came from front side and struck against his scooter due to which he suffered major injuries on his body, his both legs were crushed badly. He was firstly treated at Anandpur Sahib and thereafter referred to Chima Medical hospital, Mohali where he remained admitted from 26.2.2004 to 27.3.2004. It is further averred that when the accident took place, claimant was 43 years of age and his monthly income was Rs.20,000/- per month. He is stated to have spent Rs.3 lacs on his treatment and is still undergoing treatment.

7. The claim petition was resisted and contested by the respondents and following issues came to be framed by the Tribunal.

(i) Whether the accident has taken place due to the rash and negligent driving of Shri Sat Pal, driver of Jeep No. HP-12-2970, as alleged? OPP

(ii) If issue No. 1 is supra is proved, to what amount of compensation the petitioner is entitled to and from which of the respondents? OPP.

(iii) Whether the driver of Jeep No. HP-12-2970 did not have valid and effective driving license at the time of accident, if so, its effect? OPR-3.

(iv) Whether the petition is bad for non-joinder of necessary party? OPR.

(v) Relief.

8. The claimant, including himself as PW1, examined as many as seven witnesses, namely Manoj Kumar (PW(2) Shashi Pal (PW3), Dr. Amarjeet Singh (PW4), Murari Dass (PW5), Jagat Ram, (PW6) and Manoj Kumar (PW7) and respondent examined only one witness, namely, Mohinder Singh.

9. The Tribunal, after scanning evidence, awarded the compensation to the tune of Rs.9,23,861/- in favour of the claimant and saddled the insurer with the liability, as stated supra.

10. Admittedly, the driver was having learner's license and was competent to drive the offending vehicle.

11. Section 2 (19) of the Act defines learner's license. It provides that a person who is holding a learner's license is authorized to drive a light motor vehicle or a motor vehicle of any specified class or description. It is apt to reproduce Section 2 (19) of the Act herein:

> *"2(19) "learner's licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive as a learner, a motor vehicle or a motor vehicle of any specified class or description;"*

12. While going through the said definition, one comes to an escapable conclusion that a person who is having a learner's license is competent to drive the motor vehicle or a motor vehicle of any specified class or description, for which he has been given the license.

13. A bare perusal of the driving license Ext. R3 does disclose that the license was valid and effective at the time of accident and the driver was competent to drive the Jeep, i.e., the offending vehicle. It is not the case, either of the claimant or of the insurer, that the driver was not having a learner's license. Reference in this regard is made to the judgment delivered by this Court in case titled ***Anuj Sirkek versus Neelma Devi and others (FAO No. 57 of 2014)*** decided on 19.12.2014.

14. It is profitable here to reproduce Section 10 of the Act, which reads as under:

> *"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;
(b) motor cycle with gear;
(c) invalid carriage;
(d) light motor vehicle;
(e) transport vehicle;
(i) road-roller;
(j) motor vehicle of a specified description."

15. The mandate of Section 10 of the Act is that every learner is competent to drive the vehicle description of which is contained in the driving license Ext. R3 mention of which is made hereinabove.

16. Whether a person, who is holding a learner's license, is competent to drive light motor vehicle came up for consideration in case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** and it was held that a person having learner's license is deemed to have been holding a valid and effective driving license. It apt to reproduce paras 88, 89 and 90 of the said judgment herein:

"88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149(2) of the said Act.

89. The provisions contained in the said Act provide also for grant of driving licence which is otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation of

statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

90. Mandar Madhav Tambe's case (supra), whereupon the learned counsel placed reliance, has no application to the fact of the matter. There existed an exclusion clause in the insurance policy wherein it was made clear that the Insurance Company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". The question as to whether such a clause would be valid or not did not arise for consideration before the Bench in the said case. The said decision was rendered in the peculiar fact situation obtaining therein. Therein it was stated that "a driving licence" as defined in the Act is different from a learner's licence issued under Rule 16 of the Vehicles Rules, 1939 having regard to the factual matrix involved therein.

17. Thus, the Tribunal has rightly held that the driver was having a valid and effective driving license.

18. The offending vehicle being Jeep, the gross weight of which does not exceed 7,500 kilograms, falls within the definition of "light motor vehicle" as contained in Section 2 (21) of the Act. It is apt to reproduce Section 2 (21) of the Act herein.

"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."

19. This issue came up for consideration before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

"10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.

11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have

been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.

12-13 …. ….. …..

14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."

20. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs**. *Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

"10.I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. ……..

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

"(21)light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

11. 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.

12-13. …… …… …..

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15.My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15- …. ….. …..

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

17. ….. ……. …….. …….

18. 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'."

*19. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

21. Applying the ratio, the vehicle in question falls within the definition of "Light Motor Vehicle" while keeping in view the "unladen weight", "gross weight" and type of vehicle, given in the Registration Certificate and other documents.

22. Same principles of law have been laid down by this Court in FAOs No. 385 of 2007 & 388 of 2007 decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014 and FAO No. 293 of 2006 decided on 4.4.2014.

23. In order to seek exoneration, it was for the insurer to plead and prove that the owner has committed willful breach, in terms of the mandate of Sections 147 and 149 of the Act read with the Insurance Policy, which the insurer has failed to do, thus, cannot seek exoneration. It is apt to reproduce relevant portion of para 105 of the judgment delivered in ***Swaran Singh's*** case referred to supra, 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."*

24. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court 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."*

25. 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."

26. Having said so, the Tribunal has rightly recorded the findings and saddled the insurer with the liability.

27. The word *"just compensation"* has been used in Section 168 of the Act. In order to award just compensation, the Tribunal has to weigh all the aspects, in order to come to the conclusion what is the just compensation.

28. 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)."

29. 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**.

30. 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.*

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 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."

33. The same principles of law have been laid by this Court in case titled ***Jagdish versus Rahul Bus Service and others*** **(FAO No. 524 of 2007)** decided on 15.5.2015.

34. Applying the test in the present case, I am of the considered view that the Tribunal has rightly awarded the compensation to the tune of Rs.9,23,861 alongwith 7.5% interest in favour of the claimant, cannot be said to be excessive, in any way, rather the compensation awarded is meager.

35. As a corollary, the appeal merits dismissal and is accordingly dismissed and the impugned award is upheld. Send down the record, forthwith, after placing a copy of this judgment.

36. 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.

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

Pawan Kumar ...Appellant

Versus

Sh. Prabahu Lal & others ...Respondents

FAO No. 217 of 2008
Date of decision: 22.05.2015

Motor Vehicle Act, 1988- Section 157- Registered owner pleaded that he had sold the vehicle to 'S' prior to the accident- reliance was placed upon the affidavit and an application made by 'S' – held, that evidence on record did not prove that registered owner had sold the vehicle to 'S'- further, owner had not questioned the award, in which liability was fastened upon him- appeal dismissed. (Para-11 to 13)

For the appellant : Mr. B. C. Verma, Advocate.

For the respondents: Mr. O.P. Negi, Advocate vice Mr. Narender Sharma, Advocate, for respondents No. 1 to 3.

Mr. Dibender Ghosh, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of this appeal, the appellant-owner has questioned the award, dated 1st March, 2008 passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur (hereinafter referred to as "the Tribunal") in MAC Petition No. 36 of 2004, whereby compensation to the tune of Rs.3,05,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-respondents No. 1 to 3 herein and against the owner, appellant herein, (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The short controversy involved in this appeal is whether the Tribunal has rightly directed the owner-appellant to satisfy the impugned award.

Brief Facts:

3. The claimants, being victims of the motor vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.15,00,000/-, as per the break-ups given in the claim petition, on the ground that driver, namely, Sunni Lal, had driven vehicle-Commander Jeep bearing registration No. HP-06-1643, rashly and negligently, on 02.12.2002, at about 9.30 a.m., near Bahli about 11 kilometer towards Teklach, caused the accident, in which one Birbal sustained injuries and succumbed to the injuries on the spot.

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

5. The only question to be determined in this appeal is-whether the Tribunal has rightly saddled the registered owner with liability.

6. The registered owner has questioned the impugned award that he has sold the vehicle to Shishila Devi, respondent No. 3 in the claim petition.

7. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

8. Following issues came to be framed by the Tribunal:

> "1. Whether Sh. Birbal had died on account of rash and negligent driving of driver of vehicle No. HP-06-1643? ...OPP
>
> 2. If issue No. 1 is proved, to what amount of compensation and from whom are the petitioners entitled to? ..OPP
>
> 3. Relief."

9. The parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that registered owner Pawan Kumar has failed to prove that the offending vehicle was sold to Shishila Devi or the offending vehicle was registered in the name of said Shishila Devi.

11. The learned Counsel for the appellant was asked whether there was any agreement or power of attorney indicating that the offending vehicle was sold to Shishila Devi or it was registered in her name?

12. The learned Counsel for the appellant stated that as per affidavit Ext. RW-4/A, the offending vehicle was sold by Pawan Kumar to Shishila Devi and said Shishila Devi has made an application Ext. RW-2/A before the Deputy Commissioner for grant of aid.

13. The Tribunal has discussed the said issue in para-9 of the impugned award. I have gone through the impugned award and the entire record and am of the considered view that the registered owner has failed to discharge the onus. Accordingly, findings returned by the Tribunal on the said issue are upheld.

14. At this stage, learned Counsel for respondent No. 4, produced a copy of award dated 7th May, 2005 passed in MAC Case No. 68 of 2005, titled as **Akalzin & others versus Sh. Pawan Kumar & another,** which was outcome of the same accident, whereby compensation to the tune of Rs.2,55,000/- was awarded in favour of the claimants and owner Pawan Kumar was fastened with liability. The said award stands satisfied and has not been questioned, has attained finality.

15. Having said so, no case is made out for interference. Accordingly, the impugned award is upheld and the appeal is dismissed.

16. 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.

17. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

Ramesh Kumar. ...Petitioner.

Versus

Rajesh Kumar and others. ...Respondents.

CWP No. 6506/2014
Reserved on: 12.5.2015
Decided on: 22.5.2015

H.P. Panchayati Raj Act, 1994- Section 113- Election of the petitioner was assailed on the ground that he had not obtained no objection certificate from the office of BDO- his election was set aside- petitioner claimed that the election petition was barred by limitation- this plea was rejected on the ground that same was taken only at the time of argument- provision of limitation is mandatory and there is no provision to condone the delay- Court cannot proceed with the matter if the same is barred by limitation- hardship and injustice are no grounds for extending the period of limitation, therefore, the orders passed by the Court below set aside. (Para-6 to 18)

Cases referred:

Pyda Subbaramayya Chetty vs. The Premier Bank of India Limited, Branch Nellore and others, AIR 1959 Andhra Pradesh 96

Sheikh Makbul v. Union of India and another, AIR 1960 Orissa 146

Manindra Land and Building Corporation Limited vs Bhutnath Banerjee and others, AIR 1964 SC 1336

Syed Jalaluddin Hasan Quadri v. M/s. Tarapharmacy, AIR 1966 A.P. 136
Nagappa Gulappa Amminabhavi vs. Fakirappa Bhimappa Hanchinal and others, AIR 1970 Mysore 73
Ajab Enterprises vs. Jayant Vegoiles and Chemicals Pvt. Ltd., AIR 1991 Bombay 35
M/s Craft Centre and others vs. The Koncherry Coir Factories, Cherthala, AIR 1991 Kerala 83
Binod Bihari Singh vs. Union of India, (1993) 1 SCC 572
V.M. Salgaocar and Bros. vs. Board of trustees of Port of Mormugao, (2005) 4 SCC 613
Damodaran Pillai and others vs. South Indian Bank Limited, (2005) 7 SCC 300

For the Petitioner: Mr. Gaurav Gautam, Advocate.
For the Respondents: Mr. Sandeep Sharma, Advocate vice Mr. Ashwani Pathak, Advocate for Respondent No.1.
None for respondent No.2.
Mr. Shrawan Dogra, A.G. with Mr. Romesh Verma, Mr. Anup Rattan, Addl. A.Gs and Mr. J.K. Verma, Dy. A.G. for respondents No.3 to 5.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

Elections for the post of Pradhan, Gram Panchayat, Kawari were held on 30.12.2010. Petitioner was declared elected. The election of the petitioner was assailed by respondent No.1 by way of Election Petition under section 113 of the H.P. Panchayati Raj Act (hereinafter referred to as the "Act" for brevity sake) on the ground that the petitioner has not obtained "no objection certificate" from the office of Block Development Officer, Nagrota Bagwan at the time of contesting the election of Pradhan, Gram Panchayat, Kawari. The Election Petition was instituted on 7.2.2011. The reply was filed by the petitioner to the Election Petition vide Annexure P-2. According to the averments made in the reply, petition was not maintainable in the present form and respondent No.1 had no *locus standi* to file the petition.

2. The Sub Divisional Officer (Civil), Kangra allowed the Election Petition No. 2 of 2011 on 30.9.2013. Petitioner feeling aggrieved, assailed order dated 30.9.2013 before the Deputy Commissioner, Kangra at Dharamshala by way of case No. 7/2013. He dismissed the same on 11.4.2014. Hence, the present petition.

3. Mr. Gaurav Gautam, learned counsel for the petitioner, has vehemently argued that, Election Petition preferred by respondent No.1 assailing his client's election to the post of Pradhan, Gram Panchayat, Kawari was barred by limitation. He has also contended that the inquiry against his client has not been completed and thus the findings given by the Sub Divisional Officer (Civil), Kangra as well as the Deputy Commissioner, Kangra at Dharamshala are contrary to record.

4. Mr. Sandeep Sharma, learned vice counsel for respondent No.1, has supported the orders passed by the Sub Divisional Officer (Civil), Kangra and the Deputy Commissioner, Kangra at Dharamshala.

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

6. Elections for the post of Pradhan, Gram Panchayat, Kawari were held on 30.12.2010. Since no date of publication of result has been brought to the notice of the Court, we presume it from the date of declaration of result, i.e. 30.12.2010. We make it clear by way of abundant precaution that in case the date of publication of result was mentioned by either of the parties, the limitation would have run from that date. Section 165 of the Act lays down that if the election petition is not furnished in the prescribed manner, or the petition is not presented within the period specified in section 163 the authorized officer shall dismiss the petition. No provision has been brought to the notice of the Court whereby the delay could be condoned by the authorized officer. The language of section 165 of the Act is mandatory and imperative since the expression "***shall***" has been used therein. Petitioner has taken a specific ground that the election petition was barred by limitation. It was also argued before the Sub Divisional Officer (Civil), Kangra. Plea raised by the petitioner has been rejected merely on the pretext that the question regarding limitation was raised only at the time of arguments before the Sub Divisional Officer (Civil). The reason given by the Sub Divisional Officer (Civil) was perverse. He had to ensure that the election petition was filed within the period of limitation. Petitioner has taken the ground of limitation also in his appeal while assailing order dated 30.9.2013. The appellate authority has noticed that the election petition was filed beyond the period of limitation, but despite that has not gone into this question elaborately. The election petition was not maintainable as the same has been filed beyond the period of limitation. The result was declared on 30.12.2010. The election petition was filed on 7.2.2011 beyond the period of limitation. The election petition, according to order dated 30.9.2013, was filed on 7.2.2011, but according to the observation of the Sub Divisional Officer in his order, it was filed on 16.2.2011. There is no power vested with the Sub Divisional Officer (Civil) to condone the delay under the H.P. Panchayati Raj Act. The Deputy Commissioner was required to look into the provisions of Section 163 read in conjunction with Section 165 of the Act while hearing the appeal preferred against the order dated 30.9.2013. Petitioner had also moved an application for placing on record copy of letter of Ombudsman (MGNREGA) dated 18.6.2013 and copy of letter of Executive Engineer (RDD) dated 27.6.2013. According to these documents, the inquiry was pending and the re-assessment was being carried. Thus, the matter was under inquiry and despite that the election of the petitioner has been set aside. These documents have bearings on the case and should have been taken into consideration by the Deputy Commissioner while hearing the appeal. The appeal has been decided by the Deputy Commissioner in a very slipshod manner without taking into consideration the grounds of appeal. The Deputy Commissioner after the order dated 11.4.2014 has issued order dated 25.8.2014 Annexure P-11 and in sequel thereto, the Block Development Officer has issued order dated 27.10.2014 whereby the office of Pradhan was declared vacant.

7. The Sub Divisional Officer (Civil) Kangra and the Deputy Commissioner Kangra at Dharamshala were required to take into consideration whether the election petition was filed within limitation instead of rejecting the plea of the petitioner without due application of mind. We have already noticed that the petitioner has taken the plea in the election petition that it was not maintainable. Moreover, once the plea has been raised before the Sub Divisional Officer (Civil) Kangra, the Deputy Commissioner was also required to consider the same as per settled law. Both the authorities below have erred in law by hearing the election petition filed beyond the period of limitation only on the ground that arguable points were involved in the election petition. The Sub Divisional Officer (Civil) has no jurisdiction to condone the delay.

8. Division Bench of Andhra Pradesh High Court in ***Pyda Subbaramayya Chetty*** vs. ***The Premier Bank of India Limited, Branch Nellore and others***, AIR 1959

Andhra Pradesh 96, has held that although it is true that the court must dismiss a suit as barred by limitation if the facts disclose that it is even when the defendant has not raised such a plea, the court must make sure that it is so barred on the facts established on the evidence. Division Bench has held as under:

> "[7] We, therefore, propose to proceed upon the footing that the appellant was aware of the nature and terms of the contract between the creditor and the principal debtor which he understood to guarantee. We must ascertain first the nature of the contract between the 1st defendant and the plaintiff and then the situation in which the liability under the suit promissory note would arise.
>
> It is needless to point out that the promissory note though fully supported by consideration would remain unenforceable so long as the instalments payable by the 1st defendant in respect of the chit-fund were being regularly paid. It is only on default of payment of one or more of such instalments that the contract of guarantee of which Ex. A-l is the material embodiment, would at all become enforceable. Now, the relevant rule in Ex. B-1 which is a copy of the printed rules relating to the chit-fund, is in these terms:
>
> "If default in the due payment of subscription for any one installment be made by a subscriber who has received his prize, the Bank will, immediately on the happening of such default, become entitled to recover from him the arrears together with the full amount of subscriptions due for all future installments in one lump sum with, interest, on the aggregate sum at one per cent per mensem from the date of default without any claim for any deduction on account of discount."
>
> The argument has mainly therefore centred round this clause and canvassed at considerable length its legal effect. On behalf of the appellant it was contended that the case fell within the scope of Article 75 of the Limitation Act, and that unless the Bank could be said to have waived the benefit of the provision, the first default which was really on 10-5-1947, constituted the terminus a quo. It is pointed out that there was no proof, not even a plea of waiver in the present case.
>
> So it is argued that if time began to run against the plaintiff, as well as the sureties from 10-5-11947, the suit filed on 30-10-1950 was clearly barred. On this submission it becomes material to determine when the first default took place. If it took place on 10-5-1947, and the liability of the sureties too arose, eo instanti, the suit on the promissory note would be obviously out of time. If on the other band, the first default was on 10-12-1947 as the plaint stated it would be within time because the liability of the sureties could not spring into being before the principal debtor's own liability arose.
>
> But as we have already indicated the case in the plaint cannot be held to have been established. In the first place, there was not a sum of Rs. 1,400/-available in the savings Bank account of the 1st defendant, for being credited to the chit-fund account. Secondly it is not established that the adjustment was made with the consent of the 1st defendant because though P. W. 1 stated at one stage of his evidence, that he (the 1st defendant) authorised the adjustment, he later admitted that the Bank did not obtain any such authorisation. Now tile sum of Rs. 1,200/- available with the Bank

could only meet six instalments, and then the default would be on 10-11-1947.

It is true that in the latter case the suit would still be in time. But then, we would be proceeding on a basis different from that on which the plaint proceeded in order to claim exemption from the bar of limitation. It may however be noted that though the written statement raised a plea of limitation, there are no averments of fact in support! of such a plea. Therefore although it is true that we must dismiss a suit as barred by limitation --if the facts disclose that it is -- even when the defendant has not raised such a plea, we must make sure that it is so barred on the facts established on the evidence.

Now even if the plaint case of payment of seven instalments from 10-5-1947 to 10-11-1947 is not accepted and even if the first default should be held to have occurred on 10-5-1947, the question would still remain whether the promissory note became automatically enforceable against the promisors immediately on the date of the first default i.e., on 10-5-1947.

It is argued for the respondent that the promissory note became enforceable not on the date of the first or any other default made by the principal debtor hut when notice of such default was given to the sureties and they were intimated that their liability under the promissory note would be enforced."

9. Learned Single Judge of Orissa High Court in ***Sheikh Makbul*** v. ***Union of India and another***, AIR 1960 Orissa 146 has held that where issue such as jurisdiction and limitation, as question of pure law, are involved, the right to raise an issue cannot be treated as having been waived. Objections regarding limitation cannot be waived and even if they are waived they can be taken up again by the parties waiving them or by the courts themselves. Learned Single Judge has held as under:

"[7] Lastly, there is a point of limitation which the defendants raised in the written statement but did not press it as an issue before the learned Munsif. The learned Subordinate Judge in appeal however found that the suit was barred by limitation. Mr. H. Sen, learned counsel for the plaintiff, contended that the defendants not having pressed the issue as to limitation before the learned Munsif, it was not open to the lower appellate Court to have gone into the question and given his decision thereon. In support of his contention the learned counsel cited several decisions. In U. Kotayya v. N. Sreeramulu AIR 1928 Mad 900, it was held that a pleader's general powers in the conduct of an appeal include, in ordinary cases, the abandonment of an issue which in his discretion he thinks inadvisable to press and therefore an issue of fact abandoned by him in the lower appellate Court cannot be challenged in second appeal.

The context in which the Madras High Court gave the above finding was in connection with an issue of pure fact, namely, whether the plaintiff is entitled to the property. The Vakil had not argued before the lower appellate Court the question covered by the said issue stating that a finding in his favour on the other issue would be quite enough for his client. In Venkata Narsimha Naidu v. Bhasyakarlu Naidu ILR 25 Mad 367 (PC) on the facts that in a partition suit between brothers, relating to a zamindary at the hearing, after the other issues had been settled, the defendant asked to be allowed to raise an issue as to limitation on the ground that he had been in possession

adversely to the plaintiff for more than 12 years but the Judge refused to allow the issue to be raised, it was held that no question of limitation necessarily arose on the pleadings and it was not obligatory on the Judge to direct an issue on that point.

Furthermore in the context that one of the issues as to whether the zamindari was impartible or not, was abandoned by the Vakils for the defendant; it was held that the Vakil's powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press. All these cases cited above, related to questions of either pure fact or question of law dependent on finding of fact, which, -- on materials available before the court without further evidence, --could not be given for deciding the issue. Where however issues such as jurisdiction and limitation,--as questions of pure law, -- are involved, I do not think that the right to raise an issue can be treated to have been waived.

Objections regarding limitation cannot be waived and even if they are waived they can be taken up again by the parties waiving them or by the Courts themselves : Kunclo Mal v. Daulat Ram Vidya Parkash Firm, AIR 1940 Lah 75. The Patna High Court in Pallakdhari Thakur v. Bankey Thakur AIR 1925 Pat 549, where the question as to limitation was raised in the written statement and an issue was framed but it was not pressed in the trial court, held that the defendants respondents were entitled to press that point on appeal. It is thus open to the parties to raise it at subsequent stage. That apart, when such issue cuts at the very root of a litigation and if the court's attention is drawn to it, it must take cognizance of the same and give its decision thereon. Mr. H. Sen however contended that the issue of limitation in the present case being a mixed question of law and fact, the defendants should not be allowed to raise it at a late stage as alleged.

The learned counsel relied on a decision of the Calcutta High Court in Bejoy Kumar Bhattacharjee v. (Firm) Satish Chandra Nandi, AIR 1936 Cal 382, where it was held that no doubt the plea of limitation can be urged at any stage having regard to Section 3 of the Limitation Act but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence, it is difficult for the Court sitting in appeal to give effect to the defence contention and the court is justified in rejecting it. In Secretary of State v. Ananda Mohan 34 Cal LT 205: (AIR 1921 Cal 661) which was also relied on by the plaintiff, it was held that the general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon a question of fact; points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on evidence; if limitation is urged as bar, the facts on which it is barred must be proved after an issue has been framed.

In both the two particular Calcutta cases cited above, limitation was a mixed question of law and fact where it was necessary for the party to produce evidence. But that is not the case here. In the present case, on the materials as available, this court is in a position to give a finding on limitation. It is not necessary for the party to produce fresh materials as in the Calcutta cases cited above. The present case is clearly governed by Article 30 or Article 31 of the Limitation Act. Article 30 provides a period of one year limitation from the time when the alleged loss or injury occurred.

> Article 31 provides for the same period one year limitation from the time when the goods ought to be delivered. In the present case, the goods were delivered on July 19, 1953, alleged to be in rotten condition as aforesaid. The suit was filed not until September 29 1954. In either view whether it was under Article 30 or 31, the suit is clearly barred by limitation. Section 3 of the Limitation Act is imperative. It provides that every suit filed after the period of limitation shall be dismissed although limitation has not been set up as a defence. The point of limitation was taken as a ground as ground No. 9 before the lower appellate Court. The plaint itself shows that on the date of the institution of the suit the claim was barred by limitation. Paragraph 4 of the plaint states that potatoes were found damaged on opening of the baskets. Admittedly the delivery was taken on July 19, 1953 when the potatoes were found damaged. Therefore, one year period of limitation expired on July 19, 1954. Accordingly the suit having been filed on September 29, 1954 it was clearly out of time. Furthermore, the damage certificate Ext. C dated July 19, 1953 also supports the point of limitation raised on behalf of the defendants. The materials available to the Court are sufficient for giving a decision on the point of limitation. It is not necessary for the party to produce any further evidence on the point. I do not, therefore, accept the contention of the learned Counsel For the plaintiff on this point to be tenable in law. I uphold the finding of the lower appellate Court that the suit was barred by limitation."

10. Their Lordships of the Hon'ble Supreme Court in ***Manindra Land and Building Corporation Limited*** vs ***Bhutnath Banerjee and others***, AIR 1964 SC 1336 have held that under section 3 of the Limitation Act, it is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The court has no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate court comes to erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the court to assume or not to assume the jurisdiction to proceed with the determination of that matter. Their Lordships have held as under:

> "[9] Section 3 of the Limitation Act enjoins a Court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate Court comes to an erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter.
>
> [10] Section 5 of the Limitation Act, on the other hand, empowers the Court to admit an application, to which its provisions are made applicable, even when presented after the expiry of the specified period of limitation if it is satisfied that the applicant had sufficient cause for not presenting it within time. The Court therefore had jurisdiction to determine whether there was sufficient cause for the appellants not making the application for the setting aside of the abatement of the suit in time and, if so satisfied to admit it."

11. In the case in hand, once the election petition was barred by limitation, the Sub Divisional Officer (Civil) could not proceed with the matter.

12. Learned Single Judge of Andhra Pradesh High Court in ***Syed Jalaluddin Hasan Quadri*** v. ***M/s. Tarapharmacy***, AIR 1966 A.P. 136 has held that section 3 of the Limitation Act places a statutory obligation on the court to examine whether the suit is filed within limitation or not, and if it is filed beyond limitation it must be dismissed. Learned Single Judge has held as under:

> "[6] It was lastly contended by the learned counsel for the respondent that this Court should not interfere under Section 12 of the Act because there has been no injustice done in this case. Section 3 of the Limitation Act places a statutory obligation on the Courts to examine whether the suit Is filed within limitation or not, and if the suit is filed beyond limitation, what must follow is that it must be dismissed. When the suit is clearly time-barred and when it cannot be decreed in the teeth of Section 3 of the Limitation Act, I fail to see how the lower Court's judgment which is obviously wrong, can be sustained. The moment Article 85 becomes inapplicable to the facts of the case and the plaintiff is not in a position to show any other Article under which the suit if brought, ceases to be time-barred, what must follow is that the suit being time barred must be dismissed. This revision petition therefore, is allowed and the suit is dismissed as time-barred. In view of the circumstances of the case however I leave the parties to bear their own costs throughout."

13. Division Bench of Mysore High Court in ***Nagappa Gulappa Amminabhavi*** vs. ***Fakirappa Bhimappa Hanchinal and others***, AIR 1970 Mysore 73 has held that time barred election petition under section 13 must be dismissed under section 3 of the Limitation Act even if plea of limitation is not raised in defence. Their Lordships have held as under:

> "[9] Secondly, an application under Section 13 of the Panchayat Act to the Munsiff is not an application to examine the correctness or otherwise of the declaration of the results by the Returning Officer, but an application which questions the validity of the election itself. After hearing the parties and taking necessary evidence, the Munsiff is given the power either to confirm or amend the declared results of the election or to set aside the election itself.
>
> The various reasons on which the Munsiff can make an order in relation to the validity of the election set out in the subsequent portions of Section 13 also leave no room for doubt that what the Munsiff is called to examine is the validity of the election itself. Hence, we have no doubt in our mind that an application under Section 13 questioning the validity of an election cannot, in any sense, be regarded as an appeal against or an application to revise the declaration of the result made by the Returning Officer, nor can such a declaration be regarded as an order or a judgment for the purpose of Sub-section (2) of Section 12 of the Limitation Act, or for any other purpose.
>
> [11] There can be no doubt therefore that the Munsiff was bound under Section 3 of the Limitation Act, to dismiss the petition although the plea of limitation had not been set up as a defence by the petitioner (in this writ petition) or any other respondent before him in the election petition.

[13] We are not impressed by this argument for two reasons. The electoral right is a statutory right and the principle is that in dealing with an election statutory provisions must be strictly interpreted and applied. When Section 13 of the Panchayat Act expressly lays down a time limit of 15 days from the date of declaration of the result for entitling any person to question the validity of the election, it is not possible to extend that time except in accordance with law. We have already examined the legal position and held that there is no way of extending the time by the application of Section 12(2) of the Limitation Act as contended for on behalf of the respondent. The Munsiff, therefore, was bound to dismiss the petition under Section 3 of the Limitation Act. He having failed to exercise that jurisdiction, it is necessary that we should correct that error of jurisdiction which goes to the root o the matter.

[14] Secondly, the principle, as far as possible, is not to disturb the verdict of the electorate unless clear grounds justifying the same are made out. The verdict of the electorate in this case was in favour of the petitioner, and the Munsiffs verdict after recounting is a result based on a narrow difference. We do not think therefore that public interest will be served by dismissing this petition."

14. Learned Single Judge of Bombay High Court in ***Ajab Enterprises*** vs. ***Jayant Vegoiles and Chemicals Pvt. Ltd.***, AIR 1991 Bombay 35 has held that under section 3 it is the duty of the court to consider as to whether the suit is barred by limitation or not even if no such defence is taken by the defendant. Thus, there cannot be waiver against the provisions of limitation. Learned Single Judge has held as under:

"[7] The next question that arises for determination is about the waiver of limitation by the defendants and estoppel. As a matter of fact, the plaintiffs have to again fall back only on the consent terms. On behalf of the plaintiffs, Mr. Shah very strenuously tried to contend that the plaintiffs have averred in the Plaint that there is a waiver on the part of the defendants and as there is no written statement filed by the defendants, the said tact must be held to be established and it would not be permissible to hold that there is no waiver as such. The said contention also, really speaking, is not totally correct. The plaintiffs in para 13 of the Plaint have stated as under in this respect :-

"The plaintiffs therefore submit that the claim of the plaintiffs is within time. The plaintiffs further submit that all objections by the defendants to the claim of the plaintiffs on the ground of limitation have been given up or are deemed to be given up by the defendants at the time when the said consent terms where filed in the said Appeal and when the defendants submitted to the said consent order dated 10-10-1986 in the said Appeal No. 838 of 1986. The plaintiffs further say that the said consent order dated 10-10-1986 has been further acted upon by the defendants by depositing the sum of Rs. 20,000. 00 in this Hon'ble Court on 25-11-1986 within the time extended by the said Appeal order dated 10-10-1986. "the plaintiffs have also averred in the beginning of para 13 as under:-

"The plaintiffs submit that although the defendants urged the plea of limitation for the first time in the said Appeal No. 838 of 1986, the defendants have condoned and waived the said plea by admitting and acknowledging the liability to pay the aforesaid amount to the plaintiffs and by entering into consent terms and submitting to a consent order in the said

> Appeal whereby time to file the suit by the plaintiffs pursuant to the order dated 30-71986 was extended by a period of 10 weeks from 10-10-1986. " reading the said contention raised in para 13 of the Plaint, it is clear that the said plea of waiver is based on the consent terms dated 10-10-1986 on the basis of which the consent order confirming the Original Court's order came to be passed. I have already reproduced the consent terms earlier and by no stretch of imagination it could be considered to be a waiver of the ground of limitation. By consent terms only the order passed by the Lower Court was agreed to be confirmed. Similarly, the time which was granted earlier by the Trial Court for the depositing of the amount specified in the order and filing of the suit was extended. This also by no stretch of imagination can be said to be a waiver of ground of limitation on the basis of which the suit for recovery of the debts due to the plaintiffs could be said to have been barred by limitation. Apart from this, there is catena of decisions on the basis of which it could be said that there can be no waiver of ground of limitation even if it is assumed that in fact the said consent terms could be considered as waiver. Under Section 3 of the Limitation Act it is the duty of the Court to also consider as to whether the suit is barred by limitation or not even if no such defence is taken by the defendants in a suit. Therefore, there cannot be such waiver against the provisions of limitation. Reliance could be placed on the ruling reported in AIR 1920 PC 139 which has been followed in (1968) ILR 47 Pat. 262. In view of this, there also cannot be any estoppel which could be pleaded by the plaintiffs successfully. The defendants cannot be said to be estopped from pleading that the suit is barred by limitation when in fact the claim of the plaintiffs clearly appears to be barred by limitation taking into consideration Article 15 of the Limitation Act."

15. Learned Single Judge of Kerala High Court in ***M/s Craft Centre and others*** vs. ***The Koncherry Coir Factories, Cherthala***, AIR 1991 Kerala 83 has held that if the suit is barred by limitation on the face of it, court is duty bound to dismiss the same even at appellate stage though issue of limitation not raised. Learned Single Judge has held as under:

> "[4] What Section 3 of the Limitation Act says is that every suit instituted after the prescribed period shall be dismissed, although limitation has not been set up as a defence. It is the duty of the plaintiff to convince the Court that his suit is within time. If it is out of time and the plaintiff relies on any acknowledgment or acknowledgments in order to save limitation, he must plead them or prove, if denied. An acknowledgment not pleaded in the plaint, atleast by way of amendment, cannot be relied on. The plaint must appear on the face of it to be within time. If not, the court can reject it on the ground of limitation even without issuing summons to the defendant and waiting for his plea of limitation. In this case, the only acknowledgment pleaded is Ext.A1 dated 23-10-1978. If the Court finds that the acknowledgment was only on 23-10-1976, the suit filed beyond three years, on 20-3-1981, could be dismissed on that ground itself. The provision in Section 3 is absolute and mandatory. The Court can claim no choice except to obey it in full. It is the duty of the Court to dismiss a suit which on the face of it is barred by time even at the appellate stage despite the fact that the issue was not at all raised."

16. Their Lordships of the Hon'ble Supreme Court in ***Binod Bihari Singh*** vs. ***Union of India***, (1993) 1 SCC 572 have held that the Limitation Act is a statute of repose

and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. Their Lordships have further held that if a claim is barred by limitation and such plea is raised specifically the court cannot straightaway dismiss the plea simply on the score that such plea is ignoble. Their Lordships have held as under:

> "[10] After giving our anxious consideration to the facts and circumstances of the case, we do not find any reason to interfere with the decision of the High Court. In our view, the High Court has rightly held that the application made by the appellant was an application for directing the arbitrator to file the award in Court so that such award is made a rule of Court. In this case, there was no express authority given by the arbitrator to the applicant to file the award to make it a rule of Court although a signed copy of the award was sent to the applicant. The forwarding letter clearly indicates that the award was sent for information. Accordingly, the decision of this Court made in Kumbha Mauji's case (AIR 1953 SC 313) (supra) is applicable. The High Court has given very cogent reasons which, we have indicated in some details, for not accepting the case of the appellant that he had received a signed copy of the award and the forwarding letter some time in May, 1965 and we do not find any reason to take a contrary view. The applicant has not produced the registered cover received by him which would have established the actual date of the receipt of the postal cover by the applicant convincingly. We are also not inclined to hold that the delay in presenting the application deserves to be condoned in the facts and circumstances of the case. The appellant has taken a very bold stand that he had received the signed copy of the award only in May, 1965 and only within three weeks of such receipt, he had filed the application. On the face of such statement, the plea of ignorance of the change in the Limitation Act need not be considered and accepted. As the case sought to be made out by the appellant that he had received the signed copy of the award only in May, 1965 has not been accepted, and we may add, very rightly by the Court, the question of condonation of delay could not and did not arise. In our view, it is not at all a fit case where in the anxiety to render justice to a party so that a just cause is not defeated, a pragmatic view should be taken by the Court in considering the sufficient cause for condonation of delay under S. 5 of the Limitation Act. Coming to the contention of Mr. Ranjit Kumar that to defeat a just claim of the appellant, the ignoble plea of bar of limitation sought to be raised by the respondent should not be taken into consideration, we may indicate that it may not be desirable for the Government or the public authority to take shelter under the plea of limitation to defeat a just claim of a citizen. But if a claim is barred by limitation and such plea is raised specifically the Court cannot straightway dismiss the plea simply on the score that such plea is ignoble. A bar of limitation may be considered even if such plea, has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a Court of law, which is otherwise awful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. That apart, the appellant, in this case, having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the

respondent. We may also indicate here that the High Court is justified in its finding that the objection petition has been filed within time by the respondent and the service of the copy of the application made by the appellant on the counsel of the respondent who had appeared in an earlier proceeding did not constitute a notice as contemplated under Art. 119(b) of the Limitation Act. In the aforesaid circumstances, the appeal must fail and is dismissed but we make no order as to costs."

17. Their Lordships of the Hon'ble Supreme Court in ***V.M. Salgaocar and Bros.*** vs. ***Board of trustees of Port of Mormugao***, (2005) 4 SCC 613 have held that even if defendant intentionally does not raise the plea of limitation, if the suit is ex facie barred by law of limitation, court has no choice but to dismiss the same. Their Lordships have held as under:

"[20] The mandate of Section 3 of Limitation act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex-facie barred by the law of Limitation, a Court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation."

18. Their Lordships of the Hon'ble Supreme Court in ***Damodaran Pillai and others*** vs. ***South Indian Bank Limited***, (2005) 7 SCC 300 has held that the hardship or injustice is not a ground for extending limitation period. Their Lordships have held as under:

"[21] Hardship or injustice may be a relevant consideration in applying the principles of interpretation of statute, but cannot be a ground for extending the period of limitation."

19. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Annexures P-3 dated 30.9.2013, P-10 dated 11.4.2014, P-11 dated 25.8.2014 and P-12 dated 27.8.2014 are quashed and set aside. Pending application(s), if any, also stands disposed of. No costs.

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

Takki Mohd. ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Criminal Appeal No. 7 of 2009
Judgment Reserved on : 2.5.2015
Date of Decision : May 22, 2015

Indian Penal Code, 1860- Section 302- Accused conspired with co-accused to murder the deceased- deceased was taken to nearby jungle where he was murdered- the accused and deceased had last seen travelling on the motorcycle by independent witness- police official found a motorcycle parked at an isolated place- police went to jungle to find the owner and heard the ring of mobile phone and they noticed the dead body of the deceased- Medical Officer found multiple incised wounds on the vital parts of the body which could have been caused by means of a knife- PW-1 stated that accused went alone on his motorcycle towards

the main road, whereas deceased went on foot- prosecution failed to establish that after the accused left the house of the deceased, motorcycle remained in his possession or was being driven by him – police officials admitted that a Nepali had told them about hearing a telephonic ring but Nepali was not interrogated immediately- police had not seized the motorcycle- disclosure statement was not proved - clothes recovered by police were not connected to the accused- Medical Officer found injuries on the person of the accused- held, that in these circumstances, prosecution version was not proved and acquittal of the accused was justified. (Para-22 to 64)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330
Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316]
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Ravirala Laxmaiah vs. State of Andhra Pradesh, (2013) 9 SCC 283
Nika Ram vs. State of H.P., (1972) 2 SCC 80
Ganeshlal vs. State of Maharashtra, (1992) 3 SCC 106
Krishnan alias Ramasamy & others, vs. State of Tamil Nadu, AIR 2014 SC 2548
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45
Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434
M.G. Agarwal vs. State of Maharashtra, AIR 1963 Supreme Court 200
Balkar Singh vs. State of Haryana, (2015) 2 SCC 746
Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519
Ramesh & others vs. State of Rajasthan, (2011) 3 SCC 685
Inspector of Police, Tamil Nadu vs. John David, (2011) 5 SCC 509
Rameshbhai Mohanbhai Koli vs. State of Gujarat, (2011) 11 SCC 111
State of Karnataka vs. Suvarnamma & another, (2015) 1 SCC 323

For the appellant	:	Mr. Anoop Chitkara, Advocate for the appellant.
For the respondent	:	Mr. Ashok Chaudhary and Mr. V. S. Chauhan, Addl. Advocate Generals and Mr. J. S. Guleria, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

To a specific query put by the Court, a statement was made by learned Deputy Advocate General that neither any appeal stands filed, nor is one sought to be filed against the judgment of acquittal of co-accused Yusaf Ali.

2. Convict Takki Mohd., has assailed the judgment dated 22.12.2008, passed by learned Addl. Sessions Judge, Sirmaur, District at Nahan, Himachal Pradesh, in Sessions Trial No. 13-N/7 of 2007, titled as *State of Himachal Pradesh vs. Takki Mohd. & another,* whereby he stands convicted and sentenced to undergo rigorous imprisonment for life and pay fine of Rs.15,000/- in relation to an offence punishable under the provisions of Section 302 of the Indian Penal Code and in default thereof, to further undergo imprisonment for a period of one year. He has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973. Both he and co-accused Yusaf Ali stand acquitted in relation to the charge under Section 120 of the Indian Penal Code.

3. It is the case of prosecution that co-accused Yusaf Ali, so acquitted by the trial Court, conspired with his brother-in-law Takki Mohd. (hereinafter referred to as the appellant) to commit murder of deceased Hussan Singh, husband of Sunita Devi (PW-1) and son of Gian Chand (PW-2). Since Gian Chand had sold land for a sum of rupees one crore, Yusaf Ali who was working as his driver, sought rise in salary and an advance of rupees one lakh, which was refused. This being the motive, as part of conspiracy, on 27.3.2007, appellant went to the house of the deceased and around noon, took him on his motorcycle to a nearby jungle, where after consuming liquor, murdered him. Independent witness Mohan Singh (PW.3) noticed both the appellant and the deceased travel on the motorcycle. Independently, same day, SI Subhash Chand and Constable Rajeev Kumar (PW-17), who were on patrol duty, noticed the motorcycle parked at an isolated place on the road near the jungle. Vinod Kumar (PW.10), a passerby, when queried by the police, expressed lack of knowledge about the ownership of the motorcycle. Hence police went into the jungle to search for the owner but could not find anyone. While they were returning, Vinod Kumar (PW.10), informed them that he heard ring of a mobile phone coming from a particular direction in the forest. Hence both the police officials went there and noticed a dead body. Ruka (Ext. PW-6/A) was immediately sent on the basis of which F.I.R. No. 57/2007 (Ext. PW-20/A), dated 27.3.2007, was registered by LHC Krishna Devi (PW-20), at police station Sadar, Nahan. Station House Officer Inspector Khazana Ram (PW-31) reached the spot and conducted necessary investigation. Photographs were taken on the spot by Hukam Chand (PW-13). Inquest reports (Ext.PW-9/B and PW-9/C) were prepared. While such proceedings were going on, co-accused Yusaf Ali called the deceased on the mobile phone, which was attended to by Inspector Khazana Ram. By a common link, Gian Chand and Sunita Devi were called on the spot who identified the body to be that of Hussan Singh. Personal belongings of the deceased were taken into possession by the police. Certain eatables found near the dead body were also recovered by the police. The dead body was sent for post mortem which was conducted by Dr. K.D. Bhatt (PW-9), who upon receipt of the report of the State Forensic Science Laboratory, Junga, issued Post Mortem Report (Ext. PW-9/D). The deceased died as a result of knife injury. On suspicion, appellant who was arrested on 28.3.2007 was got medically examined from Dr. A. Chaturvedi (PW-26) who opined the injuries found on the hand to be caused with a knife. On 30th March, 2007, appellant made a disclosure statement (Ext. PW-5/A) to the effect that both he and the deceased consumed liquor and that he could get the weapon of offence recovered. Pursuant thereto, on 31.3.2007, police recovered knife (Ext. P-2) in the presence of independent witness Inder

Singh (PW-5). On 4.4.2007, appellant again made a disclosure statement (Ext. PW-7/A) and got identified the place from where he had purchased the eatables and liquor; the place where it was consumed and the place where he concealed the bottle (pint) (Ext. P-3) and the glasses (Ext.P-4 and P-5); which he got recovered in the presence of independent witness Shiv Ram (PW-7). Police took into possession the same vide memo (Ext. PW-7/B). During interrogation, in the presence of Shiv Ram, accused also got recovered a motor cycle as also his blood stained clothes i.e. pants (Ext. P-6), half sleeve sweater (Ext. P-7) and shirt (Ext. P-8), so kept in the dickey. Report of the Director, Finger Prints Bureau, Phillaur (Ext. PB) revealed the finger prints, lifted from the bottle (pint) and the glasses with the help of the tape, to be that of the appellant. Call records of mobile numbers of the deceased, the appellant and co-accused Yusaf Ali, were obtained by the police. Investigation revealed complicity of both the accused in the alleged crime. Hence, challan was presented in the Court for trial.

4. Accused Takki Mohd. (appellant) was charged for having committed offences punishable under the provisions of Sections 120-B and 302 of the Indian Penal Code, whereas, co-accused Yusaf Ali was charged for having committed an offence punishable under the provisions of Section 120-B of the Indian Penal Code, to which they did not plead guilty and claimed trial.

5. In order to prove its case, in all, prosecution examined as many as thirty three witnesses and statements of the accused under Section 313 Cr. P.C. were also recorded, in which appellant took the following defence:

> "I am innocent and I have been falsely implicated in this case. I was arrested on suspicion because on the relevant date I had visited the house of deceased and thereafter the police planted recoveries against me and prepared other documents in order to fasten guilt on me. The cut injury on my palm was sustained in the marriage while I was working there. The abrasions were sustained on account of beating by the police on 27.3.2007 as I was brought by the police from the marriage on that day."

In defence he examined four witnesses.

6. Appreciating the material on record, including the testimonies of the witnesses, trial Court disbelieved the prosecution case in relation to an offence punishable under the provisions of Section 120-B IPC, but however convicted the present appellant for having committed an offence punishable under the provisions of Section 302 IPC and sentenced him as aforesaid. Hence, the present appeal.

7. We have heard Mr. Anoop Chitkara, learned counsel appearing for the convict as also Mr. V.S. Chauhan learned Addl. Advocate General ably assisted by Mr. Ashok Chaudhary, learned Addl. AG. and Mr. J. S. Guleria, Asstt. A.G. on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that the reasoning adopted by the trial Court is not only perverse but is also not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on legal evidence and other material placed on record, causing serious prejudice to the accused, also resulting into miscarriage of justice.

8. Mr. Anoop Chitkara, learned counsel for the appellant, while making the following submissions has taken us through the record. (1) Genesis of the prosecution case of conspiracy and motive stands falsified and disbelieved by the trial Court. Hence accused merits acquittal; (2) In the absence of any motive, prosecution version of appellant

having committed the crime is also rendered to be extremely doubtful; (3) Prosecution version of disclosure statement(s) and recoveries of incriminating articles effected pursuant thereto, stand belied if not falsified from the record; (4) Prosecution has not been able to establish its case beyond reasonable doubt and (5) Defence taken by the appellant stands probablized through clear, cogent and convincing piece of evidence.

9. On the other hand, Mr. V.S. Chauhan, learned Addl. Advocate General while supporting the impugned judgment for the reasons set out therein has argued that (1) Prosecution has been able to establish its case beyond reasonable doubt; and (2) Defective investigation by the investigating agency cannot be a ground for acquitting the appellant.

10. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ....
>
> (Emphasis supplied)

11. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

12. It is not in dispute that there is no eye witness to the occurrence of the incident. Prosecution relies upon the following circumstances for establishing the guilt of the accused:

1. Recovery of dead body of the deceased who died on account of shock and haemorrhage as a result of multiple injuries.
2. Appellant was last seen in the company of the deceased.
3. Motorcycle driven by the appellant was seen parked on the road near the spot of crime.
4. Disclosure statement(s) (Ext.PW-5/A & Ext.PW-7/A) made by the appellant, which also led to the identification of place of occurrence of crime; place from where he purchased eatables; place where both he and the deceased consumed the same; place where he committed the crime; place where he concealed the bottle (pint) of liquor, glasses, weapon of offence and the motor cycle.
5. Recovery of incriminating articles including blood stained clothes of the appellant from the dickey of his motorcycle.

13. Before we deal with the factual matrix, with profit, we discuss the law on the point.

Law on Circumstantial Evidence:

14. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble the Supreme Court of India held that:-

> "9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been

committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ....."

10. .....In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

15. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [Also: *Pudhu Raja and another Versus State Represented by Inspector of Police,* (2012) 11 SCC 196; *Madhu Versus State of Kerala,* (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat,* (2010) 15 SCC 622; *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, (2006) 10 SCC 172; *Trimukh Maroti Kiran versus State of Maharashtra,* (2006) 10 SCC 681; *Mulakh Raj and others Versus Satish Kumar and others,* (1992) 3 SCC 43; *Ashok Kumar Chatterjee vs. State of M.P.,* 1989 Supp. (1) SCC 560; *Balwinder Singh vs. State of Punjab,* (1987) 1 SCC 1; *State of U.P. vs. Sukhbasi,* 1985 Supp. SCC 79; *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116; *Earabhadrappa vs. State of Karnataka,* (1983) 2 SCC 330; *Hukam Singh vs. State of Rajasthan,* (1977) 2 SCC 99; and *Eradu vs. State of Hyderabad,* AIR 1956 SC 316]

16. In *Sujit Biswas vs. State of Assam,* (2013) 12 SCC 406, Hon'ble the Supreme Court of India held that:-

"13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of

dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].

14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:

> "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

17. Relying upon its earlier decision in *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, AIR 1952 SC 343, Hon'ble the Supreme Court of India in *Dharam Deo Yadav v. State of Uttar Pradesh,* (2014) 5 SCC 509, again reiterated that:

> "15. .... Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

18. In *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116, Hon'ble the Supreme Court of India held that:-

> "Moreover the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court." ... ...
>
> ... ... "There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court."

19. Keeping in view the aforesaid principles, we proceed to deal with each of the circumstances separately.

Circumstance No. 1

20. Recovery of dead body of the deceased from the jungle is not in dispute.

21. Dr. K. D. Bhatt (PW-9) who conducted the post mortem of the deceased and issued report (Ext. PW-9/D), found multiple incised wounds on the vital parts of the body of the deceased, which could have been caused with the weapon of offence i.e. Knife (Ext.P-2). According to the Doctor, multiple injuries resulting into shock and hemorrhage was the cause of death. Through the testimony of this witness, it is quite apparent that death, which was instantaneous, took place sometime during the day on 27.3.2007. The deceased had also consumed alcohol.

Circumstance No. 2

Law on Last Seen Theory:

22. Hon'ble the Supreme Court of India in *Ravirala Laxmaiah vs. State of Andhra Pradesh,* (2013) 9 SCC 283, after taking note of its earlier decisions rendered in *Nika Ram vs. State of H.P.,* (1972) 2 SCC 80; *Ganeshlal vs. State of Maharashtra,* (1992) 3 SCC 106 and *Trimukh Maroti Kirkan vs. State of Maharashtra,* (2006) 10 SCC 681 reiterated the principle that where accused is last seen with the victim, it becomes his duty to explain the circumstances under which the victim died. It is a strong circumstance indicative of the fact that he is responsible for the crime.

23. Hon'ble the Supreme Court of India in *Dharam Deo Yadav vs. State of Uttar Pradesh,* (2014) 5 SCC 509 has further held that:-

> "19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in *Sahadevan vs. State,* (2003) 1 SCC 534." (Emphasis supplied)

24. In *Krishnan alias Ramasamy & others, vs. State of Tamil Nadu,* AIR 2014 SC 2548; and *Harivadan Babubhai Patel vs. State of Gujarat,* (2013) 7 SCC 45, the principle stands reiterated.

25. Significantly, in *Rohtash Kumar vs. State of Haryana,* (2013) 14 SCC 434, Hon'ble the Supreme Court of India has held that:-

> "34. Thus, the doctrine of "last seen together" shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."
>
> (Emphasis supplied)

26. Thus, last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased died or is found dead, is so small that possibility of any person, other than the accused, being the author of crime becomes impossible. The burden would immediately shift upon the accused.

27. Prosecution through the testimonies of Sunita Devi (PW-1) and Gian Chand (PW-2) wants the Court to believe that the appellant came to the house of the deceased and took him away on his motorcycle.

28. In court, initially Sunita Devi does state that on 27.3.2007 at 11.30 a.m. appellant came to her house in village Moginand, Tehsil Nahan, District Sirmaur, on a motorcycle bearing No. HP-17A-0086. He had wanted the deceased to arrange for a party. After some time, her husband left with the appellant on his motorcycle. Same day, at 4.30 p.m., she also informed her father-in-law of such fact. She does state that both the appellant and the deceased were not only known to each other from before but were also on visiting terms. But then, she qualifies her statement by deposing that the appellant went alone on his motorcycle towards the main road whereas the deceased went on foot, which version is so corroborated by Gian Chand. Significantly where did they go, remains unexplained by them. These witnesses do establish presence of the appellant in the house of the deceased, but as to whether deceased left with the appellant, on his motorcycle, to an undisclosed destination, cannot be said to have been established, with certainty, on record. It is not the case of the witnesses that the appellant coerced, threatened, intimidated or enticed the deceased to accompany him. Also what conversation took place between them is not so disclosed. Both left voluntarily to an undisclosed destination. So, in our considered view, the first link in the chain cannot be said to have been conclusively established.

29. Further, prosecution, through the testimony of Mohan Singh (PW-3), a close relative of the deceased, wants the court to believe that this witness, while travelling in a private truck, had also seen the deceased and the appellant travel on the very same motorcycle. This was around the same time when the appellant left the house of the deceased. Though in the earlier part of his testimony, witness clearly states such fact, but however later on contradicts himself rendering his earlier version to be not true. He admits himself to be a government servant, posted as a driver at Nahan, with the Civil Supplies Corporation. On the day of occurrence of the incident he admits to be on duty. His duty hours are between 10.00 a.m. to 5.00 p.m. It is not his case that either he was on leave or was required to travel for some official work. He does not disclose the purpose of his visit to Paonta Sahib, a place far off from Nahan. It is not that he had left Nahan on an official tour and that too in a private vehicle. We very much doubt the presence of this witness at the place where he allegedly noticed the appellant. He does not know the number of the truck or the name of the driver in which he travelled. Thus his presence on the spot, and having seen the appellant drive the motorcycle appears to be extremely doubtful. He does not remember the speed at which the motorcycle was being driven. All this may or may not be significant in rendering his testimony to be untrue. But what is relevant is his admission to the effect that "*The driver of the motor cycle was wearing helmet and so it was not possible to see his face to identify him"* and that "*It is correct that since the driver of the motor cycle was wearing helmet and so I had not identified him. It is correct that I have told today in the court that Taki Mohd. was driving the motor cycle at the instance of the police. I had not told to anybody that Hussan Singh was sitting on the motor cycle.*" It is nobodies case that the police got conducted a test identification parade for the purpose of identifying the rider of the motorcycle. Hence this admission, also breaks the link in the chain of the circumstance of the deceased seen last together in the company of the appellant.

30. We are not unmindful of the fact that both Sunita Devi as also this witness do disclose the number of the motorcycle, but then evidently motorcycle is not registered in the name of the appellant. It is in the name of his wife. Testimony of Rahish Ahmad (PW-30) and document (Ext. PW-30/A) is clear to this effect.

31. Also prosecution failed to establish that after the appellant left the house of the deceased, motorcycle remained in his possession or was being driven by him. Also police made no inquiries from the wife of the appellant. The circumstance cannot be said to have been proved.

Circumstance No.3

32. Through the testimonies of Vinod Kumar (PW-10), Constable Rajeev Kumar (PW-17) and SI Subhash Chand (PW-6), prosecution wants the court to believe that the motorcycle of the appellant was seen parked on the road at a secluded place in the forest. This was on the road from Paonta Sahib to Kala Amb.

33. Vinod Kumar, working as a helper in the Military Engineering Services, posted at the Pump House, Judoo, states that at about 2.15 – 2.30 p.m. he went to the forest for easing out. Two police officials inquired about the ownership of a motorcycle bearing No. HP-17A-0086 so parked on the road. He expressed his ignorance. Thereafter, these officials went towards the jungle, searching for the owner of the vehicle. Meanwhile he heard ring of a mobile phone, which fact he also informed them. Later on he came to know that body of the deceased was found at the place from where mobile was ringing.

34. Version of this witness, to us, is uninspiring in confidence. His presence appears to be doubtful. He had no reason to be near the place where motorcycle was parked, for it is at a distance of 2 k.m. from his place of work. Why would a person travel this far only for the purpose of easing out and that too in a jungle area, remains unexplained. His explanation of owning land close by remains uncorroborated by any evidence. Crucially witness admits to have been called by the police to the police station on 6.4.2007, where his statement was recorded. He specifically does not state that the very same police officials had called him. The question which arises is as to how did the police reach out to him. It is not that police was aware of his identity or that he had disclosed his identity to the police. He was just a passer by. Then how is it that police was able to call him after a gap of more than 10 days. The witness had not seen the motorcycle on an earlier occasion and under normal circumstances, was not expected to have remembered its number. The possibility of the witness being introduced cannot be ruled out. Further what discredits the witness is his admission to the effect that *"I had not told to the said persons that I had seen motor cycle No. HP-17A-0086 parked on the road side or that the police had met me or that I had heard any sound of ring of the mobile phone"*. As such his testimony is of not much use to the prosecution. But the matter does not end here.

35. Constable Rajeev Kumar does state that on 27.3.2007, he along with SI Subhash Chand were on patrol duty in connection with a Motor Car Rally. At 3.30 p.m. they reached Khajurna Pull, and noticed a motor cycle bearing No. HP-17A-0086 parked on the side of the road. He saw a "Nepali" (he specifically does not name Vinod Kumar) who on inquiry, expressed lack of knowledge about the ownership of the motorcycle. On suspicion, police party went into the forest to search for the owner. While they were returning, the said "Nepali" informed that he had heard ring of a mobile phone and when they went in that direction, they saw a dead body of a male person lying in the forest. Ruka was immediately sent to the police station for registration of the F.I.R.

36. Version of this witness stands corroborated by SI-Subhash Chand who further states that with the registration of the F.I.R., SHO Khazana Ram arrived on the spot and conducted necessary investigation.

37. Now when we read the cross examination part of the testimonies of these police officials, on the point in discussion, we find that this "Nepali" had only disclosed the place of his employment. It is not the case of the prosecution that these police officials went to the place where the very same "Nepali" was working and got him identified. Crucially these witnesses admit that despite the fact that dead body was recovered shortly (within five minutes) after the "Nepali" informed them of a phone call, they did not call him. Why so? remains unexplained. In our considered view, in fact this "Nepali" was a prime suspect, for he was the last one to have been seen in the jungle, near the place where dead body was recovered. This "Nepali" was also not interrogated for more than 10 days. Where all did the "Nepali" go for easing out? What all did he see there? For how much time he remained in the jungle? Where did he go from there? What all did he take with himself? Why did he not go towards the place from where the sound of the call was coming? All these questions, which remain unexplained, were required to be looked into by the investigating agency**.** After all, possibility of involvement of any other person had to be ruled out by the prosecution. Is it that the "Nepali" himself took away the motorcycle? Also who interrogated him? What all did he disclose to the police, remains unexplained on record. Significantly these witnesses do not state that when they went to the jungle, motorcycle was taken away by someone. Had it been so, they would have definitely got such fact recorded at the first instance. Unclaimed motorcycle, raising suspicion, prompting the police to search for its owner, would have only led the police to seizure of the vehicle. Which was not so done. This fact, as we shall see herein later, would acquire significance. Hence, we are of the considered view that even this circumstance, cannot be said to have been established by leading clear, cogent, consistent or reliable piece of evidence.

Circumstance No. 4

38. Prosecution through the testimonies of Inspector Khazana Ram (PW-31), SI – Chain Ram (PW-32), Inder Singh (PW-5) and Shiv Ram (PW-7) relies upon the circumstance of disclosure statements (Ext. PW-5/A and Ext. PW-7/A) made by the appellant, which further led to the recovery of incriminating articles and identification of spot of crime and other places.

39. Inspector Khazana Ram does state that he conducted the necessary investigation on the spot. He prepared inquest reports (Ext. PW-9/B and Ext. PW-9/C); got the dead body identified from Gian Chand and Sunita Devi; took into possession bathroom slipper (Ext. P-1) as also blood stained sample of soil and leaves and some eatables (grams and egg fry) found near the dead body. He further states that the appellant, who was arrested by him on 28.3.2007, made a disclosure statement (Ext. PW-5/A) on 30.3.2007 and also in the presence of Inder Singh (PW-5) led the police party and got identified the place (i) where both he and the deceased consumed liquor and (ii) concealed the knife (Ext. P-2). Also memos (Ext. PW-5/B and Ext.PW-5/D) were prepared.

40. Having perused the testimony of Inder Singh we express our doubt about the genuineness and legality of the disclosure statement and correctness of the version so disclosed by Khajana Ram. Inder Singh admits the disclosure statement and the memos to have been recorded in the police station and that too only on their return from the Khajurna jungle. It is not the case of the Investigating Officer that the disclosure statement was oral or that the appellant of his own led the police to the place of crime, as such his statement could not be recorded on the spot. Now if the police was already aware of the places so

identified by the appellant, then in law, disclosure statement loses its relevance and significance and cannot be relied upon by the prosecution. It is not a discovery of fact, pursuant to a disclosure statement. Crucially it has come in the testimony of Inder Singh that police did try to recover the weapon of offence on 30.3.2007 itself, but was prevented from doing so by the mob present on the spot. It appears that there was hue and cry with regard to false implication of the accused. Be that as it may, knife (Ext. P-2) kept on a shelf in the bathroom, was recovered on 31.3.2007 vide memo (Ext. PW-5/D), as is evident from the testimony of Inder Singh. We find that SI Chain Ram (PW-32) who took over the investigation of the case from Inspector Khazana Ram on 30.3.2007, was present at the time of recovery of weapon of offence. He is categorical that knife was not covered or kept in a concealed manner. Further it is an admitted case of the prosecution, as stands revealed through the ocular (PW-5 and PW-32) and documentary evidence, that knife so recovered was immediately sealed with seal impression-A. Undisputedly this parcel was neither opened nor tampered with. But when we examine the testimony of Gian Chand, father of the deceased, we find the circumstance of recovery of knife to have been totally contradicted and belied, also contradicting the testimonies of the witnesses, for according to him *"police had shown me a knife in the police station"*. Now if the parcel in which knife was kept was sealed, then how is it that it was shown to the father of the deceased. All this renders the prosecution case to be doubtful, if not false and the circumstance not to have been proved, much less beyond reasonable doubt.

41. Another disclosure statement (Ext. PW-7/A) so recorded in the presence of Shiv Ram (PW-7) as also Babu Ram (PW-11) was made by the appellant on 4.4.2007, through which, prosecution wants the Court to believe that the appellant got identified the spot (i) where he had concealed the bottle of liquor/glasses and (ii) the motorcycle. Independent witnesses who are close relatives/acquaintances of the deceased have deposed that the appellant first took the police party to the place from where he had purchased liquor and then got identified the spot where he had concealed the bottle and glasses. Memo (Ext. PW-7/B) was recorded. Appellant also took the police to the place where he concealed the motorcycle and got recovered his blood stained clothes from its dickey vide memo (Ext. PW-7/D).

42. We do not find testimonies of these witnesses or the prosecution case to be inspiring in confidence at all. Sanjay Kumar (PW-8) from whom the accused allegedly purchased eatables has not supported the prosecution. It has come in the testimony of Gian Chand and Inspector Khazana Ram that on 27.3.2007 itself, police had searched entire Khajurna jungle and nothing was found there. Hence subsequent recovery is rendered to be doubtful. Constable Rajeev Kumar (PW-17) states that having seen the spot on 27.3.2007, he could make out that someone had consumed alcohol. Then why did the police not interrogate the appellant on this aspect. It is not the case of the prosecution that despite interrogation, accused refused to co-operate or divulge information. The spot from where recovery was effected was not far off from the place of crime. On the issue, there is yet another mitigating circumstance in favour of the appellant, rendering the factum of disclosure statement (Ext. PW-7/A) and the recovery of glasses and bottle to be extremely doubtful. Shiv Ram (PW-7) an independent witness states that "Takki Mohd. accused lifted the glasses and the pint of 8 PM. Again stated that the police had lifted the same and the accused had only shown the same. The glasses and the pint were lying together. The police had given the glasses and the pint in the hands of the accused Takki Mohd. so as to hold them. The entire documents were reduced into writing on the National Highway and my signatures on all the documents were taken on the National Highway. The police had not reduced into writing any document before proceeding to the forest from the spot, where we had been waiting for arrival of the police at Khajurna. The wooden box in which the pint and

glasses were sealed was called from Nahan through some person. He was some police man. It is correct that the pint and the wooden box are exactly of the same size. The pint was not sent by the police to Nahan for preparing the wooden box of its size." (Emphasis supplied)

43. Evidently impression of finger prints of the appellant, on the glasses and the bottle were obtained by the police by asking him to hold the same. But the matter does not end here. Still there is contradiction. SI Chain Ram states that the impression of finger prints on the pint were taken with the help of a tape. But then where is this tape? It is not on record. Also report of the Director, Finger Print Bureau, Phillaur (Ext. PB) does not establish the prosecution case on this point. The manner in which finger prints were obtained and the bottle and glasses recovered, renders the prosecution case to be doubtful. How did the police know the exact dimensions of the bottle or the glasses? Is it that police was already aware of the same and thus got a box specifically prepared for keeping the articles in safe custody? There is no other evidence to link the appellant with the same. Thus even this circumstance cannot be said to have been proved.

Circumstance No. 5

44. The next circumstance pertains to recovery of motorcycle and blood stained clothes of the accused found in its dickey. This is pursuant to disclosure statement (Ext. PW-7/A) so made in the presence of Babu Ram and Shiv Lal. It has come in the testimony of the prosecution witnesses that the motorcycle was parked in an open courtyard. It was not kept in a covered/concealed manner**.** Between the time of arrest of the appellant on 28.3.2007 and recovery of the motorcycle on 4.4.2007, anyone could have seen the same. In view of our earlier discussion, the factum of recovery of motorcycle itself is rendered to be extremely doubtful, for it has not come on record that after committing murder it was only the accused who took away the motorcycle and concealed it in the house of his brother.

45. Shiv Lal categorically does not state that the clothes so recovered, belonged to the accused. Testimony of Babu Ram is also to similar effect. Now clothes i.e. Pants (Ext. P-6), Sweater (Ext. P-7), shirt (Ext. P-8) contained blood stains, which as per report of the Forensic Science Laboratory (Ext.PW-33/A), was of Group-A. It is not that of the appellant. No blood of the accused was found on these clothes.

46. It is the positive case of the prosecution that while committing murder, accused also sustained knife injuries on his hand. Had it been so, some blood would have fallen on his clothes. There is no other evidence linking the appellant to these clothes. He was not made to wear the same. Clothes are also not of his size. In fact, the best person who could have testified such fact was Sunita Devi who incidentally is silent on this aspect. After all, just four hours prior to the occurrence of the incident, she had seen the appellant in her house. Whether or not he was wearing the very same clothes, she could have testified to such fact. Even this circumstance cannot be said to have been proved.

47. Appellant who was arrested on 28.3.2007, had already made a disclosure statement on 30.3.2007. Possibility of being subjected to torture cannot be ruled out. After all it has come on record that local residents were enraged and had not allowed the police to enter his house. Significantly police did not take any action against the villagers who prevented them from discharging their duties.

48. On 28.3.2007 police got the appellant medically examined from Dr. A. Chaturvedi (PW-26) who found the following injuries on his body:

> "1. On left palmer surface of hand, just below little finger, there was clear cut, sutured wound/ situated size 2.7 C.M. regular colour dusky red, three sutured applied.

2. On left dorsum of hand multiple linear superficial abrasions present size 2 to 3 C.M. horizontally situated colour dusky red. No fresh bleeding present.

3. On right dorsum of hand multiple small superficial abrasion present colour dusky red/ situated no fresh bleeding size 1 to 1.5 C.M.

4. On nose three superficial abrasion, present size 1.25 C.M. colour dusky red/ situated no fresh bleeding.

5. On right temple/situated broad abrasion present size 3 cm. X 3 cm. colour dusky red."

49. Though no definite opinion could be given with regard to injury No. 1, but the Doctor did not rule out possibility of such injury, being caused by a knife in a scuffle. Significantly Doctor opined that injuries No. 2 to 5 could be caused as a result of beatings. It is not the case of prosecution that there was a scuffle between the accused or the deceased. This itself raises doubt about the prosecution story. Prosecution, through the testimony of Vijay Pal (PW-4) has tried to establish that appellant got his wound stitched. However, his testimony cannot be said to be inspiring in confidence. He was only working in the clinic of Dr. H. K. Panth, a medical practitioner, not examined in Court. Also record of employment is not proved. Register pertaining to the treatment so administered by him is also not placed or proved on record. It is not that he was medically trained, experienced or authorized to treat the patients. In what capacity he administered such treatment remains unexplained. Whether he was working in the clinic as a peon, an attendant, or a compounder remains undisclosed. He also did not issue any prescription slip to the accused.

50. On the other hand we find that with an endeavour of probabilising his defence, appellant examined Dr. Satpal Verma (DW-1), a registered medical practitioner, who proved the wound to have been stitched on 27.3.2007 at his clinic in Jagadhari. It has come on record through the testimony of Amit Kumar (DW-2) as also Iqbal (DW-3), which we see no reason to disbelieve, that the accused did attend the marriage ceremony of his cousin in village Amadalpur, Tehsil Jagadiri, District Yamunagar (Haryana) and while removing the tent, he sustained injury on his left hand. As per the prosecution, while inflicting injuries on the deceased, appellant also sustained injuries on his hand. Had it been so, and had the accused driven the motorcycle with a bleeding hand, then positively on the handle, blood stains would have been found. But none were there, for there is no such evidence proved on record by the prosecution. Such blood on the handle of the motorcycle could have linked the accused to the motorcycle. Absence thereof only goes in favour of the accused. Thus, defence so taken by the accused sands probabilised and not falsified.

51. Constitution Bench of Hon'ble the Supreme Court of India in *M.G. Agarwal vs. State of Maharashtra,* AIR 1963 Supreme Court 200, has held as under:

"18. There is another point of law which must be considered before dealing with the evidence in this case. The prosecution case against accused No. 1 rests on circumstantial evidence. The main charge of conspiracy under Section 120-B is sought to be established by the alleged conduct of the conspirators and so far as accused No. 1 is concerned, that rests on circumstantial evidence alone. It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused persons's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is

> entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basis on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt." … … [Emphasis supplied]

52. It is also a settled principle of law that absence of motive, in a case of circumstantial evidence itself would not be a ground to acquit the accused, but however such fact has to be kept in mind, while appreciating the prosecution evidence for determining his guilt beyond reasonable doubt. In the instant case co-accused stands acquitted so also appellant Takki Mohd. on the charge of conspiracy. Now if the link of conspiracy in the chain of circumstances stands snapped, prosecution version on a material fact is only rendered to be not true or proven on record.

53. In *Balkar Singh vs. State of Haryana,* (2015) 2 SCC 746, Hon'ble the Supreme Court of India held that one alleged conspirator cannot be convicted if all co-conspirators are acquitted. Under these circumstances, conspiracy would remain unestablished.

54. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: *Brathi alias Sukhdev Singh v. State of Punjab,* (1991) 1 SCC 519).

55. No doubt in his statement under Section 313 Cr.P.C. appellant admits to have visited the house of the deceased. He had wanted deceased to accompany him to the place of marriage. Since deceased refused, he left alone. His explanation is in the line of testimony of Sunita Devi and Gian Chand who have deposed that appellant alone left the house on a motorcycle and deceased only followed him on foot.

56. The Court below erred in ignoring the fact that police did not rule out the possibility of involvement of the "Nepali", for he was the last to have been seen near the place where dead body was recovered.

57. Also who took the motorcycle away from the spot, despite presence of the police, remains unexplained and not considered by the trial Court. It is not the case of prosecution that accused was seen around the place of crime by anyone else. Testimony of Mohan Singh, is not worthy of credence. Vinod Kumar, Rajeev Kumar and Subhash Chand are silent on this aspect. Also no explanation as to why police did not seize the motorcycle lying idle on the road under suspicious circumstance, is forthcoming.

58. The Court erred in not correctly appreciating the testimonies of defence witnesses. No doubt in the photographs so proved by Amit Kumar (DW-2), accused is not there but nonetheless, testimony of Iqbal (DW-3), rendering presence of the accused in the wedding cannot be said to be false or uninspiring in confidence.

59. On the question of link evidence, court erred in holding that knife (Ext. P-2) was properly sealed and not tampered with by the investigating agency.

60. No doubt Doctor (PW-26) has opined that injury on the hand of the accused could have been caused by the knife (Ext.P-2), but then this fact itself would not be sufficient enough to convict the accused, more so, in the light of improbabilities and weak or missing link in the chain, which, as we have already discussed, stands snapped. Knife was not kept in a concealed manner. It was lying on the shelf inside the bath room and was clearly visible. Family members of the accused could have easily destroyed such evidence on 30.3.2007 itself.

61 As already discussed, prosecution has failed to link the accused with the clothes so recovered from the dickey of the motorcycle.

62. On the point of recovery of bottle of alcohol (pint) and glasses, findings returned by the trial Court, as is evident from para-84 of the judgment, are contradictory.

63. The tape with which finger prints were lifted from the tumblers and the pint is not proved as a fact on record.

64. We now proceed to consider certain decisions referred to on behalf of the State.

65. In the given facts and circumstances, ratio of law laid down by the apex Court in *Ramesh & others vs. State of Rajasthan,* (2011) 3 SCC 685, is misconceived. In the instant case very recovery of the incriminating articles, pursuant to disclosure statements, so made by the accused, itself is rendered to be doubtful, notwithstanding the fact that it was so effected from the very same place from where the body was recovered.

66. The case in hand is not of defective investigation. Prosecution has to establish, the circumstances, forming complete chain of events, pointing towards the guilt of the accused, beyond reasonable doubt, without their being any possibility of any other hypothesis. Ratio of law laid down by the apex court in *Inspector of Police, Tamil Nadu vs. John David,* (2011) 5 SCC 509 in the given facts and circumstances is thus inapplicable. So is the decision rendered in *Rameshbhai Mohanbhai Koli vs. State of Gujarat,* (2011) 11 SCC 111.

67. Reliance on *Dharam Deo Yadav vs. State of Uttar Pradesh,* (2014) 5 SCC 509, so relied upon by the State is also distinguishable on facts. The Court was dealing with a case where dead body was recovered from the house of the accused who was lastly seen in his company.

68. The apex Court in *State of Karnataka vs. Suvarnamma & another,* (2015) 1 SCC 323 has only reiterated that mere lapse on the part of the investigating agency would not be a ground to discard the overwhelming evidence establishing the prosecution case on record. Also false plea taken by the accused would be an additional circumstance which can be used against him, which is not the fact in fact.

69. It cannot be said that each and every incriminating circumstance stands clearly established by leading reliable and clinching piece of evidence. It also cannot be said that the circumstances, so proved form a chain of events, leading to the only irresistible

conclusion drawing the guilt of the accused and no other hypothesis against such guilt is possible. The evidence collectively is incapable of explanation on any other reasonable hypothesis, save the guilt of the accused.

70. From the material placed on record, prosecution has failed to establish that the appellant is guilty of having committed the offence. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the appellant does not stand proved, beyond reasonable doubt, to the hilt. The chain of events do not stand conclusively established, leading only to one conclusion, i.e. guilt of the appellant. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the appellant and no other hypothesis other than the same.

71. Thus, findings returned by the trial Court, convicting the appellant, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of his guilt. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as he stands wrongly convicted for the charged offence.

72. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 22.12.2008, passed by Addl. Sessions Judge, Sirmaur District at Nahan, H.P., in Sessions Trial No. 13-N/7 of 2007, titled as State of Himachal Pradesh vs. Takki Mohd. and another, is set aside and the appellant is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited, be refunded to him. Release warrants be prepared accordingly. 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.

Tapat Bahadur Shahi ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.322 of 2011
Reserved on : 4.5.2015
Date of Decision : May 22, 2015

N.D.P.S. Act, 1985- Section 20- An alto car being driven by accused 'R' was stopped for checking- accused 'V' was sitting on the front seat - remaining accused 'T', 'N' and 'Z' were sitting on the rear seat- police found one bag containing 1.850 kgs of charas- independent witnesses did not depose that bag from which charas was recovered belonged to appellant 'T'- PW 'H' stated that when he inquired from the occupant of the vehicle, accused 'T' told that it belonged to him- this version was made for the first time in the Court- bag was concealed underneath the driver seat and none had deposed that vehicle was hired by 'T' or that the passengers sitting on the rear seat were his relatives, friends, acquaintances or business associates- further, other persons were acquitted, it was not permissible to convict one conspirator, when others had been acquitted- held, that in these circumstances, prosecution version was not proved. (Para-8 to 24)

Cases referred:
Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338
Balkar Singh v. State of Haryana, (2015) 2 SCC 746

For the Appellant	:	Mr. Anoop Chitkara, Advocte.
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

Record reveals that no appeal stands filed by the State against the judgment of acquittal of four co-accused persons. In fact, under instructions from the State, learned Additional Advocate General made a specific statement that neither any appeal against the judgment of acquittal of these co-accused persons stands filed nor was it sought to be filed. Hence, we proceed to decide the appeal, so filed by the present appellant Tapat Bahadur, who alone stands convicted.

2. Appellant-convict Tapat Bahadur, hereinafter referred to as the appellant, has assailed the judgment dated 17.5.2011/20.5.2011, passed by Special Judge, Fast Track Court, Shimla, Himachal Pradesh, in Sessions Trial No.6-S/7 of 2010, titled as *State of Himachal Pradesh v. Rajiv alias Sanju & others*, whereby he stands convicted of the offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default of payment thereof, to further undergo rigorous imprisonment for a period of one year.

3. It is the case of prosecution that in the night intervening 24.11.2009 & 25.11.2009, ASI Harjit Singh (PW-8) alongwith HHC Ram Lal (PW-7), was on a patrol duty and had set up a naka near Beas Dhaba, 16 Meel, District Shimla. At about 4.10 a.m., an Alto Car bearing number HP-01A-6515, driven by co-accused Rajiv Kumar alias Sanju, was stopped for checking. In the vehicle, co-accused Vinod Kumar was sitting on the front seat and the remaining accused persons namely Tapat Bahadur (appellant), Nain Bahadur and Zamil were sitting on the rear seat. Upon checking the vehicle, police recovered one bag, concealed under the driver's seat, which contained charas like substance in the shape of Damru. Upon weighment, it was found to be 1.850 kgs. The same was sealed with seal impression 'T' and seized vide Memo (Ex. PW-1/B). Search and seizure operations were carried out in the presence of independent witnesses Dharam Parkash (PW-1), Sanjeev Sood (PW-2) and Virender (not examined). HHC Ram Lal took the ruka (Ex. PW-7/A), on the basis of which FIR No.229 dated 25.11.2009 (Ex. PW-9/A), under the provisions of Section 20 of the Act, was registered at Police Station, Shimla West, District Shimla. File was taken back to the spot and necessary formalities completed, including filling up of NCB form (Ex. PW-8/B). All the accused persons (occupants of the vehicle) were arrested and informed about

the ground of arrest. Case property as also the accused were produced before Inspector Gurdeep Singh (PW-9), who resealed the parcel with his seal impression 'B'. Thereafter, it was deposited with the MHC Nand Lal (PW-6), who kept the same in the Malkhana. Special Report (Ex. PW-5/A), so prepared by Harjit Singh, was presented before Madan Lal (PW-10), working in the Officer of ASP, Shimla. Contraband substance was sent to the Forensic Science Laboratory, Junga, for analysis, through Constable Kishori Lal (PW-3). Report of the Laboratory (Ex.PY) revealed the contraband substance to be Charas. On completion of investigation, which prima facie revealed complicity of the appellant and his co-accused in the alleged crime, challan was presented in the Court for trial.

4. All the accused persons, were charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 12 witnesses and statements of the accused persons, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded. All the accused, though admitted their presence on the spot, pleaded false implication.

6. Based on the testimonies of the witnesses and the material on record, trial Court only convicted and sentenced appellant Tapat Bahadur. Remaining co-accused persons (Rajiv alias Sanju, Vinod, Nain Bahadur and Zamil) stand acquitted.

7. We have heard learned counsel for the parties as also perused the record.

8. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: *Brathi alias Sukhdev Singh v. State of Punjab,* (1991) 1 SCC 519).

9. Dharam Parkash (PW-1) categorically states that the vehicle in question was being driven by Sanju, whose friend Vinod was sitting on the front seat and the remaining accused were sitting on the back seat of the car, which was stopped by the police for checking. Witness clarifies that the vehicle was hired by the occupants, as was so disclosed by them to the police. But then which one of the occupants, he does not state. He also states that the occupants of the vehicle had not informed the police that the bag belonged to the driver or his friend. He categorically states that the bag was found concealed under the driver's seat. In his testimony, there is nothing specific qua the present appellant.

10. Sanjeev Sood has not supported the prosecution and was extensively cross-examined by the Public Prosecutor. However, with regard to complicity of the present appellant Tapat Bahadur, he has not disclosed anything, save and except, recording presence on the spot, which fact, in any case, is not in dispute.

11. Thus from the testimony of independent witnesses, it cannot be proved that the bag, from which charas was recovered, belonged to appellant Tapat Bahadur.

12. Now, this brings us to the testimony of the police officials present on the spot.

13. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

14. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

15. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

> [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

16. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

17. Harjit Singh categorically states that the vehicle in question was stopped for checking. At that time, all the accused persons were sitting in the vehicle. Rajiv alias Sanju

was on the wheels, whereas Vinod Kumar was sitting on the front seat and the remaining three accused persons were sitting on the rear seat. He specifically does not state who was sitting in the centre or on the sides. He further states that upon checking the vehicle, a bag, kept under the driver's seat, was recovered, which contained Charas, in the shape of Damru. This was in the presence of witnesses Sanjiv Sood and Dharam Parkash. On weighment, Charas was found to be 1.850 kgs, which was seized and sealed with seal impression 'T'. NCB form (Ex. PW-8/B) was filled up on the spot. Also, Ruka (Ex. PW-7/A) was sent to the Police Station. All the accused persons were arrested on the spot and informed of their rights. Witness states that during interrogation, it so revealed that Charas was brought by Tapat Bahadur and he had negotiated with Nain Bahadur and Zamil, who further had conversation with Rajiv. Now, this version of his is mere exaggeration and improvement. We find testimony of the witness not to be inspiring in confidence at all. Where did Tapat Bahadur bring the charas from, has not been disclosed. Why was the investigation not taken to the source? All this remains unexplained, rendering such version to be further doubtful, if not false. There are improvements, exaggerations and embellishments. The witness admits absence of any reference to the weighing scales in his previous statement. Also, there is no reference of either Zamil or Tapat Bahadur indulging in the trade of contraband substance. Crucially, witness admits that when the vehicle was checked, all the passengers were standing outside. The only incriminating evidence, in his version, against Tapat Bahadur is that "when I asked the occupants of the vehicle about the bag, Tapat Bahadur told that it belonged to him", but then this version has come out, for the first time, in Court, as the witness admits it not to be there in his previous statement, so recorded under the provisions of Section 161 of the Code of Criminal Procedure and corroborated by any evidence. Significantly, Ruka (Ex. PW-7/A), FIR (Ex. PW-9/A) and Special Report (Ex.PW-5/A) do not record such fact. What is recorded is only that Tapat Bahadur was sitting immediately behind the driver's seat. Now, it is not the case of the prosecution that the co-passengers, during investigation, had revealed that the bag either belonged to or was concealed by Tapat Bahadur. It is also not the case of prosecution that Tapat Bahadur was holding the bag. In fact, it is the positive case of the prosecution that the bag was concealed underneath the driver's seat. It is also not the case of prosecution that the passengers sitting on the rear seat could have seen the same. If at all, anyone was accusable, it was the driver, who incidentally was also the owner of the vehicle. Thus, this version is absolutely uninspiring in confidence.

18. HHC Ram Lal also categorically does not state that the bag, from which Charas was recovered, belonged to Tapat Bahadur or was so concealed by him. In fact, he is categorical that "the passengers sitting on the back seat, did not say that the bag did not belong to them and it belonged to the driver".

19. Though it stands established that at the time when the vehicle was checked, all the accused persons were travelling together, but however, none has come forward to establish that the vehicle was either hired by Tapat Bahadur alone or that the passengers sitting on the rear seat were his relatives, friends, acquaintances or business associates. Prosecution also has not been able to establish that the bag in question was concealed by Tapat Bahadur or that it belonged to him. Then how can it be presumed that recovery was effected from the conscious possession of the appellant. There is no past history of appellant Tapat Bahadur being involved in any crime. He was also not under any suspicion. Police party was not suspecting any trafficking of the contraband substance at the relevant point in time. Also the area in question is not prone to trafficking of such substance.

20. It is in this backdrop the Court below erred in relying upon Ruka (Ex. PW-7/A), wherein it is recorded that Tapat Bahadur was sitting immediately behind the driver's

seat, hence, he was in the control and supervision of the bag (Ex. P-2). Trial Court erred in invoking the statutory presumption of having recovered the contraband substance from his conscious possession. Trial Court also erred in relying upon the provisions of Sections 7 & 8 of the Indian Evidence Act, while coming to the conclusion that admission so made by Tapat Bahadur before the Police officer, not being a concession, was admissible in evidence. Admission of ownership of bag, before the Police Officer, was absolutely inculpatory, and hit by statutory provisions, which, in any case, we do not find to be inspiring in confidence. Action, if any, had to be taken against the owner/driver and no appeal of acquittal stands filed against him.

21. Charge against the accused is not under the provisions of Section 29 of the Act. In any event, in *Balkar Singh v. State of Haryana,* (2015) 2 SCC 746, Hon'ble the Supreme Court of India held that one alleged conspirator cannot be convicted if all co-conspirators are acquitted. Under these circumstances, conspiracy would remain unestablished.

22. In view of the aforesaid discussion, thus, it cannot be said that the prosecution, by leading clear, cogent, convincing and reliable piece of evidence, has been able to establish, beyond reasonable doubt, recovery of the contraband substance from conscious possession of the appellant.

23. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of appellant Tapat Bahadur.

24. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 17.5.2011/20.5.2011, passed by Special Judge, Fast Track Court, Shimla, Himachal Pradesh, in Sessions Trial No.6-S/7 of 2010, titled as *State of Himachal Pradesh v. Rajiv alias Sanju & others,* is set aside and appellant Tapat Bahadur is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited by the appellant, be refunded to him accordingly. Release warrants be immediately prepared. Appeal stands disposed of, so also pending application(s), if any.

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

Sunehru Devi (Now deceased) through LRs and others — Appellants.

Versus

Pohlo Ram and another — Respondents.

RSA No. 509 of 2002.
Reserved on: 16.5.2015.
Date of decision: 25.5.2015.

Specific Relief Act, 1963- Section 38- Plaintiff sought a relief of permanent prohibitory injunction claiming that he had constructed a work shed (Reniali) for the work of Iron smith-defendant No. 1 dismantled the wall of the work shed and threw the material from the land-held, that when the plaintiff had admitted that he was dispossessed from the suit land by dismantling his work shed and his material was thrown out, he was out of possession, he could not have sought the relief of injunction as necessary requirement for granting the relief of injunction is possession which is not established. (Para-7)

Limitation Act, 1963- Article 65- Plaintiff claimed to be a non-occupancy tenant –he also claimed to have become owner by way of adverse possession- held, that pleas taken by the plaintiff were contradictory - plaintiff had not specified the date of commencement of his possession with necessary animus – hence his plea of becoming owner by operation of law was not acceptable. (Para- 8 to 11)

For the appellant: Mr. Raman Sethi, Advocate.
For the respondent No.1: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant appeal is directed against the judgment and decree, rendered on 4.6.2002, in Civil Appeal No. 125 of 1995 by the learned District Judge, Bilaspur, H.P., whereby, the learned First Appellate Court had partly allowed the appeal filed by the appellant/plaintiff whereby the suit for permanent injunction seeking to restrain the defendants from interfering in the suit land till such time he is evicted in due course was decreed. However, the plaintiff's suit for the alternative relief of possession and for declaration was dismissed.

2. The facts giving rise to the present case are that the plaintiff had filed a suit for permanent prohibitory injunction and also in the alternative for possession with the averments that the plaintiff is in possession of the land measuring 2 biswas comprised in Khasra No. 118 min, Khewat Khatoni No. 5/8 situated in village Bhatoli, Pargana Ajmerpur, Tehsil Ghumarwin, District Bilaspur, H.P. as Gair Morusee (non occupancy tenant). The plaintiff has constructed the work shed 'Reniali' for the work of Iron smith over the suit land. On 19.6.1989 the defendant No.1 forcibly came into the suit land and dismantled the walls of the workshop and also thrown the material which was kept over the suit land.

3. Written statement-cum-counter claim filed on behalf of the defendants. The preliminary objection of maintainability, misjoinder and non joinder of necessary parties, locus standi, estoppel and cause of action were taken. On merits, it is stated that the defendants are in possession of the suit land and they are recorded owners of the suit land. The entries showing the plaintiff as Gair Maurusee (Bila Lagan Babaja Khidmat Pessa) over the suit land are wrong, illegal and contrary to the spot. By way of counter claim, it is contended that the defendants are owners in possession of the suit land and the revenue entries showing the plaintiff as non occupancy tenant over the suit land are totally wrong. It is alleged that the plaintiff has got these wrong entries incorporated in his name in the revenue record in connivance with the revenue staff.

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

1. Whether the plaintiff is in possession of the suit land as non occupancy tenants? OPP.
2. Whether the defendants are interfering in the possession of the plaintiff over the suit land? OPP.
3. Whether the plaintiff is entitled to the possession of the suit land if dispossessed from the suit land during the pendency of the suit by dismantling the construction? OPP.

4. Whether the plaintiff has no locus standi to file the present suit, as alleged, OPD.
5. Whether the plaintiff is estopped to file the present suit by his own acts, conducts, omissions and commissions? OPD.
6. Whether the suit is not properly valued? OPD.
7. Whether the plaintiff has no cause of action? OPD.
8. Whether the defendants are in possession of the suit land, as alleged? OPD.
9. A. Whether the plaintiff has become owner of the suit land by way of adverse possession? OPP.

   B. Whether the defendants are owners in possession of the suit land, as alleged? OPD.
10. Whether the defendants are entitled to a decree of declaration? OPD.
11. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court had dismissed the suit of the plaintiff and the learned District Judge, Bilaspur, had partly allowed the appeal.

6. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court, in, its impugned judgment and decree. When the appeal came up for admission on 29.11.2002, this Court, admitted the appeal on, the hereinafter extracted substantial questions of law:-

1. Whether a party can be permitted to take two diametrically opposite and inconsistent stands and claim to be tenant on one hand and also be allowed to plead that the said part has become owner by way of adverse possession?
2. Whether a suit for permanent injunction can be filed by a party against the true owner when it is not in possession of the land?

***Substantial questions of law No. 1 and 2*.**

7. The plaintiff had constructed a work shed (Raniali) on the suit land for carrying therein the avocation of an iron smith. The aforesaid 'Reniali' raised by the plaintiff over the suit land stood dismantled by defendant No.1 on 19.6.1989. The plaintiff has claimed a decree for permanent injunction restraining the defendant from interfering over/ upon the suit land, in any manner. Besides a decree is claimed against the defendants qua theirs being directed to restore the possession of the suit land to him in the event of his during the pendency of the suit being dispossessed by the defendants. The core relief claimed or asserted by the plaintiff against the defendants was hence primarily of a decree of permanent prohibitory injunction restraining the defendants from interfering in the suit land, besides in the alternative a decree for possession of the suit land in case during the pendency of the suit the plaintiff stands dispossessed by the defendants. Therefore, the graveman of the controversy is anvilled upon the apposite pleadings and apt evidentiary facts unearthing the factum whether the plaintiff has been able to establish the factum of his being in possession of the suit land, for his then being entitled to a decree for injunction

besides his having proved the factum of his having been dispossessed from the suit land during the pendency of the suit by an act of the defendants so as to claim the relief or a decree of possession of the suit land. Obviously, for a decree of injunction being rendered in favour of the plaintiff, the indispensable tenet to be satiated by evidence, is of the plaintiff being in settled possession of the suit land. Besides, for an alternative decree of possession being renderable in favour of the plaintiff, the plaintiff was enjoined to establish that viz.a.viz the defendants he has a superior and better title to the suit land hence even if he stands dispossessed from the suit land, he has a right to reclaim or recover its possession. The factum of the plaintiff being not in possession of the suit land is borne out by an admission of the plaintiff comprised in his examination in chief wherein he has deposed that the defendants dismantled his 'Raniali' besides there is another admission in his cross-examination, of the Reniali/workshop, wherein he performed his avocation as an iron smith, no longer existing at the site, rather it having been dismantled five years prior to the recording of his deposition, on oath. In aftermath, the admissions aforesaid forcefully convey the fact of no 'Reniali' or workshop wherein the plaintiff performed his avocation as an iron smith existing at the site. Besides, there is a revelation in Ext.PA, which is an order imposing fine upon the defendant Sunehru Devi by the Gram Panchayat concerned on its receiving a complaint from the plaintiff attributing therein an inculpatory act to the defendant-Sunehru Devi comprised in hers dismantling the 'Reniali' of the plaintiff existing on the suit property, of hence the defendant Sunehru Devi having been fined for hers having committed an offence under Section 427 of the IPC. However, there is no portrayal therein of the defendant Sunehru Devi having been ordered to restore the possession of the suit land to the plaintiff. Nor there is any evidence adduced by the plaintiff that his possession of the suit land comprised in the existence of an iron shed thereon, which stands dismantled, having been reclaimed by him by his reoccupying the suit land hence warranting this Court to render a decree of injunction, as prayed for. Consequently, when there is abysmal want of evidence, rather when the aforesaid evidence is communicative of the plaintiff by his omitting to reclaim it or his having not reclaimed it, hence his having abandoned possession over the suit land, the refusal by the learned trial Court of a decree of injunction in favour of the plaintiff was legally apt as well as tenable. The first Appellate Court while reversing the decree of the learned trial Court whereby the latter Court dismissed the suit of the plaintiff appears to have formed a conclusion qua the fact of the plaintiff being in possession of the suit land merely on conjectures and surmises, besides on the mere existence of a stray suggestion having been put to PW-2 during his cross-examination by the defendants connoting the factum of acquiescence of the defendants to the permissive possession of the plaintiff over the suit land. The conclusions aforesaid arrived at, by the learned First Appellate Court on mere conjectures and surmises qua the possession of the plaintiff stand to be discountenanced more especially when the said conclusion warrants its being dislodged/displaced, by the existence of potent admissions in the deposition of the plaintiff besides other material as referred to hereinabove, portraying the fact of the plaintiff being extantly not in possession of the suit land, hence when the factum of proven possession over/upon the suit land of the plaintiff would alone entitle him to a decree of permanent prohibitory injunction, its want, necessitated its refusal as tenably done by the learned trial Court and which decree has been untenably accorded by the learned First Appellate Court.

8. The claim of the plaintiff to recover possession of the suit land necessitated adduction of apposite potent evidence and its also carrying probative sinew besides its manifesting the fact that even if he stood dispossessed from the suit land, he had a right to reclaim its possession from the defendants, as he had acquired title to it by adverse possession, as averred in the plaint. Besides a decree for possession was renderable in his favour, in the event of the factum recorded in the apposite jamabandies displaying him to be

a gair marusee tenant qua the suit land, enjoying sanctity, as such, empowering him to assert acquisition of title thereon by operation of law. However, the learned trial Court had dispelled the factum of the plaintiff having lent or adduced strong and potent proof qua his having become owner of the suit land by adverse possession. The pre dominant reason which prevailed upon the learned trial Court for dispelling the factum of the plaintiff having proven the predominant factum of his having become owner of the suit land by adverse possession was harbored upon omission of a communication in his deposition with precision qua the commencement of his possession over the suit land with an animus possidendi, comprised in his act of his having constructed a work shop thereupon. Omission of a communication with precision qua the exact time of his having commenced possession of the suit land with the requisite animus possidendi gives latitude to the inference that his deposition is nebulous, shaky and infirm for fostering thereupon an apt conclusion qua the precise time when he entered possession upon the suit land with an animus possidendi so as to, as a corollary reckon therefrom the elapse of the statutorily ordained period of time for rendering him capacitated to be construable to be owner thereof by prescription.

9. The learned trial Court had struck an issue qua the factum of the validity of entries in the revenue record depicting the plaintiff as a gair marusee tenant. The findings returned on the said issue by the learned trial Court were against the plaintiff. The plaintiff had asserted acquisition of title to the suit land by way of adverse possession, as also with his being, in the apposite revenue entries qua the suit land comprised in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 displayed therein to be a non occupancy tenant qua the suit land, rendered him empowered to foist a claim qua his having become owner of the suit land by operation of law.

10. Significantly, the tenacity of the revenue entries of the aforesaid apart, his plea of his having become owner of the suit land on the strength of the revenue entries personifying him and depicting him to be a gair marusee tenant under the defendants/landowners rendering him legally fit to claim vestment of title by operation of law and the alternative plea of his having become owner of the suit land by way of adverse possession, are mutually antithetical besides inconsistent pleas. Both erode and whittle down the effect of the other. Predominantly, the factum of occurrence of an entry in the relevant revenue record displaying the plaintiff to be a gair marusee tenant qua the suit land under the land owners, whereupon he anvilled a claim of his having become its owner by operation of law, is necessarily built upon a bilateral contract inter se the landlords and the tenant or the entries aforesaid pre suppose the germination of or coming into existence of a valid relationship of landlord and tenant interse the contesting parties. While canvassing the said plea there is an apparent acquiescence by the plaintiff, of the defendants landlords being the owners of the suit land and his possession under them being in his capacity as a tenant. However, he in derogation to his admitted and accepted status as a tenant under the defendants landlords qua the suit land has proceeded to assert his having acquired title over/upon the suit land by way of prescription arising from efflux of time. Obviously, then he erodes the effect of besides benumbs the effect of the entries in the revenue record portraying him to be a gair marusee tenant qua the suit property under the defendants/landlords.

11. Also concomitantly he while canvassing an assertion of his having acquired title to the suit land by way of adverse possession afflicts it with the malady of its starkly contradicting his primarily plea of his while being recorded as a gair marusee tenant qua the suit land under the defendants/landlords, its ownership stands by operation of law vested in his favour. Both pleas being mutually destructive erode and whittle down the effect of the other. They render the plaintiff incapacitated and disempowered to sustain and establish

each of the alternative yet mutually destructive and erosive pleas. Apart therefrom, dehors the plaintiff having canvassed mutually destructive pleas which mutually emasculate each other, the factum of existence of entries in the jamabandis apposite to the suit land connoting the plaintiff to be a gair marusee tenant over the suit land under the defendants land owners, too would gain succor and would attract truth only in the event of it having been established by cogent evidence that the entries in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 aforesaid in succession to the reflection in Ext.P-5 wherein the predecessor-in-interest of the defendants is recorded owner in possession of the suit land stood incorporated in substitution to the preceding entries comprised in Ext.P-5, only in pursuance to orders rendered by the competent revenue authorities.

12. However, in the face of no evidence having been adduced qua orders having been rendered by the competent revenue authority for effectuating substitution of entries in Ext.P-5 by entries in Ext.P-1, P-2, P-4, P-6 and Ext.P-7, renders the entries in the Jamabandies prepared subsequent to Ext.P-5 to be hence recorded or incorporated without the authority of law and as such construable to be nonest. Consequently, the presumption of truth hence attracted or enjoyed by revenue entries comprised in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 displaying the plaintiff to be gair marusee tenant over the suit land stands whittled down. In sequel, there is no right in the plaintiff to canvass that his being recorded as a gair marusee tenant therein he has a right in law to claim or assert vestment of title in the suit land in him by operation of law. Moreover, there is no evidence portraying the factum of the entries comprised in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 having been preceded by rendition of an order for attesting mutation in favour of the plaintiff as a gair marusee tenant qua the suit land. Absence of the above evidence not only dispels the factum portrayed therein of the plaintiff being a gair marusee tenant qua the suit land under the defendants/land owners, besides efficaciously rebuts the truth, if any, carried by them.

13. In sequel, the entries in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 then hold no force, also Ext.P-3 which is a Roznamcha Bakiati prepared by the halqa Patwari, which is also not demonstrated to be founded upon an order of the revenue authority nor has been demonstrated to be preceded by a detailed inquiry in which the defendants also participated hence rendering its recitals while being unilaterally incorporated therein in infraction of the principles of natural justice, to be hence nonest and void. In aftermath, even when the plaintiff has been unable to establish the factum of the revenue entries depicting him to be a gair marusee tenant qua the suit land under the defendants to be acquiring any truth of veracity, rather the presumption attracted/attached thereto for the reasons aforesaid facing rebuttal, as such, he is incapacitated to either claim the factum of his being a gair marusee tenant under the defendants qua the suit land, besides he is disempowered to claim vestment of title in him qua the suit land by statutory operation. Naturally then when he has been unable to establish title to the suit land as also when he stands dispossessed from the suit land, he cannot claim a decree for possession qua the suit land. The learned First Appellate Court while, overcoming the effect of the admission in the testimony of the plaintiff personifying the factum of his being no longer in possession of the suit land and thereupon having reversed the judgement and decree of the learned trial Court, comprised in it having relied upon a mere stray suggestion having been put to PW-2 conveying the factum of acquiescence of the defendants to the permissive possession of the plaintiff over the suit land has committed a grave illegality. Obviously then it has proceeded to untenably render a decree of injunction in favour of the plaintiff by imputing unnecessary leverage to the aforesaid factum whereas for reasons assigned hereinabove its effect does stand wholly benumbed and smothered. Besides, the aforesaid discussion unfolds the factum of not only the plaintiff being not entitled to the decree of injunction in the face of his being unable to establish the factum of his being in possession of the suit land the preeminent sine qua non

for rendition of a decree of injunction in his favour. Moreover, in the face of his having not established the factum of his having no lawful title to the suit land for entitling him to claim recovery or restoration of the possession of the suit land, rather with it having been forcefully established that the entry in Ext.P-5 while having been substituted by unwarranted entries in the subsequent jamabandies holds the field, wholly dis-empowers him to also claim possession as well as ownership of the suit land. Now with Ext.P-5 reflecting the predecessor in interest of the defendants as owner they hence stand entitled to the suit land. The judgement and decree of the learned trial Court is maintained and affirmed and the judgement of the learned First Appellate Court is set-aside. Consequently, the suit of the plaintiff is dismissed and the substantial questions of law are answered in favour of the defendants/appellants. Records be sent back forthwith. 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.

Devta Balu Nag Ji ...Appellant.
Versus
Devta Shring Rishi Ji & others ...Respondents.

LPA No. 422 of 2012
Decided on: 26.05.2015

Constitution of India, 1950- Article 226- Appellant was not a party before the Writ Court and had not filed any application seeking leave to appeal- held, that leave can be granted to 3rd party provided it carves out a case to the effect that the judgment is prejudicial to its rights and interests- since no such case was made out therefore, writ Petition dismissed as not maintainable. (Para-1 to 3)

For the appellant: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. O.P. Sharma, Senior Advocate, with Mr. Naveen K. Dass, Advocate, for respondents No. 1 to 3 and 5.
Name of respondent No. 4 stands deleted.
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. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The appeal, on the face of it, is not maintainable for the simple reason that the appellant was not a party in the lis before the Writ Court in CWP No. 3757 of 2011-D, titled as Devta Shring Rishi Ji and other versus State of Himachal Pradesh and others and has not applied for grant of leave to file appeal, not to speak of carving out a case for grant of leave.

2. It is a beaten law of land that leave can be granted to a third party provided it carves out a case to the effect that the impugned judgment is prejudicial to its rights and interests.

3. The Writ Court in para 2 and the last para of the impugned judgment held that it has not determined the rights of the parties by the medium of the impugned judgment. However, the Writ Court has observed that the Deputy Commissioner's communication, dated 01.10.2008 is taking care of the grievances of the writ petitioners. It is apt to reproduce para 2 and the last para of the impugned judgment herein:

> *"2. In this writ petition, I do not intend to adjudicate upon the rights of each and every deity or individual but only the participation of the petitioner deity in the Kullu Dussehra festival which is of International fame.*
>
> *.....*
>
> *In these circumstances, this Court sees no reason as to why this practice should not be followed in letter and spirit, which should take care of all the grievances of the petitioners. It is directed accordingly. This order does not determine or circumscribe the right of any other participant in the festival."*

4. In the given circumstances, appeal merits to be dismissed. However, the appellant is at liberty to challenge the communication, dated 01.10.2008 (Annexure P-1 to the writ petition), if aggrieved and advised.

5. The appeal is dismissed as such alongwith all pending applications.

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

Sudesh Kumar ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.21 of 2012
Reserved on : 5.5.2015
Date of Decision : May 26, 2015

Indian Penal Code, 1860- Sections 341, 506 and 376- Prosecutrix was going to her home- accused met her on the road and raped her- incident was narrated by her to her parents who reported the matter to Pardhan- Pardhan called accused and his parents- his father and brother came and expressed their regrets- even if it is assumed that accused and prosecutrix knew each other and were in love with each other that would not give a licence to the accused to sexually assault the victim- testimony of prosecutrix is sufficient to convict the accused if it inspires confidence- matter was reported to the police promptly- mere fact that victim did not resist due to fear cannot lead to the conclusion of consent. (Para-9 to 26)

Cases referred:

Vinod Kumar v. State of Kerala, (2014) 5 SCC 678
Amar Bahadur Singh v. State of U.P., (2011) 14 SCC 671
Narayan alias Naran v. State of Rajasthan, (2007) 6 SCC 465
Deelip Singh alias Dilip Kumar v. State of Bihar, (2005) 1 SCC 88
Balasaheb v. The State of Maharashtra, 1994 CLJ 3044

Rajesh Patel Versus State of Jharkhand, (2013) 3 SCC 791
State of Rajasthan Versus Babu Meena, (2013) 4 SCC 206
Narender Kumar Versus State (NCT of Delhi), (2012) 7 SCC 171

For the Appellant : Mr. S.D. Gill, 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 Sudesh Kumar, hereinafter referred to as the accused, has assailed the judgment dated 31.12.2011, passed by Additional Sessions Judge-I, Kangra at Dharamshala, Himachal Pradesh, in Sessions Trial No.62-D/2010, titled as *State of Himachal Pradesh v. Sudesh Kumar*, whereby he stands convicted of the offences, punishable under the provisions of Sections 341, 506 and 376 of the Indian Penal Code and sentenced as under:

Section	Sentence
341 IPC	Rigorous imprisonment for a period of one month and fine of Rs.500/- and in default of payment thereof to further undergo simple imprisonment for a period of one month.
506 IPC	Rigorous imprisonment for a period of one year and fine of Rs.2,000/- and in default of payment thereof to further undergo simple imprisonment for a period of three months.
376 IPC	Rigorous imprisonment for a period of ten years and fine of Rs.20,000/- and in default of payment thereof to further undergo simple imprisonment for a period of six months.

All the sentences have been ordered to run concurrently. Out of the fine amount, so imposed by the trial Court, an amount of Rs.15,000/-, on realization, has been ordered to be paid, as compensation, to the prosecutrix.

2. It is the case of prosecution that prosecutrix (PW-14), resident of Jhikar, was running a tailoring and beauty parlour in village Gharoh. On 21.8.2010, after closing her parlour, while she was returning home, at about 6.15 p.m., accused met her at Murad Gohar and disclosed his liking for her. Also, he prevented her from going home and on the spot forcibly subjected her to sexual intercourse. Finding the prosecutrix not to have returned home, since it was raining heavily, her mother Reeta Devi (PW-2) and father Prem Chand came to search for her. On way, they met the prosecutrix, who disclosed the entire incident to them. The matter was immediately brought to the notice of Pradhan Urmila (PW-1), who called the accused and his parents. Though accused did not come, but his father and brother came and expressed their regrets. The matter was immediately brought to the notice of the police. On the basis of complaint (Ex. PW-14/A), police registered FIR No.208,

dated 22.8.2010 (Ex. PW-15/A), under the provisions of Section 376/341/506 of the Indian Penal Code, at Police Station Dharamshala. Prosecutrix was got medically examined at the Government Hospital, Dharamshala. Dr. Shalini Gautam (PW-7), who conducted the medical examination, issued MLC (Ex. PW-7/B). Investigating Officer, Narain Singh (PW-15), conducted investigation on the spot. He took into possession clothes of the prosecutrix as also other incriminating articles. Report of the Forensic Science Laboratory, with respect to the vaginal swab and the clothes was obtained by the police. With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed offences, punishable under the provisions of Sections 341, 506 and 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 15 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he pleaded innocence and took the following defence:

> "PW 1 Urmila Katoch Pradhan and parent of the prosecutrix have prepared a false case. Because the parents of Prosecutrix are working in the house of Pradhan. Therefore they alongwith police have prepared false case."

5. Based on the testimonies of the witnesses and the material on record, trial Court convicted the accused of the charged offences and sentenced him, as aforesaid.

6. Learned counsel for the appellant has assailed the judgment on the following counts, (i) accused and the prosecutrix were known from before and the act is consensual in nature, (ii) prosecution has concealed relevant material from the Court, as call logs of the mobile number of the prosecutrix would have revealed proximity between the two, and (iii) testimony of the prosecutrix is absolutely uninspiring in confidence. In fact, she has falsely deposed before the Court and as such accused only merits acquittal. He has referred to the following decisions:

1. *Vinod Kumar v. State of Kerala,* (2014) 5 SCC 678;
2. *Amar Bahadur Singh v. State of U.P.,* (2011) 14 SCC 671;
3. *Narayan alias Naran v. State of Rajasthan,* (2007) 6 SCC 465;
4. *Deelip Singh alias Dilip Kumar v. State of Bihar,* (2005) 1 SCC 88; and
5. *Balasaheb v. The State of Maharashtra,* 1994 CLJ 3044.

7. Learned Additional Advocate General has supported the findings of fact and judgment, so rendered by the trial Court.

8. Having heard learned counsel for the parties, we are of the considered view that no case for interference is made out.

9. We find the testimony of the prosecutrix to be absolutely inspiring in confidence. In this backdrop, we do not find any merit in the submission of learned counsel that the investigating agencies had concealed relevant material from the Court. In any case, plea is based on suspicion and not fact, much less proven. Call logs would have only revealed proximity between the accused and the prosecutrix. Assuming hypothetically that they knew each other from before, or for that matter were even in love with each other, that fact would not be construed to be a licence to sexually assault the victim. Prosecution, through reliable and creditable piece of evidence is duty bound to establish the incident of sexual assault. If testimony of the prosecutrix is found to be inspiring in confidence,

evidence of call logs would pale into insignificance. In any event, accused has not led any evidence in his defence to establish such fact. On the contrary, accused has tried to impeach the character of the prosecutrix, as is evident from the cross-examination of the prosecution witnesses.

10. In Court, prosecutrix states that on 21.8.2010, while she was returning from village Murad Gohar to Jhikar, accused met her near the Pulli (culvert) at Murad Gohar. He enquired and she replied that she was going home. He asked her to stop. Accused, who was drunk, said that he liked her and wanted to marry her, to which she responded that she would talk lateron and asked him to let her go. However, for about 15-20 minutes, accused prevented her from going home. She got frightened and took out her mobile phone from her bag, which was also thrown away by the accused. When she raised hue and cry, accused caught her from the throat and also started intimidating her. He threatened to kill her. Accused took her to the bushes and raped her. Thereafter, he threatened her not to disclose the incident to anyone. Since she had got late, her parents came searching for her, whom she met on the way and disclosed the entire incident. Thereafter, they went to the house of the Pradhan, who called the accused and his father. Though accused did not come, but his father and brother came and felt sorry. On her asking complaint (Ex.PW-14/A) was lodged with the police. This is all that she states in her examination-in-chief.

11. It is a settled principle of law that testimony of prosecutrix is sufficient enough to convict the accused if it inspires confidence. (See: *Rajesh Patel Versus State of Jharkhand,* (2013) 3 SCC 791 and *State of Rajasthan Versus Babu Meena,* (2013) 4 SCC 206).

12. The Court is duty bound to appreciate the evidence in the totality of the background of the entire case. It is also settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected. The apex Court in *Narender Kumar Versus State (NCT of Delhi),* (2012) 7 SCC 171, has held as under:-

> "20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.
>
> 21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: *Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.*, (2003) 3 SCC 175; and *Vishnu v. State of Maharashtra,* (2006) 1 SCC 283.
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> 22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version

may be otherwise, no reliance can be placed upon her evidence. (Vide: *Suresh N. Bhusare & Ors. v. State of Maharashtra*, (1999) 1 SCC 220.

23. In *Jai Krishna Mandal & Anr. v. State of Jharkhand*, (2010) 14 SCC 534, this Court while dealing with the issue held:

> "4….the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

24. In *Rajoo & Ors. v. State of Madhya Pradesh*, (2008) 15 SCC 133, this Court held: (SCC p. 141, para 10)

> "10….that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."
>
> The court however, further observed:
>
> "11…….It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication….. there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

25. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, this Court held has under:

> "9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

26. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: *State of Maharashtra & Anr. v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57; *State of Punjab v. Gurmit Singh & Ors.,* (1996) 2 SCC 384; and *State of U.P. v. Pappu @ Yunus & Anr.*, (2005) 3 SCC 594.

27. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.

28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant

discrepancies in the evidence of witnesses which are not of a substantial character.

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: *Tukaram & Anr. v. The State of Maharashtra,* (2979) 2 SCC 143; and *Uday v. State of Karnataka*, (2003) 4 SCC 46.

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

31. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of."

13. Now, when we examine the cross-examination part of her testimony, we find her credit not to be impeached. Her testimony is clear, cogent and consistent. We find her version to be absolutely inspiring in confidence. It has come on record, which fact she also does not deny that her father had lodged a report with the police that she had been found missing from her home, but then, this was in the year 2006 and not 2010. The fact that she had opened a parlour in village Murad Gohar is not disputed by the accused, which fact is, in any way, evident from her testimony. She explains that she was dragged by the accused in a standing position. She clarifies that "*the accused had slightly pressed my throat and threatened me. It is incorrect that accused had pressed my throat so I could not speak".* This explains the reason of absence of any injury marks on her face or throat or any other part of her back. We find that she did resist the acts of the accused, but eventually under threat of life, gave it up.

14. Painstakingly, Mr. S.D. Gill has taken us through the following part of her testimony to throw light that it is a case of consent:

> "…….*It is incorrect that I had been asked to state the above things for the first time today in the court. It is correct that after I was laid down on the ground the accused opened the string of my salwar and came near to me. I had not bitten the accused with my teeth or scratched him with my finger, as I*

was frightened. I cannot tell as to how much time taken by the accused in removing my salwar. The accused had also removed the undergarment. I had not struggled or scratched the accused when he removed my undergarment. Volunteered that I was weeping at that time. It is correct that when the accused tried to rape me, I closed my legs together so that accused may not rape. Thereafter, the accused forcefully opened the thighs with his hands. I cannot tell as to how much time accused took in forcefully opening the thighs. Thereafter I did not close my legs. It is correct that I had not given the above facts in detail in my complaint to the police. I cannot tell as to how much time the accused took in committing the rape."

15. We are in total disagreement with the learned counsel on this count. She has explained the reason of not continuing with her resistance. She was weeping and the accused, without her consent, for satisfying his lust and desire, subjected her to sexual intercourse.

16. We find her version to have been corroborated by her mother Reeta Devi (PW-2) as also Pradhan Urmila Katoch (PW-1).

17. Yes, these are main contradictions. We find in the testimony of Reeta Devi, there is denial of lodging of missing report in the year 2006. But then, this fact alone would not shatter the prosecution case or for that matter render the testimony of the prosecutrix, or her mother, to be doubtful. Parties hail from rural background and it is not that the mother had lodged the report. Benefit of loss of memory, on account of passage of time, has to be accorded to her. Also Pradhan Urmila states that the place where the prosecutrix was dragged, bushes were broken, which fact the Investigating Officer has not been able to highlight. But then, this fact would not render the prosecution case to be doubtful, for on material aspect, prosecution case stands totally established on record and beyond reasonable doubt.

18. We find that there is no delay in lodging the FIR. The very same day, the incident was reported to the Pradhan and then to the police. It is not a case of due deliberations or false implication. It is also not the case of the accused that the prosecutrix subjected him to blackmail.

19. Dr. Shalini Gautam (PW-7), who examined the prosecutrix, on local examination observed as under and found the following injuries on her body:

"1. Abrasions red in colour multiple in number over wrist forearm right arm right foot,

2. Multiple abrasion seen on the middle part of right side back,

3. One abrasion over upper part of left breast.

Local Examination:

1. Red coloured around 5 c.m. long abrasion present over the left groin. No other injury mark seen over thighs and private parts.

2. Pubic hairs present, pubic hair not matted and pubic hair clipping taken sealed and packed. Dried grass pieces seen over the perineal.

3. P/S (Per speculum) examination showed ton taggs of hymen. (carunculae hymenalis) Brownish coloured secretions seen in the vagina. Cervix healthy. Swab taken from the vagtina, posterior fornix and cervical canal. Two slides prepared from the vagina and posterior fornix.

4. Per veginal examination: two fingers easily admitted. No local tenderness uterus anteverted normal size and bilateral fornices clear.

Nature of Injuries:

2. Injuries 1 to 3 were simple in nature, caused approximately more than six hours. Referred for age verification. .....

Opinion

In my opinion it cannot be ruled out that sexual intercourse has not taken place based on physical findings, final opinion to be given after report from FSL."

20. Age of the prosecutrix is between 17 and 19 years, whereas accused was aged 24 years as on the date of commission of crime. On account of intimidation and threat to her life, she was not able to resist the overt acts of the accused. Also her body structure is frail, whereas accused is an able bodied man.

21. Absence of injury marks on the back side of the prosecutrix would also not render her testimony to be uninspiring in confidence. How a person would respond to the threats would depend from case to case. It is neither the requirement of law nor that of medical jurisprudence that in every case of sexual assault, so committed in a jungle/open place, victim must, under all circumstances, sustain injuries. Reaction of a victim is dependent upon various attending circumstances, including the nature of threat to her life. Initially, in the instant case, victim did raise noise, but then none could have come forward to help her, for it is not the case of the accused that there were houses/habitation nearby. It is also not the case of the accused that the path where the alleged offence took place was common and frequently used by passersby.

22. For the benefit of the accused, it be only observed that the scientific evidence does not establish complicity of the accused, but then it is not the law that the accused is to be co acquitted solely on this ground. Laboratory could not conclusively establish presence of semen on the vaginal swab, as it was insufficient for examination.

23. We find testimony of the prosecutrix to be absolutely inspiring in confidence. There is no prior animosity between the complainant and the accused or a reason sufficient enough for the prosecutrix to have falsely implicated the accused.

24. Alleged immoral character, so imputed from the circumstance of the prosecutrix of having left the house of her parents, way back in the year 2006, by no stretch of imagination, would render the prosecution case to be false or testimony of the prosecutrix to be impeachable.

25. In *Vinod Kumar (supra)*, the Court was dealing with the case where the parties had expressed their desire of getting married and only thereafter they indulged in sexual activity. In *Amar Bahadur Singh (supra),* the Court was dealing with the case where the prosecutrix was caught, having sexual act, in her own house, in the presence of her children. In *Narayan (supra)*, the Court was dealing with a case where testimony of the prosecutrix was not found to be inspiring in confidence. In *Deelip Singh (supra)*, the Court itself has clarified that consent given, under fear or injury, is not consent at all. In fact there is consent between "consent" and "submission". The Court clarified that consent or absence of it could be gathered from attending circumstances. Previous, contemporaneous or subsequent act would be relevant.

26. 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.

27. 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.

28. 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 TARLOK SINGH CHAUHAN, J.

Smt. Sunita Kumari ...Appellant

Versus

Bhumi Chand ...Respondent

FAO (HMA) No. 41 of 2014
Reserved on 21.5.2015
Date of decision: 26.5.2015

Hindu Marriage Act, 1955- Section 13(1) (ia) (ib)- Wife started residing in the house of her parents- a compromise was effected- husband went to bring her back but she did not return- husband was serving in the army - he suffered a stroke of paralysis but wife did not visit home to care for him- wife claimed that she and her child were forced to reside in her parental home- wife had gone to Hamirpur to get her son educated and had agreed to return to her matrimonial home after the conclusion of examination- she instead went to her parental home - she had not complied with the decision of the Panchayat – she claimed maintenance from the Army Authority- she had not visited her husband even when he had suffered paralytic stroke- all this showed that intention of the wife was to harass her husband- held, that in these circumstances, husband was rightly held entitled for divorce.

(Para-17 to 24)

Case referred:

K. Shrinivas Rao Vs. D.A. Deepa, (2013) 5 SCC 226

For the Appellant: Mr. S.D. Gill, Advocate.

For the Respondent: Mr.K.D. Sood, Senior Advocate with Mr.Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The appellant is aggrieved by the order passed by learned District Judge, Hamirpur, on 24.12.2013, whereby the marriage between the parties was ordered to be dissolved under Section 13(1) (ia) (ib) of the Hindu Marriage Act.

2. The brief facts of the case as per the respondent (who was the petitioner before the Court below) are that the marriage between the parties was solemnized on 28.7.2002 in accordance with Hindu rites and customs. One son, namely, Suraj was born out of the wedlock. The appellant began to reside in the house of her parents and thereafter a compromise was affected between the parties at the instance of Pradhans of the respective Gram Panchayats. As per the compromise effected on 11.3.2010, parents and relatives of the respondent along with Pradhan Urmila Devi and other villagers went to the parental house of the appellant to bring her back to her matrimonial house, but she did not join her matrimonial home.

3. The respondent was serving in the Army and suffered a stroke of paralysis, due to which he was admitted in the Army hospital, but the appellant did not even care to see, much less look after him. He was discharged from the hospital on 19.1.2011 and thereafter on 24.10.2011 came to his home after availing leave and sent a message to the appellant through his father. But, even then the appellant refused to come to the house of the respondent. It was alleged that no cohabitation has taken place between the parties since March, 2010 and the appellant has not only deserted the respondent, but also treated him with cruelty.

4. The appellant opposed the petition by filing reply, wherein preliminary objections regarding maintainability and estoppel were raised. On merits, the appellant denied the allegations that she had treated the respondent with cruelty or had deserted him as alleged. Her specific stand was that the respondent and his family members had forced the appellant and her minor child to live in her parental house, through she was ready to join the company of respondent at anytime and anywhere and it was the respondent who was not interested to keep her with him and therefore, had neglected to maintain her. It was for this reason that the maintenance of Rs.5670/- per month was being paid to her by the Military Authorities. It was further alleged that prior to the year 2010 the appellant resided at Hamirpur with the consent of the respondent because their son was studying at DAV School, Salasi, but later on all the house hold luggage was removed by the respondent and his family members from the rented accommodation, in which the appellant was residing. The appellant in such circumstances has no other option, but to live in her parental house. Such luggage was finally removed by mother-in-law of the appellant forcibly on 12.3.2010.

5. The appellant further denied the so called compromise and it was alleged that some persons from the side of respondent had come and discussed the matter, but they simply disclosed that the respondent would consume poison and end his life in case the appellant comes to her matrimonial house. It was thereafter pleaded that the appellant was ready to return to her matrimonial house and fulfill all the obligations, if she is allowed to live in the matrimonial home with proper dignity. It was further alleged that the respondent never disclosed to the appellant that he had suffered from paralytic attack and had remained admitted in Army Hospital, due to which the appellant was not in a position to have any access at the place of posting of the respondent.

6. The learned Court below on 28.12.2012 framed the following issues:-

"1. Whether the respondent has subjected the petitioner with cruelty as alleged? OPP

2. Whether the respondent has deserted the petitioner as alleged? OPP

3. Whether the petitioner is estopped from filing the present petition by his act and conduct? OPR

4. Relief."

7. After recording the evidence and evaluating the same, the learned Court below allowed the petition and ordered the dissolution of the marriage by passing a decree for divorce on the ground of cruelty as also desertion. It is against this order that the present appeal has been filed.

8. Sh. S.D. Gill, learned counsel for the appellant has vehemently argued that the learned Court below has failed to take into consideration that the appellant was ready to live with her husband and therefore, in such circumstances it would not have been held that the appellant had deserted the respondent. He further contended that the Court below had wrongly relied upon the compromise, whereas no compromise was ever affected between the parties. He also contended that the decree was silent with respect to alimony and maintenance of minor child.

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

9. A perusal of the record would show that the respondent in support of his case had examined in all four witnesses. He appeared as PW-1 and re-iterated the facts as stated in the petition. In his cross-examination he admitted that the appellant had earlier remained at Hamirpur with their son in a rented accommodation. He also admitted that he had removed the luggage from the rented accommodation, but then qualified his statement by saying that the same was removed only after the decision of the Panchayat. He also admitted that the rented accommodation was taken at Hamirpur for the schooling of their child. He denied the suggestion that no compromise had taken place between the parties. However, he did not dispute that Pradhan of his Panchayat was his aunt.

10. PW-2 Urmila Devi is the Pradhan of Gram Panchayat, Sapahal, who deposed regarding the dispute between the parties. She stated that the respondent had filed a complaint in the Panchayat and on the basis of said complaint, the Panchayat had got effected a compromise Ex.PW-2/A between the parties. She stated that the compromise was signed by her and she identified her signatures. She further stated that at the time of compromise the mother of the appellant, Daljit and Gopi etc. and one Up-Pradhan from the side of the appellant was also present. In cross-examination, she admitted that the complaint is not available in the Panchayat record. She also stated that at the time of compromise, the parties were present at the spot, but their signatures were not obtained on the compromise deed. The compromise was written in the house of respondent. She also admitted that the respondent was her nephew.

11. PW-3 Munshi Ram, father of the respondent has corroborated the version of respondent. He further stated that he along with 5-6 other respectable persons of the village had gone to bring back the appellant to her matrimonial house, but she refused to come and was residing separately from the respondent since 2010. In his cross-examination he has stated that one Khiali Ram, his two brothers and some other villagers accompanied him when they had gone to bring the appellant. He also stated that he had not gone to the place

of posting of his son, when he had suffered a paralytic attack. He also stated that he had informed the appellant about the paralytic attack of his son.

12. PW-4 Khiali Ram acknowledged the compromise and also identified his signatures thereupon. He also deposed regarding his having accompanied the father of the respondent to the parental house of the appellant. He stated that the compromise Ex. PW-2/A was written in his presence and bears his signatures. He further stated that when he had accompanied the father of respondent, so as to bring the appellant back to her matrimonial house, the appellant had refused to come. In his cross-examination he stated that compromise Ex. PW-2/A was written in the house of the respondent in the presence of the parties.

13. On the other hand respondent examined three witnesses. She appeared as her own witness as RW-1 and deposed that she along with her minor child was residing in her parental house for the last three years. The reason for the same was that her son was studying at Hamirpur. She further deposed that earlier she had been residing in a rented accommodation at Hamirpur, but her mother-in-law gradually removed the entire luggage from the accommodation and finally on 12.3.2010 after removing the luggage her mother-in-law threatened her with dire consequences in case she returned to her matrimonial house. She further stated that her husband was not paying any maintenance to her, which constrained her to file an application before the Army Authorities and thereafter maintenance to the tune of Rs.5500/- was awarded to her. She further stated that her husband proclaimed that in case she returns to the matrimonial home, then he will commit suicide. She then goes to state that she did not know about the paralytic attack of her husband, as she was not informed by anyone. Her uncle and some other villagers had gone to persuade the respondent, then on the first date he agreed to behave properly, but the next date he began quarrel. He even refused to have intercourse with her. She then stated that she was still ready to reside in the matrimonial house. Her husband has not issued any notice to bring her back to her matrimonial house. She admitted that her son was studying in school in her parental village.

14. In cross-examination the appellant stated that when she remained at Hamirpur, her mother-in-law used to provide maintenance to her. She also admitted that her husband used to provide maintenance to her through his mother. She admitted that on 12.3.2010 a compromise has taken place between the parties. She also admitted that in the compromise, she had admitted that after the examination of her son, she would come back to her matrimonial house, but after the examination, she did not come there and went to her parental house. She also admitted that after the compromise her father-in-law and 3-4 other persons had came to take her back to matrimonial house. She further admitted that after the year 2010, there was no relation of husband and wife between the parties. She also admitted that she had never filed any case against the respondent.

15. RW-2 Rajinder Singh, who is the Up-Pradhan of Gram Panchayat, Panoh, states that at the instance of mother of the appellant he had come to the house of in-laws of the appellant. There they had made both the parties understand because the complaint of the appellant was that whenever she goes to her matrimonial house from Hamirpur, her husband used to leave the house. After persuasion by them, the respondent had agreed that he will not do so in future. He further stated that no written compromise was affected between the parties to this effect. In his cross-examination, however, admitted that the appellant had agreed that now she will live in the matrimonial house. He also stated that after that no complaint from the appellant was received by them.

16. RW-3 Dalgir Chand, who is the uncle of the appellant has deposed on the same lines as RW-2 Rajidner Singh. In his cross-examination he admitted that when they reached the house of in-laws of the appellant, at that time the persons of the Panchayat and other persons from the village were present. He also admitted that both the parties had admitted their guilt.

This is the entire evidence led by the parties.

17. Learned counsel for the appellant has strenuously argued that the mere fact that the parties were living separately would not mean that the appellant had deserted the respondent. He further contended that the reasons for living separately was the education of minor child of the parties and therefore, by no stretch of imagination could it be held that she had either deserted the respondent or had treated him with cruelty. Strong reliance has been placed by him on the judgment rendered by Hon'ble Supreme Court in ***K. Shrinivas Rao Vs. D.A. Deepa,*** *(2013) 5 SCC 226*, more particularly, the following observations:-

> *"**16**. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh Vs. Jaya Ghosh, (2007) 4 SCC 511, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.*
>
> ***27**. We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the respondent wife in her complaint dated 4-10-1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the appellant husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to us to be justified. This complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from the evidence of the mother of the respondent-wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the respondent-wife was anxious to go back to the appellant-husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the respondent-wife has caused mental cruelty to the appellant husband.*
>
> ***28**. Pursuant to this complaint, the police registered a case under Section 498-A of the IPC. The appellant-husband and his parents had to apply for anticipatory bail, which was granted to them. Later, the respondent-wife withdrew the complaint. Pursuant to the withdrawal, the police filed a closure report. Thereafter, the respondent-wife filed a protest petition. The trial court took cognizance of the case against the appellant-husband and his parents (CC No. 62/2002). What is pertinent to note is that the respondent wife filed criminal appeal in the High Court challenging the acquittal of the appellant husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence*

punishable under Section 498-A of the IPC. She filed criminal revision seeking enhancement of the punishment awarded to the appellant husband for the offence under Section 498-A of the IPC in the High Court which is still pending. When the criminal appeal filed by the appellant-husband challenging his conviction for the offence under Section 498-A of the IPC was allowed and he was acquitted, the respondent wife filed criminal appeal in the High Court challenging the said acquittal. During this period respondent-wife and members of her family have also filed complaints in the High Court complaining about the appellant husband so that he would be removed from the job. The conduct of the respondent-wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, in filing appeal questioning the acquittal of the appellant husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the appellant husband.

29. *In our opinion, the High Court wrongly held that because the appellant-husband and the respondent wife did not stay together there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouses life miserable. This is what has happened in this case."*

18. Indisputably, the appellant had initially with the consent of the respondent and his family members gone to Hamirpur to educate their minor child, but later on in terms of compromise Ex. PW-2/A, which was duly been proved on record, the appellant was to join her matrimonial house after the examination of the child were over, but the appellant instead went back to her parental home, never to return.

19. Desertion is a matter of inference and has to be gathered from the surrounding circumstances. It is a condition of mind. It is to be inferred from the course of conduct. In so far as the appellant's act and conduct in failing to return to her husband's house is concerned, obviously the same is entitled to more weight as against her evidence of true intention, and her assurances made in the compromise deed to return to her matrimonial home, which ultimately proved to be false. When the appellant refused to return to the conjugal fold, it would be legitimate to presume that she was no longer ready to keep the marriage intact.

20. The essence of desertion is the backup of the matrimonial home caused by the withdrawal of one spouse. It is the cessation of cohabitation brought about by the failure or act of the deserting spouse. Was there a sincere intention and a bonafide offer on the part of the appellant to join the company of her husband, the records also do not support such version.

21. The appellant instead of joining her matrimonial home returned to her parental house, never to return. She did not comply with the decision of the Panchayat, in terms whereof she had agreed to return to her matrimonial house. She directly claimed the

maintenance from the Army Authorities and despite the respondent having suffered a paralytic attack and being admitted at Command Hospital Calcutta, she did not come to even see him there or even at the village when he had come on leave, that too, despite the fact that she had been informed.

22. The appellant has further made no efforts to resume cohabitation and she has admitted that there is no relationship of husband and wife between the parties since the year 2010. This clearly proves the intention-animus deserendi on the part of the appellant. There is no probable reason why the appellant did not join her matrimonial home, particularly when there is no evidence led by the appellant to the fact that she had ever been treated with cruelty.

23. Now in so far as the contention of the appellant that no compromise had been affected between the parties, suffice it to say that the appellant herself in her cross-examination has admitted that on 12.3.2010 a compromise had been arrived between the parties. She further admitted that in terms of the said compromise she after the examination of her son was to come back to the matrimonial house. Even if, the statement of the appellant is brushed aside, even then, the compromise has been duly proved, not only by respondent, but even by PW-2, Pradhan Gram Panchayat, Sapahal, PW-3 Munshi Ram and PW-4, Khiali Ram, who is the signatory to the compromise.

24. Lastly, in so far as there being no provision for alimony for maintenance of minor child is concerned, admittedly the minor child is not party to the proceedings and even otherwise the law has provided adequate safeguards for protecting the interest of the minor and resort to the same can always be taken by the minor.

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

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

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

Criminal Appeal No. 59 of 2011
Judgment Reserved on : 29.4.2015
Date of Decision : May 26, 2015

Indian Penal Code, 1860- Sections 302, 323, 324, 201, 452 and 506 (II)- Accused gave beatings to his sister who took refuge in the house of his neighbor – accused went to the house of the neighbor and again gave beating to her when another neighbor 'S' tried to intervene - she was also beaten by the accused- accused gave beatings to 'R' and 'K'- accused poured kerosene upon them and set them on fire- testimonies of the witnesses were corroborated by medical officer who stated that deceased had died due to shock caused as a result of 100% burn injuries- held that the accused was rightly convicted. (Para-10 to 13)
Indian Penal Code, 1860- Section 84- Accused claimed that he had no malice against the deceased- accused was a chronic patient of epilepsy and last attack had occurred one day prior to the date of incident- accused was not in a proper state of mind at the time of incident- held, that absence of motive is no ground to discard the prosecution story and

witnesses- mere lack of motive is also not sufficient to establish the unsoundness of mind- medical evidence does not establish the insanity of the accused- version of accused that he suffered from mental disorder was not believable – Doctor admitted that accused had normal behaviour and he was cooperative at the time of examination- hence, his plea of insanity was not established. (Para-14 to 43)

Cases referred:
Sheralli Wali Mohammed vs. The State of Maharashtra, (1973) 4 SCC 79
State of Madhya Pradesh v. Shmadulla, AIR 1961 SC 998
Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563
Elavarasan v. State, represented by Inspector of Police, (2011) 7 SCC 110
Sidhapal Kamala Yadav v. State of Maharashtra, (2009) 1 SCC 124
Hari Singh Gond v. State of M.P., (2008) 16 SCC 109
Bablu alias Mubarik Hussain v. State of Rajasthan, (2006) 13 SCC 116
Shrikant Anandrao Bhosale v. State of Maharashtra, (2002) 7 SCC 748
T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219
State of H.P. v. Gian Chand, (2001) 6 SCC 71; (1974) 3 SCC 299
Sheralli Wali Mohammed v. The Statte of Maharashtra, (1973) 4 SCC 79
Oyami Ayatu v. The State of Madhya Pradesh
Bhikari v. The state of Uttar Pradesh, AIR 1966 SC 1
Amrit Bhushan Gupta v. Union of India and others, (1977) 1 SCC 180
Paras Ram and others v. State of Punjab, (1981) 2 SCC 508
Vijayee Singh and others v. State of H.P., (1990) 3 SCC 190
Bapu alias Gujraj Singh v. State of Rajasthan, (2007) 8 SCC 66
Sudhakaran v. State of Kerala, (2010) 10 SCC 582
Surender Mishra v. State of Jharkhand, (2011) 11 SCC 495

For the appellant : Mr. Vishal Bindra, Advocate for the appellant.
For the respondent : Mr. Ashok Chaudhary, Addl. Advocate General with Mr. V. S. Chauhan, Addl. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Convict Surender Singh (appellant herein), has assailed the judgment dated 31.12.2010/7.1.2011, passed by Sessions Judge, Sirmaur, District at Nahan, Himachal Pradesh, in Sessions Trial No. 02-ST/7 of 2010, titled as *State of Himachal Pradesh vs. Surender Singh,* whereby he stands convicted for having committed offences punishable under the provisions of Sections 302, 323, 324, 201, 452 and 506 (II) of the Indian Penal Code and sentenced as under:-

Sections	Sentence
302 IPC	Rigorous imprisonment for life and pay fine of Rs.20,000/- and in default thereof to further undergo imprisonment for a period of one year.
323 IPC	Rigorous imprisonment for a period of one year and to pay fine of Rs.1,000/- and in default thereof to further

	undergo imprisonment for a period of three months.
324 IPC	Rigorous imprisonment for a period of two years and to pay fine of Rs.10,000/- and in default thereof to further undergo imprisonment for a period of six months.
201 IPC	Rigorous imprisonment for a period of five years and to pay fine of Rs.10,000/- and in default thereof to further undergo imprisonment for a period of six months.
452 IPC	Rigorous imprisonment for a period of five years and to pay fine of Rs.10,000/- and in default thereof to further undergo imprisonment for a period of six months.
506 (II) IPC	Rigorous imprisonment for a period of three years and to pay fine of Rs.5,000/- and in default thereof to further undergo imprisonment for a period of three months.

he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that accused Surender Singh resident of village Dadahu was working as a Chowkidar at Panchayat Vishram Griha (Kisan Rest House), Dadahu. On 13th October, 2009, he gave beatings to his sister Kunta Devi who took refuge in the house of her neighbour Sh. Jagdish Chand (PW-1). In the middle of night, armed with a scissor, darat and danda, accused came and knocked the door of Jagdish Chand asking Kunta Devi to come out. When she came out accused again gave her beatings. Hearing her cries, neighbour Shashi Bala (PW-5) also came who also was beaten up by the accused. However, she was saved by her son Deepak Kumar (PW-8). Accused then went to the house of Rangi Lal and started giving him beatings. He also gave beatings to Kartar Singh who also was present there. However when both of them ran towards the road, accused drenched them with kerosene oil and set them on fire. Resultantly both Rangi Lal and Kartar Singh died on the spot. Jagdish Chand reported the matter to the police and F.I.R. No. 54/2009 (Ext. PW-1/A), dated 14.10.2009, was registered against the accused at Police Station Renukaji, Distt. Sirmaur, under the provisions of Section 302 of the Indian Penal Code. SI-Narayan Singh (PW-11), posted as Station House Officer, Renukaji, proceeded to the spot and conducted the necessary investigation. After taking photographs on the spot, he prepared inquest reports (Ext.PW-1/B and PW-1/D) and sent the dead bodies for post mortem, which was conducted by Dr. Vinay Kumar (PW-10) and reports (Ext. PW-10/C and PW-10/D) obtained. From the spot, police took into possession plastic canny (Ext.P-3), match-box (Ext. P-4), scissor (Ext.P-5), knife (Ext. P-6) and other incriminating articles. Accused was arrested and was also medically examined by Dr. Vinay Kumar on 15.10.2009. Upon receipt of the report of the State Forensic Science Laboratory, Junga, the Doctor opined the deceased to have died due to shock caused as a result of 100% burn injuries and that death took place within 15 minutes of receiving such burn injuries. Investigation revealed complicity of the accused in the alleged crime. Hence, challan was presented in the Court for trial.

3. Accused was charged for having committed offences punishable under the provisions of Sections 452, 324, 323, 302, 506(II) and 201 of the Indian Penal Code to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as eleven witnesses and statement of the accused under Section 313 Cr. P.C. was also recorded.

5. Quite apparently accused took plea of insanity, not knowing as to what and how the incident happened. In defence he examined three witnesses.

6. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused of all the charged offences and sentenced as aforesaid. Hence, the present appeal.

7. We have extensively heard learned counsel appearing on both the sides and perused the record.

8. Challenge to the judgment, by Mr. Vishal Bindra, learned counsel for the appellant-accused, is on a limited ground. The actual occurrence of the incident is not in dispute. However it is argued that the accused, in a state of mental disorder and unsoundness of mind, without realizing the consequences of his acts, committed the charged offences. Also accused had no malice or bias against any one of the victims. Thus, in law, their being no knowledge and intent of commission of crime, appeal needs to be allowed. More specifically, it is argued that accused was a chronic patient of epilepsy and last such attack took place only one day prior to the incident i.e. on 12th October, 2009, for which he had undertaken treatment from a competent medical practitioner. It is further argued that in the night intervening 13th/14th October, 2009, the time of occurrence of the incident and commission of crime, accused who was undertaking medical treatment for his medical illness was not in a proper sate of mind. His conduct exhibits such fact. Hence, he needs to be acquitted.

9. On the other hand, Mr. Ashok Chaudhary, learned Addl. Advocate General ably assisted by Mr. V. S. Chauhan, learned Addl. A.G. has supported the impugned judgment for the reasons set out therein.

10. From the conjoint reading of the testimonies of the prosecution witnesses namely Jagdish Chand (PW-1), Shashi Bala (PW-5) and Deepak Kumar (PW-8) it is evidently clear that prosecution has been able to establish, beyond reasonable doubt, the fact that accused committed criminal trespass; voluntarily caused injuries with sharp edged weapon to Shashi Bala; criminally assaulted Rangi Lal and Kartar Singh; threatened to kill Shashi Bala and Jagdish Chand and their family members and also caused the evidence to disappear with an intention of screening himself. Also it stands established that accused first gave beatings to deceased Rangi Lal and, thereafter, by pouring kerosene oil, set them on fire. We notice that the occurrence of the incident is also not disputed by Kunta Devi (DW-3) who stepped into the witness box on the asking of her brother, the present accused. They are spot witnesses and saw the occurrence of the incident. There is no infirmity in their testimonies, which are fully inspiring in confidence with regard to the incident(s) in question. Each one of them have categorically deposed that in the night intervening 13th and 14th of October, 2009 at about 12.30 a.m., accused came to the house of Jagdish Chand and shouted for his sister Kunta Devi. When she came out he started giving her beatings. Shashi Bala who also reached the spot was also beaten by the accused though she was saved by her son Deepak Kumar. Testimony of Jagdish Chand, to the effect that accused set the deceased on fire, is fully inspiring in confidence.

11. From the testimony of Dr. Vinay Kumar (PW-10), who conducted the post mortem on the deceased, it is evidently clear that both the deceased died as a result of shock, so received on account of 100% burn injuries. Post mortem report of deceased Rangi Lal is Ext. PW-10/C and that of deceased Kartar Singh is Ext. PW-10/D. They stand proven on record.

12. The incriminating articles recovered from the spot, with which accused set the deceased on fire stands proved on record by the police officials and witnesses to the recovery memos. We need not elaborately deal with this aspect of the matter, in view of limited submission so made before us.

13. However only to satisfy our conscience, we went through the testimonies of the prosecution witnesses and find, as briefly discussed herein above, the accused to have committed the acts for which he stands charged for.

14. The question which needs to be considered is as to whether such crime was committed by the accused out of malice/bias and in a state of unsound mind. In effect, plea of insanity, as one of the defences, so provided under the provisions of Section 84 IPC is taken by the accused.

15. It is a settled position of law that absence of motive itself cannot be a ground to discredit the prosecution story and its witnesses. Accused cannot be acquitted solely on this ground. Coming to the defence of insanity, so taken by the accused, before we deal with the evidence on record, we shall first deal with the law on the issue.

16. Section 84 of the Indian Penal Code provides that nothing is an offence which is done by a person who, at the time of its commission, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law. However, the burden to prove such defence, in view of the provisions of Sections 101 and 105 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act), would be on the accused. The plea of insanity has to be established by leading credible evidence. It is also a settled principle of law that law presumes every person to be sane, unless contrary is proved.

17. The apex Court in *Sheralli Wali Mohammed vs. The State of Maharashtra,* (1973) 4 SCC 79 has held that it would be most dangerous to admit the defence of insanity upon the arguments derived merely from the character of the crime. The mere fact that no motive was proved, as to why the accused committed the crime of murder nor the fact that he made any attempt to run away from the spot, would not be indicative of his plea of insanity or lack of necessary *mens rea* for the commission of the crime.

18. Apex Court in *State of Madhya Pradesh v. Shmadulla,* AIR 1961 SC 998, has clearly held that burden to establish mental condition of the accused, at the crucial point of time, lies upon the accused, who claims such benefit of unsoundness of mind.

19. While taking note of provisions of Section 101 as also Section 105 of the Evidence Act, the apex Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat,* AIR 1964 SC 1563 held that when a plea of legal insanity is set up, Court has to consider whether at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. *The crucial point of time for ascertaining the state of mind of the accused is the time of commission of offence.* Whether accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed by the crime. [Also see:

Elavarasan v. State, represented by Inspector of Police, (2011) 7 SCC 110; *Sidhapal Kamala Yadav v. State of Maharashtra,* (2009) 1 SCC 124; *Hari Singh Gond v. State of M.P.,* (2008) 16 SCC 109; *Bablu alias Mubarik Hussain v. State of Rajasthan,* (2006) 13 SCC 116; *Shrikant Anandrao Bhosale v. State of Maharashtra,* (2002) 7 SCC 748; *T.N. Lakshmaiah v. State of Karnataka,* (2002) 1 SCC 219; *State of H.P. v. Gian Chand,* (2001) 6 SCC 71; (1974) 3 SCC 299, *Sheralli Wali Mohammed v. The Statte of Maharashtra,* (1973) 4 SCC 79; *Oyami Ayatu v. The State of Madhya Pradesh;* and *Bhikari v. The state of Uttar Pradesh,* AIR 1966 SC 1.]

20. In *Amrit Bhushan Gupta v. Union of India and others,* (1977) 1 SCC 180, the apex Court had the occasion to deal with a case where, based on medical opinion of the convict suffering from schizophrenia, while appreciating the law as laid down in England, rejected the plea of the accused not to undergo sentence, so imposed by the criminal Court.

21. Further, in *Paras Ram and others v. State of Punjab,* (1981) 2 SCC 508, the apex Court held that:

> "2. Just one more observation relevant to the punishment. The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a blood-curdling butchery of one's own beloved son was perpetrated, aided by other 'pious' criminals, to propitiate some bloodthirsty deity. Secular India, speaking through the court, must administer shock therapy to such anti-social 'piety', when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants. In discharge of this high duty, we refuse special leave in these applications against the correct convictions and sentences of the courts below."

22. In *Vijayee Singh and others v. State of H.P.,* (1990) 3 SCC 190, the apex Court, observed that:

> "23. At his stage it becomes necessary to consider the meaning of the words "the court shall presume the absence of such circumstances" occurring in Section 105 of the Evidence Act. Section 4 of the Act explains the meaning of the term "shall presume" as to mean that the Court shall regard the fact as proved unless and until it is disproved. From a combined reading of these two Sections it may be inferred that where the existence of circumstances bringing the case within the exception is pleaded or is raised the Court shall presume the absence of such circumstances as proved unless and until it is disproved. In Section 3 of the Act meaning of the terms "proved", "disproved" and "not proved" are given. As per this provision, a fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be "disproved" when, after considering the matters before it the Court either believes that it does not exist, or considers its non existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the

supposition that it does not exist. A fact is said to be "not proved" when it is neither "proved" nor "disproved".

24. The first part of Section 105 as noted above lays down that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the exceptions or proviso is on him and the latter part of it lays down that the Court shall presume the absence of such circumstances. In a given case the accused may discharge the burden by expressly proving the existence of such circumstances, thereby he is able to disprove the absence of circumstances also. But where he is unable to discharge the burden by expressly proving the existence of such circumstances or he is unable to disprove the absence of such circumstances, then the case would fall in the category of "not proved" and the Court may presume the absence of such circumstances. In this background we have to examine the meaning of the words "the Court shall presume the absence of such circumstances" bearing in mind the general principle of criminal jurisprudence that the prosecution has to prove its case beyond all reasonable doubt and the benefit of every reasonable doubt should go to the accused.

23. The apex Court in *Bapu alias Gujraj Singh v. State of Rajasthan,* (2007) 8 SCC 66, held as under:

"9. There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind), i.e., (1) an idiot; (2) one made *non compos* by illness (3) a lunatic or a mad man and (4) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See *Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and Misdemeanors, 12th Edn. Vol., p.105; 1 Hale's Pleas of the Grown 34*). A person made non compos mentis by illness is excused in criminal cases from such acts as are-committed while under the influence of his disorder, (See 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

10. Section 84 embodies the fundamental maxim of criminal law, i.e*., actus non reum facit nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furios is nulla voluntas est*).

11. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the: defence of insanity upon

arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of: exemption from criminal responsibility. Stephen in *'History of the Criminal Law of England*, Vo. II, p. 166 has observed that if a persons cut off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in *Sheralli Walli Mohammed v. State of Maharashtra*, (1973) 4 SCC 79 held that (SCC p.79):

> "The mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have the necessary mens rea for the offence."

12. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated *M'Naughton* rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in *M Naughton's case. (1843) 4 St. Tr. NS 847(HM).* Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or prefect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

13. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section." (Emphasis supplied)

24. The apex Court in *Sudhakaran v. State of Kerala,* (2010) 10 SCC 582, further observed as under:

> "30. A bare perusal of the aforesaid section would show that in order to succeed, the appellant would have to prove that by reason of unsoundness of mind, he was incapable of knowing the nature of the act committed by him. In the alternate case, he would have to prove that he was incapable of knowing that he was doing what is either wrong or contrary to law.
>
> 31. The aforesaid section clearly gives statutory recognition to the defence of insanity as developed by the Common Law of England in a decision of the House of Lords rendered in the case of R. Vs. Daniel Mc Naughten2. In that case, the House of Lords formulated the famous Mc Naughten Rules on the basis of the five questions, which had been referred to them with regard to the defence of insanity. The reference came to be made in a case where Mc Naughten was charged with the murder by shooting of Edward Drummond, who was the Pvt. Secretary of the then Prime Minister of England Sir Robert Peel. The accused Mc Naughten produced medical evidence to prove that, he was not, at the time of committing the act, in a sound state of mind. He claimed that he was suffering from an 2 [1843 RR 59: 8ER 718(HL)] insane delusion that the Prime Minister was the only reason for all his problems. He had also claimed that as a result of the insane delusion, he mistook Drummond for the Prime Minister and committed his murder by shooting him.
>
> 32. The plea of insanity was accepted and Mc Naughten was found not guilty, on the ground of insanity. The aforesaid verdict became the subject of debate in the House of Lords. Therefore, it was determined to take the opinion of all the judges on the law governing such cases. Five questions were subsequently put to the Law Lords. The questions as well as the answers delivered by Lord Chief Justice Tindal were as under:-
>
> > "Q.1 What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing a revenging some supposed grievance or injury, or of producing some public benefit?
> >
> > Answer
> >
> > "Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.
> >
> > Q.2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or

more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

Q.3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

Answers - to the second and third questions

That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

Q.4. If a person under an insane delusion as to the existing facts commits and offence in consequence thereof, is he thereby excused?

Answer

The answer must, of course, depend on the nature of the delusion, but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self- defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

> Q.5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?
>
> Answer
>
> We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."
>
> A comparison of answers to question no. 2 and 3 and the provision contained in Section 84 of the IPC would clearly indicate that the Section is modeled on the aforesaid answers."

25. In *Surender Mishra v. State of Jharkhand,* (2011) 11 SCC 495, the apex Court held as under:

> "11. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code. (Emphasis supplied)

26. Plea of insanity or defence set up by the accused has to be examined in the light of aforesaid decisions and settled principles of law.

27. To prove the factum of insanity, our specific attention is invited to the testimonies of Jagdish Chand (PW-1), Shashi Bala (PW-5), Deepak Kumar (PW-8), Dr. Vinay Kumar (PW-10) and SI-Narayan Singh (PW-11), prosecution witnesses and Dr. Suresh Kumar Bansal (DW-1), Dr. Peter Desouza (DW-2) and Kunta Devi (DW-3), defence witnesses.

28. We shall first deal with the testimony of the prosecution witnesses.

29. From the testimony of Jagdish Chand it is evident that accused had suffered some kind of "fit" on 12th October, 2009. Resultantly he was shown to Dr. Peter Desouza at

Nahan and on his advise some test was got conducted on 13th October at Chandigarh. Witness also states that even on 2nd October, 2009, accused was taken for treatment to Dr. Peter Desouza who had issued prescription slip (Ext. DW-2/A). This witness further states that when police had tried to nab the accused he had started spitting at the police officials and laughing loudly saying that "I have killed two piegons see them".

30. Shashi Bala is silent with regard to the ill health or mental state of unsoundness of mind of the accused.

31. Deepak Kumar states that he rescued his mother Shashi Bala from the clutches of the accused who was beating her. At that time accused was "very violent and was assaulting every one whoever was seen by him". Even he was beaten up. Also even after his arrest in the police station accused continued to remain violent and abused everyone. It was only after a great deal of effort that the accused was brought under control.

32. The Investigating Officer SI-Narayan Singh states that when the accused was arrested, he was struggling and saying that "why I am being arrested, when I have done nothing". Also accused was abusing. An application for hand cuffing was filed for the reason that the accused was using force against the police.

33. Dr. Vinay Kumar examined the accused on 15th October, 2009. The injuries on his body, as was so observed by the Doctor, stands explained through the unrebutted testimony of Deepak Kumar who states that at the time he saved his mother (Shashi Bala), he gave beatings to the accused. Much emphasis has been led on the testimony of the Doctor to highlight that at the time of commission of offence, accused was not in his senses. However, we do not find such fact to have been established. In cross examination, Doctor states that:

> "There is no prescribed medical test to judge insanity. To judge the insanity, the personal behaviourial history is considered. For medical legal aspects, Medical jurisprudence by Dr. Modi and Text Book of Forensic Science by Dr. Ready are considered as guidelines in routine practice. It is correct that to commit murder without any motive, to attack near and dears, the absence of secrecy in committing crime, committing crime without preparation and without accomplice and not absconding from the scene after committing crime are the signs of insanity. The period of fit of insanity depends from person to person and from disease to disease and can be as short as few minutes or can last for hours or days. It is correct that episode of fit of insanity can occur after a day or it is also possible that the same occurs after a period of year. It is also correct that the normal interval between the two episodes of insanity is called lucide interval and during the lucide interval, the behaviour of the person is absolutely normal. It is also correct that a person who has suffered a fit of insanity, 14-10-2009 can be absolutely normal on 15-10-2009. There can be a delusion that a person suffering from mental disease can see a human being as an animal or bird. The medicine written on Mark A is tab. Phenobarbiton. This medicine is prescribed for mental disorder and more particular for epilepsy. The test of EEG can be normal even if a person is suffering from mental disease."

His opinion conclusively does not establish mental state of unsoundness of mind of the accused.

34. Significantly it has come on record through the unrebutted testimony of Shashi Bala that accused, aged 30 years, was initially working in a *Halwai* shop and for the last four – five years has been working as a Chowkidar, in the Rest House, Dadahu. Even she does not state that accused was suffering from any mental illness or had suffered a "fit" on the day of occurrence of the incident. In fact, no such suggestion has been put to her.

35. Significantly Jagdish Chand does not state that in the night of 13th October, 2009, when Kunta Devi came to his house, she informed him that the accused was suffering from any kind of mental disorder or had suffered a "fit" (epilepsy) as a result of which accused had given her beatings. All that he states is that since Kunta was frightened, she sought refuge in his house for the reason that she was beaten by her brother and thus was scared.

36. Significantly this witness clarifies that Dr. Peter Desouza did not disclose the reason of "fit" so suffered by the accused, nor did he disclose his diagnosis. He is not aware as to whether any medication was prescribed by the Doctor or in fact taken by the accused. Crucially the witness does not disclose that on 13th October, 2009, the day of incident, he was informed by Kunta Devi of the accused having suffered any fit. She was beaten up by the accused and had sought refuge in the house of this witness, as she was scared. Hence this witness does not even prima facie establish, much less conclusively, the plea of insanity.

37. The question which arises for consideration is as to whether the following circumstances which have come on record, conclusively exhibit the conduct of the accused to be that of an insane person:

(i) Absence of motive,

(ii) Possessing multiple weapons at the time of attack,

(iii) Attack without provocation,

(iv) Cordial relationship with all the victims including the deceased,

(v) Absence of secrecy,

(vi) Laughing and not fleeing away from the spot after commission of crime,

(vii) Calling deceased to be pigeons and

(viii) Exhibiting violent behaviour against the police who filed application for handcuffing the accused before the appropriate court.

38. Now we proceed to discuss the testimonies of the defence witnesses. Kunta Devi (DW-3) states that on 12th October, 2009 accused who suffered a "fit" became unconscious and froth was coming from his mouth. On 13th October, he was taken to Chandigarh for medical examination and they returned at about 6.00 – 7.00 p.m. Now significantly this witness does not state anything with regard to the treatment so administered by Dr. Peter Desouza. She further states that same day at about 10.00 p.m., accused suddenly slapped her and tried to slash her throat. However, she sought refuge in the house of her uncle Jagdish Chand where she slept. In the middle of night, accused came to the house of Jagdish Chand armed with weapons. She came out of the house and the accused again stated beating her with kick blows. He then ran away and starting assaulting Shashi Bala. When police tried to catch the accused he was saying "why you are catching me when I have just killed pigeons". Witness further states that even in the year 2007, accused had exhibited similar conduct when a *Pandit* had told that he was under the influence of evil powers. The said *Pandit* treated him and thereafter he was normal. Now

significantly witness admits her parents to be alive who have not been examined in Court. Her version that on 12th October, 2009 accused having suffered an epileptic attack does not inspire confidence at all. She was not alone at home. Her parents are alive. Yet they have not been examined. Except for prescription (Ext. DW-2/A) dated 2.10.2009, there is no medical evidence on record proving the illness of the accused. From her testimony it is evident that when accused returned from Nahan and Chandigarh, he was normal. He also had dinner that day. Crucially she admits that on the day of occurrence of the incident there was no attack of any kind even in the evening, though she clarifies by stating that the accused was behaving like a mad man.

39. Now Dr. Peter Desouza (DW-2) who issued prescription slip (Ext. DW-2/A) states that "It is correct that in case of an epileptic cizure grandmal epileptic cizure, patient falls unconscious. It is correct that when patient Surender was brought to me he was having normal behaviour and cooperative".

40. Dr. Suresh Bansal (DW-1) who conducted the EEG (Ext. DW-1/A) admits that the test revealed the brain cells to be functioning normally. Also the patient was cooperative and behaving in a normal manner.

41. In view of this evidence on record, by applying the ratio of law laid down by the Hon'ble Supreme Court of India and more specifically in *Surender Mishra* (supra), *Bapu alias Gujraj Singh* (supra), *Dahyabhai Chhaganbhai Thakkar* (supra) and *Sheralli Wali Mohammed* (supra), it cannot be said that the accused has been able to discharge his statutory burden so stipulated under the provisions of the Indian Evidence Act. It cannot be said that on account of his unsoundness of mind, accused was incapable of knowing the nature of offence he was committing.

42. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour, which can also be violent, cannot be said to be a symptom of unsoundness of mind. Crucially the accused was employed as a Chowkidar, where he had been working over a long period of time, without any behaviour of abnormality. Violent behaviour can be as a result of anger against anyone and everyone for undisclosed reasons. Parents were the best persons to have thrown light on the upbringing of the child. There is no prior history of unsoundness of mind.

43. Quite apparently, accused has not been able to examine any witness, or produce any credible evidence, establishing the plea of insanity. Thus, the essential ingredients, as is so required, under the provisions of the Indian Penal Code and the Indian Evidence Act, not having been established on record, defence of the accused cannot be said to have been probablized, much less proved.

44. 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.

45. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that accused committed the charged offences.

46. For all the aforesaid reasons, there is 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. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

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

Deepi Devi wife of Sh. Rupia Ram ....Petitioner
Versus
State of H.P. & others ....Respondents

CWP No. 1257 of 2013
Order Reserved on 15th May 2015
Date of Order 27th May, 2015

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages basis on muster roll as Beldar - services of 1087 workmen including petitioner were retrenched by respondent No. 3- 43 workmen raised industrial dispute and their services were reinstated – petitioner raised an industrial dispute after this order but his case was rejected and was not referred to Industrial Tribunal on the ground of delay- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay. (Para-5 and 6)

Cases referred:
Collector Land Acquisition Anantnag and another vs. Mst. Katji and others, 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 Petitioner: Mr. Rahul Mahajan, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

It is pleaded that in the month of December 1998 petitioner was engaged by co-respondent No.3 on daily wages basis on muster roll as Beldar. It is pleaded that thereafter on dated 8.7.2005 the services of 1087 workmen were retrenched by co-respondent No.3 including the services of petitioner. It is pleaded that on dated 30.3.2009

the retrenchment order dated 8.7.2005 of 43 workmen was set aside and quashed by learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala. It is further pleaded that on dated 16.9.2009 services of 43 workmen were reinstated by co-respondent No. 3 but petitioner was not given opportunity of reemployment being senior workman. It is also pleaded that on dated 9.11.2009 one Smt. Bhichi Devi raised demand notice under Section 2-A of Industrial Disputes Act 1947 against her illegal termination w.e.f. June 2004 after elapse of more than five years and five months. It is pleaded that on dated 12.11.2009 petitioner raised industrial dispute under Section 2-A of Industrial Disputes Act 1947 against co-respondent No. 3 to set aside the retrenchment order dated 8.7.2005 after about four years. It is pleaded that on dated 27.1.2010 one Shri Nand Lal had also raised industrial dispute under section 2-A of Industrial Disputes Act 1947 against co-respondent No. 3 to set aside the retrenchment order dated 8.7.2005 after more than five years. It is pleaded that on dated 6.8.2010 case of Inder Singh was referred by co-respondent No. 3 to learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala and said Shri Inder Singh has raised the industrial dispute after lapse of more than seven years. It is also pleaded that on dated 30.11.2011 case of Nand Lal was referred by co-respondent No. 2 to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala for adjudication after lapse of more than five years. It is also pleaded that on dated 31.3.2012 the case of Bhichi Devi was referred by co-respondent No. 2 to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala for adjudication after lapse of more than five years and five months. It is also pleaded that on dated 30.5.2012 case of petitioner was rejected by co-respondent No. 2 and was not referred to Hon'ble Industrial H.P. Tribunal-cum-Labour Court Dharamshala for adjudication. It is pleaded that order dated 30.5.2012 passed by Labour Commissioner H.P. whereby Labour Commissioner has refused to refer the dispute of petitioner to H.P. Industrial Tribunal-cum-Labour Court Dharamshala be set aside and co-respondent Nos. 1 and 2 be directed to refer the dispute of petitioner for adjudication to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of co-respondent Nos. 1 and 2 pleaded therein that petitioner served demand notice on dated 12.11.2009 on co-respondent No.3 and same was submitted to Labour Officer-cum-Conciliation Officer Mandi. It is pleaded that Labour Officer-cum-Conciliation Officer tried to settle the dispute amicably but dispute could not be settled by way of conciliation. It is pleaded that thereafter Labour Officer-cum-Conciliation Officer Mandi sent the report under Sub-section 4 of Section 12 of Industrial Disputes Act 1947 to the Labour Commissioner. It is pleaded that co-respondent No. 2 exercising the powers of appropriate government examined the report sent by Labour Officer-cum-Conciliation Officer Mandi and also perused the reply filed by respondent No.1 and found that petitioner had raised dispute vide demand notice dated 12.11.2009 after a lapse of more than four years without giving any detailed reasons relating to delay. It is pleaded that dispute was not kept alive by petitioner for long period and learned Labour Commissioner came to the conclusion that dispute had faded away after a lapse of long time and demand notice raised by petitioner was found to be vexatious and devoid of any merits. It is pleaded that facts and circumstances of other cases always differ and could not be compared with each other. It is pleaded that Government of India has amended the Industrial Dispute Act 1947 whereby direct access has been given to workman for raising any dispute upon termination and dismissal of services directly to the Labour Court-cum-Industrial Tribunal within a period of three years from the date of termination. It is pleaded that as per amended Section 2-A dismissal of services of an individual workman would be deemed to be an industrial dispute. It is pleaded that non-alive issue could not be referred to Labour Court-cum-Industrial Tribunal for adjudication. Prayer for dismissal of civil writ petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the respondents and Court also perused the entire record carefully.

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

1. Whether order of learned Labour Commissioner (H.P.) No.11-23/84(Lab)ID/2012-Mandi dated 30th May 2012 is liable to be set aside as mentioned in memorandum of grounds of civil writ petition?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing for the petitioner that matter in dispute is service matter and learned Labour Commissioner Himachal Pradesh has illegally declined to refer the matter to learned Labour Court-cum-Industrial Tribunal for adjudication is accepted for the reasons hereinafter mentioned. Court has carefully perused the order passed by learned Labour Commissioner dated 30.5.2012. Learned Labour Commissioner has specifically mentioned in the order that petitioner did not agitate the matter for more than four years and present dispute faded away with passage of time. 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 mode 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 on 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:-

> "10.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.

(c) Refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication.

6. Submission of learned Additional Advocate General appearing on behalf of the respondents that petitioner did not agitate the matter for more than four years and on this ground civil writ petition filed by petitioner be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner is illiterate and she has marked her thumb impression in writ petition and petitioner is a rustic woman and it is not expedient in the ends of justice to decline the relief to the petitioner. In view of the above stated facts point No. 1 is answered in affirmative.

Point No.2 (Final Order)

7. In view of above stated facts petition filed by petitioner is allowed. Order No. 11-23/84(Lab)ID/2012-Mandi dated 30.5.2012 passed by learned Labour Commissioner Himachal Pradesh is set aside and co-respondents Nos. 1 and 2 are directed to refer the dispute of petitioner for adjudication to H.P. Industrial Tribunal-cum-Labour Court Dharamshala under Section 10 of Industrial Disputes Act 1947 within one month from today. No order as to costs. Petition 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 TARLOK SINGH CHAUHAN, J.

Manoj Singh ..... Petitioner.

Vs.

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

CWP No. 4087 of 2014.
Judgement reserved on: 20.5.2015.
Date of decision: 27.5.2015.

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 4- Petitioner claimed that his grand-father had been in possession of land and after his death, he is in possession- administrator had accorded sanction to carry out additions, alterations and re-construction- additions and alterations were carried out according to the sanctioned plan- he was wrongly held to be unauthorized possession – petitioner had failed to prove his ownership over the land- letters permitting him to carry out the construction were not sufficient to establish the ownership - his plea of adverse possession implied that he is not the owner but some other person is owner of the land, held, that in these circumstances, he was rightly evicted. (Para-17, 18 & 22 to 25)

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 5- Petitioner claimed that his grand-father had been in possession of land and after his death he is in possession- administrator had accorded sanction to carry out additions and alterations and re-construction- additions and alterations were carried out according to sanctioned plan- he was wrongly held to be unauthorized possession.

Limitation Act, 1963- Article 65- Petitioner claimed ownership as well as adverse possession- held, that both these pleas were contradictory to each other - mere long possession is not equal to adverse possession - Court has to be circumspect while adjudicating the plea of adverse possession in case of an encroacher, illegal occupant or

land grabber of public property - petitioner had not mentioned the date from which his possession became adverse- hence, his plea of adverse possession was not acceptable. (Para-19 to 21 and 26 to 29)

Cases referred:

P.T. Munichikkanna Reddy and others vs. Revamma and others (2007) 6 SCC 59
Mandal Revenue Officer vs. Goundla Venkaiah and another (2010) 2 SCC 461
P. Periasami (dead) by L.Rs. vs. P. Periathambi and others (1995) 6 SCC 523
Mohan Lal (deceased) vs. Mira Abdul Gaffar and another (1996) 1 SCC 639
L.N. Aswathama & anr. vs. P. Prakash (2009) 13 SCC 229
Om Parkash & ors. vs. Gian Chand & ors. 2014(2) Him.L.R. 1071
South Eastern Coalfields Limited vs. State of M.P. and others (2003) 8 SCC 648
Indian Council for Enviro-Legal-Action vs. Union of India and others (2011) 8 SCC 161

For the petitioner : Mr. S.D. Sharma, Advocate.
For the respondents : Mr. Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner is aggrieved by the order passed by the Appellate Authority under the Public Premises (Eviction of Unauthorized Occupants Act, 1971) (for short, the Act) whereby it affirmed the order passed by the Estate Officer on 28.11.2011 ordering the eviction of the petitioner from the unauthorized premises.

2. The case of the petitioner is that since 1937 his grand father late Udai Singh had been in possession of the land and property, comprised in khata/khatauni No 56/72, khasra No. 220, measuring 33.75 sq. meters situate at Shimla. After his death in 1989, the same is possessed by the petitioner.

3. In 1958 the then Administrator of Union territory of Himachal Pradesh accorded sanction to carry out additions and alterations and re-construction of stall. The then Shimla Municipality sanctioned the plan, pursuant to which the grand father of the petitioner carried out extensive additions and alterations in the existing premises in the year 1959.

4. It is the further case of the petitioner that he had been earning his livelihood from the premises in question and had been paying house tax to the Municipal Committee/ Corporation, Shimla.

5. In 1974 the Estate Officer, CPWD issued notice and thereafter initiated proceedings under the Act and the predecessor-in-interest of the petitioner was ordered to be evicted vide order dated 19.11.1975. On appeal, the order was set-side and the case was remanded back to the Estate Officer, Shimla. It was thereafter only in the year 2005 that petitioner again received a notice under section 4 of the Act and ultimately the petitioner was ordered to be evicted vide order dated 28.11.2011. This order was challenged further before the learned Appellate Authority, who too dismissed the appeal and upheld the order of eviction.

6. The petitioner has challenged this order on the ground that authorities have erred in concluding that petitioner was in unauthorized occupation. It was proved on record

that petitioner had become owner of the premises by way of adverse possession and further that the impugned order was not sustainable as the petitioner's right to live had been gravely infringed. The respondents have supported the orders and have prayed for the dismissal of the writ petition.

7. The respondents have opposed the petition by filing the reply. The factum of possession of the predecessor-in-interest since the year 1937 has been disputed, rather it has been stated that since the ownership was undisputedly that of the respondents, it had rightly initiated the aforesaid proceedings. It was further averred that the ownership of the respondent was duly supported by the revenue record and once the factum of ownership of the respondents is not disputed then they can take no exception to the lawful orders passed by the competent authority and affirmed by the Appellate Authority.

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

8. At the outset, it may be observed that the claim of the petitioner rests solely on the basis of two letters, dated 2.1.1958 (P-3) and dated 3.1.1959 (Annexure P-4), respectively. The letter dated 2.1.1958 (Annexure P-3) reads thus:-

"No.Sty-25-75/57
HIMACHAL PRADESH ADMINISTRATION
SECRETARIAT ADMINISTRATION.

From:

Shri M.S. Jandrotia,
Assistant Secretary (SAD)
To Himachal Pradesh Administration.

To

The Secretary,
Simla Municipal Committee,
SIMLA.

SUBJECT: CONSTRUCTION OF A STALL.
DATED SIMLA-4, the 2nd JANUARY, 1958.

MEMO

An application, dated the 26th December, 1957 alongwith form 'A" and a plan received from Sh. Udey Singh, Hawker, Himachal Pradesh Secretariat building for the construction of a stall are enclosed for necessary action. There is no objection, if permission is accorded by the Municipal Committee to the applicant for the construction of a stall at the proposed site.

Sd/-
M.S.Jandrotia,
ASSISTANT SECRETARY.

No. Sty- 25.75/57. Dated Simla-4, the 2nd January, 1958.

1. Copy forwarded to Udey Singh, Hawker Himachal Pradesh Secretariat Building, Simla for information with reference to his application referred to above.

2. All further correspondence on the subject may please be addressed direct to the above officer.

Sd/-
ASSISTANT SECRETARY."

Whereas the letter dated 3.1.1959 only accords sanction to make certain additions and alterations, re-construction of the stall. These letters are not of much help to the petitioner for the simple reason that respondents are not denying the existence of a stall at the site.

9. The only question to be determined is as to whether the petitioner is in authorized possession of the premises.

10. The respondents in order to prove their ownership examined two witnesses. PW 1 Dev Raj Sharma, Assistant Engineer, CPWD proved on record the copies of the revenue record alongwith the site plan and also the report prepared by the Junior Engineer.

11. PW 2 Hameer Singh is the Junior Engineer, who has stated that he had personally visited the spot and measured the land and prepared the lay out plan. The unauthorized construction was shown by him in the site plan Ex. PW 2/A.

12. While on the other hand the petitioner appeared as RW 1 and claimed that premises were in possession of his predecessor-in-interest ever since 1939 till his death on 15.1.1989 and thereafter it was the petitioner who had been in possession of the premises.

13. To the similar effect is the statement of RW 2 Rangeela Ram. RW 3 Hem Chand has proved on record the water connection installed in the premises by the predecessor-in-interest of the petitioner on 17.6.1977.

14. RW 4 Diwan Chand, Taxation Inspector has proved on record that the property was assessed to tax, which are being paid by the petitioner. However, he has stated that as per the revenue record it is the respondent who is the owner of the property.

15 RW 5 Radhay Shyam, Senior Assistant is an official from the HPSEB, who has proved on record the installation of electricity meter in the premises in the name of one of the predecessor-in-interests of the respondents.

16. The statements of RW 1 to RW 5 categorically proved on record the possession of the petitioner, but then who is disputing his possession. Even the respondents are not disputing his possession and it is only on account of his possession that the necessity of filing of the eviction petition under the Act has arisen. The dispute therefore is only qua the ownership.

17. The petitioner merely on the basis of letters dated 2.1.1958 (Annexure P-3) and 3.1.1959 (Annexure P-4) cannot be held to be the owner of the premises. The petitioner was required to produce contemporaneous records to prove his ownership. The "Public Premises" under the Act has been defined to mean:-

"2 [(e) "public premises" means—

(1) any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980), under the control of the Secretariat of either House of Parliament for providing residential

accommodation to any member of the staff of that Secretariat;

(2) any premises belonging to, or taken on lease by, or on behalf of,—

(i) any company as defined in section 3 of the Companies Act, 1956 (1 of 1956), in which not less than fifty-one per cent. of the paid up share capital is held by the Central Government or any company which is a subsidiary (within the meaning of that Act) of the first-mentioned company;

(ii) any corporation (not being a company as defined in section 3 of the Companies Act, 1956 (1 of 1956) or a local authority) established by or under a Central Act and owned or controlled by the Central Government;

(iii) any University established or incorporated by any Central Act.

(iv) any Institute incorporated by the Institutes of Technology Act, 1961 (59 of 1961);

(v) any Board of Trustees constituted under the Major Port Trusts Act, 1963 (38 of 1963);

(vi) the Bhakra Management Board constituted under section 79 of the Punjab Reorganisation Act, 1966 (31 of 1966), and that Board as and when re-named as the Bhakra-Beas Management Board under sub-section (6) of section 80 of that Act; [3] [***]

[4] [(vii) any State Government or the Government of any Union Territory situated in the National Capital Territory of Delhi or in any other Union Territory;

(viii) any Cantonment Board constituted under the Cantonments Act, 1924 (2 of 1924); and]

(3) in relation to the 5[National Capital Territory of Delhi]—

(i) any premises belonging to the Municipal Corporation of Delhi, or any Municipal Committee or notified area committee; [3] [***]

(ii) any premises belonging to the Delhi Development Authority, whether such premises are in the possession of, or leased out by, the said Authority;] [and] [5]

[4] [(iii) any premises belonging to, or taken on lease or requisitioned by, or on behalf of any State Government or the Government of any Union Territory;]"

18. The petitioner has set up self contrary case wherein he has firstly tried to establish his lawful ownership and has thereafter attempted to canvass that he has become owner by way of adverse possession.

19. It is more than settled that long possession is not necessarily adverse possession. What would constitute adverse possession has repeatedly been subject matter of the courts. However, this concept was dealt in detail by the Hon'ble Supreme Court in **P.T. Munichikkanna Reddy and others** vs. **Revamma and others (2007) 6 SCC 59,** wherein, it was held as follows:-

"CHARACTERIZING ADVERSE POSSESSION

5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessoror on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird, 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock, 227 Ark. 1085, 303 S.W.2d 569 (1957); Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim.

7. To understand the true nature of adverse possession, Fairweather v St Marylebone Property Co [1962] 2 WLR 1020, [1962] 2 All ER 288 can be considered where House of Lords referring to Taylor v. Twinberrow [1930] 2 K.B. 16, termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law:

> "In my opinion this principle has been settled law since the date of that decision. It formed the basis of the later decision of the Divisional Count in Taylor v. Twinberrow [1930] 2 K.B. 16, in which it was most clearly explained by Scrutton, L.J. that it was a misunderstanding of the legal effect of 12 years adverse possession under the Limitation Acts to treat it as if it gave a title whereas its effect is " merely negative " and, where the possession had been against a tenant, its only operation was to bar his right to claim against the man in possession (see loc. cit. p. 23). I think that this statement needs only one qualification: a squatter does in the end get a title by his possession and the indirect operation of the Act and he can convey a fee simple.
>
> If this principle is applied, as it must be, to the Appellant's situation, it appears that the adverse possession completed in 1932 against the lessee of No. 315 did not transfer to him either the lessee's' term or his rights against or has obligations to the landlord

> who held the reversion. The appellant claims to be entitled to keep the landlord at bay until the expiration of the term by effluxion of time in 1992: but, if he is, it cannot be because he is the transferee or holder of the term which was granted to the lessee. He is in possession by his own right, so far as it is a right: and it is a right so far as the statutes of limitation which govern the matter prescribe both when the rights to dispossess him are to be treated as accruing and when, having accrued, they are thereafter to be treated as barred. In other words, a squatter has as much protection as but no more protection than the statutes allow: but he has not the title or estate of the owner or owners whom he has dispossessed nor has he in any relevant sense an estate "commensurate with" the estate of the dispossessed. All that this misleading phrase can mean is that, since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against, such, for instance, as equitable easements, which axe no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed."

Also see Privy Council's decision in Chung Ping Kwan and Others v. Lam Island Development Company Limited (Hong Kong) [(1997) AC 38] in this regard.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

> 1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
>
> 2. Specific Positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

9. It is interesting to see the development of adverse possession law in the backdrop of the status of Right to Property in the 21st Century. The aspect of stronger Property Rights Regime in general, coupled with efficient legal regimes furthering the Rule of Law argument, has redefined the thresholds in adverse possession law not just in India but also by the Strasbourg Court. Growth of Human Rights jurisprudence in recent times has also palpably affected the developments in this regard.

NEW CONSIDERATION IN ADVERSE POSSESSION LAW

10. In that context it is relevant to refer to JA Pye (Oxford) Ltd v. United Kingdom [2005] 49 ERG 90, [2005] ECHR 921 wherein the European Court of Human Rights while referring to the Court of Appeal judgment ([2001]EWCA Civ 117, [2001]Ch 804) made the following reference:

> "Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even

though limitation periods both limited the right of access to the courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol."

11. This brings us to the issue of mental element in adverse possession cases-intention.

1. Positive Intention

12. The aspect of positive intention is weakened in this case by the sale deeds dated 11.04.1934 and 5.07.1936. Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession case.. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts limitation act and it also assists the court to unearth as the intention to dispossess.

13. At this juncture, it would be in the fitness of circumstances to discuss intention to dispossess vis-`-vis intention to possess. This distinction can be marked very distinctively in the present circumstances.

14. Importantly, intention to possess can not be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialize.

15. The High Court observed:

> "It is seen from the pleadings as well in evidence that the plaintiff came to know about the right of the defendants', only when disturbances were sought to be made to his possession."

16. In similar circumstances, in the case of Thakur Kishan Singh (dead) v. Arvind Kumar [(1994) 6 SCC 591] this court held:

> "5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licencee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession. Apart from it, the Appellate Court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse." (emphasis supplied)

17. The present case is one of the few ones where even an unusually long undisturbed possession does not go on to prove the intention of the adverse

possessor. This is a rare circumstance, which Clarke LJ in Lambeth London Borough Council v Blackburn (2001) 82 P & CR 494, 504 refers to:

> "I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the animus possidendi identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention."
>
> (emphasis supplied)

18. On intention, The Powell v. Macfarlane (1977) 38 P & CR (Property, Planning & Compensation Reports) 452 _ 472 is quite illustrative and categorical, holding in the following terms:

> "If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."
>
> ** ** **
>
> If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.
>
> ** ** **
>
> In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.
>
> ** ** **
>
> What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of

limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of Saroop Singh v. Banto and Others [(2005) 8 SCC 330] in that context held:

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)
>
> 30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in Karnataka Board of Wakf v. Government of India and Others [(2004) 10 SCC 779] in the following terms:

> "_Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

24. In Narne Rama Murthy v. Ravula Somasundaram and Others [(2005) 6 SCC 614], this Court held:

> "However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this

case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter." (emphasis supplied)

25. The test is, as has been held in R.V. Oxfordshine County Council :

"... Bright v. Walker (1834) 1 Cr. M. & R. 211, 219, "openly and in the manner that a person rightfully entitled would have used it. . ." The presumption arises, as Fry J. said of prescription generally in Dalton v. Angus (1881) 6 App.Cas. 740, 773, from acquiescence.

26. The case concerned interpretation of section 22(1) of the Commons Registration Act 1965. Section 22(1) defined "town or village green" as including

"...land _ on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years."

27. It was observed that the inhabitants' use of the land for sports and pastimes did not constitute the use "as of right". The belief that they had the right to do so was found to be lacking. The House held that they did not have to have a personal belief in their right to use the land. The court observed:

"....[the words 'as of right] import the absence of any of the three characteristics of compulsion, secrecy or licence_ 'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements....."

28. Later in the case of Beresford, R (on the application of) v. City of Sunderland [2003] 3 WLR 1306, [2004] 1 All ER 160 same test was referred to.

29. Thus the test of nec vi, nec clam, nec precario i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

30. In Karnataka Wakf Board (Supra), the law was stated, thus:

"11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : S M Karim v. Bibi Sakinal AIR 1964 SC

1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D N Venkatarayappa v. State of Karnataka (1997) 7 SCC 567.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

2. Inquiry into the particulars of Adverse Possession

31. Inquiry into the starting point of adverse possession i.e. dates as to when the paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and Other facts such as the manner in which the possession operationalized, nature of possession: whether open, continuous, uninterrupted or hostile possession - have not been disclosed. An observation has been made in this regard in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254]:

> "Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea." (emphasis supplied)

32. Also mention as to the real owner of the property must be specifically made in an adverse possession claim.

33. In Karnataka Wakf Board (Supra), it is stated:

> "12. Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that –
>
> > "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

> "4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had

acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

(emphasis supplied)

"3. New Paradigm to Limitation Act

34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254] in the following terms:

"... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

[See also M. Durai v. Madhu and Others 2007 (2) SCALE 309]

35. The aforementioned principle has been reiterated by this Court in Saroop Singh v. Banto and Others [(2005) 8 SCC 330] stating:

"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

36. In Mohammadbhai Kasambhai Sheikh and Others v. Abdulla Kasambhai Sheikh [(2004) 13 SCC 385], this Court held:

"But as has been held in Mahomedally Tyebally v. Safiabai the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of

> the defendant becomes adverse to the plaintiff. Therefore, unless the defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiffs claim."
>
> 37. The question has been considered at some length recently in T. Anjanappa and Others v. Somalingappa and Another [(2006) 7 SCC 570], wherein it was opined :
>
> > "21. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable."
>
> [See also Des Raj and Ors. v. Bhagat Ram (Dead) By LRs. and Ors., 2007 (3) SCALE 371; Govindammal v. R. Perumal Chettiar & Ors., JT 2006 (10) SC 121 : (2006) 11 SCC 600]."

20. It has to be remembered that whenever an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/ title of the State to immovable property and give upper hand to the encroachers, unauthorized occupants or land grabbers.

21. In this context, it shall be fruitful to refer to the following observations of the Hon'ble Supreme Court in **Mandal Revenue Officer** vs. **Goundla Venkaiah and another (2010) 2 SCC 461**:-

> "47. In this context, it is necessary to remember that it is well neigh impossible for the State and its instrumentalities including the local authorities to keep every day vigilance/watch over vast tracts of open land owned by them or of which they are the public trustees. No amount of vigil can stop encroachments and unauthorised occupation of public land by unscrupulous elements, who act like vultures to grab such land, raise illegal constructions and, at times, succeeded in manipulating the State apparatus for getting their occupation/possession and construction regularized. It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroachers, unauthorised occupants or land grabbers.
>
> 48. In State of Rajasthan v. Harphool Singh (Dead) through Lrs. 2000 (5) SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial Court with the finding that he had acquired title by adverse possession. The

first and second appeals preferred by the State Government were dismissed by the lower appellate Court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below:-

> "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in P. Lakshmi Reddy v. L. Lakshmi Reddy adverted to the ordinary classical requirement -- that it should be nec vi, nec clam, nec precario -- that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."

49. A somewhat similar view was expressed in A.A. Gopalakrishnan v. Cochin Devaswom Board 2007 (7) SCC 482. While adverting to the need for protecting the properties of deities, temples and Devaswom Boards, the Court observed as under:-

> "The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/archakas/ shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

22. Reverting to the facts, it would be seen that petitioner in response to the notice issued under the Act filed his reply, wherein he set up the plea of so called ownership in the following manner:-

> "That the contents of notice pertaining to alleged un-authorised occupation of Respondent with regard to Khasra No. 220, measuring 33.75 sq. meters, are denied as wrong and incorrect, it is submitted that grant father of Respondent late Udai Singh had been in possession of premises in question since the year Nineteen hundred thirty seven (1937). The ownership of predecessor of the Respondent with regard to premises in question was duly acknowledged by the concerned government authorities from time to time. Accordingly the predecessor of present Respondent made extensive

additions and alterations in the premises presently in occupation of the Respondent with the due approval of then Municipal body in the year 1959-60. Since the possession of predecessor/s of Respondent dates back to time before independence, with regard to premises in question, the ownership of the predecessor/ s of the Respondent has been much prior to time when the premises in question came under control of concerned governments i.e. Union territory Himachal Pradesh government and the Central government."

23. In the later part of the reply, he set up the plea in the following manner:-

"In the alternative, it is submitted that the predecessor/s of Respondent had become owner of the premises in question by way of adverse possession and that stand of the predecessor of Respondent his grandfather Sh. Udai Singh, is duly established in the judgement by the Appellate Authority Simla division, Himachal Pradesh in Case No. CHA-s/ 14 of 1975, dt. 29.5.1976 (copy enclosed);

..... The respondent has been enjoying/ using the premises in question peacefully, openly and his hostile possession with regard to premises in question, was never objected to by any quarter whatsoever....."

24. The plea of ownership simpliciter is based on the concept of title, which one may acquire through various sources like succession, gift, will, sale, exchange, grant etc. etc. and the person in possession is essentially to be treated as being in lawful possession. While on the other hand when the plea of adverse possession is projected inherent is the plea that someone else is the ownership of the property. (See: **P. Periasami (dead) by L.Rs.** vs. **P. Periathambi and others (1995) 6 SCC 523.** Having said so, it can safely be concluded that the pleas based on title and simultaneously on adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. (Ref: **Mohan Lal (deceased)** vs. **Mira Abdul Gaffar and another (1996) 1 SCC 639** and **L.N. Aswathama & anr.** vs. **P. Prakash (2009) 13 SCC 229.**

25. It was incumbent upon the petitioner to have chosen one line of defence and could not have raised the plea of ownership and also the plea of adverse possession. Moreover, the plea of adverse possession as raised by the petitioner is absolutely vague as the petitioner has not cared to mention the date from which his possession in fact became adverse. This question assumes importance as the petitioner initially had set up a lawful title in himself.

26. In **Om Parkash & ors.** vs. **Gian Chand & ors. 2014(2) Him.L.R. 1071** one of us (Tarlok Singh Chauhan, J) dealt in detail with the question of adverse possession particularly when the defendant therein had not spelt out any specific date from which his possession became adverse and it was observed as follows:-

"11. Therefore, the moot question is as to whether the pleadings set out by the defendants can meet the requirement of law or not. This question assumes importance, because admittedly, the defendants have not spelt out any specific date from which their possession became adverse.

In **Kamla and others** vs. **Baldev Singh and others 2008(1) Shim. LC 215,** this court has held as under:-

".....Moreover, in case defendant or his father were in possession of the suit land as owner and the possession was never taken by the plaintiffs in pursuance of the decree, they can be said to be in possession as owner, but they cannot be treated to be in adverse possession of the suit land in any manner. The learned trial Court has

not given its findings that the defendant or his father continued to be owner of the suit land even after passing of the decree since the decree was never executed, but has given the findings in the alternative that the defendant has become owner by way of adverse possession. This plea was taken by the defendant in the alternative but he never pleaded as to from which date his permissive possession as owner became adverse to the true owners i.e. plaintiffs and what overt act was done by him to show his hostile title to the suit land. There were no allegations as to when the possession became adverse, in which year or month or in what manner and the simple general allegation made by the defendant in the alternative were accepted by the trial Court without looking into the question that the original possession of the defendant over the suit land or that of his father was permissive being an owner and it never became adverse as against the true owner and if it became adverse in what manner and from which date, month or year. The permissive possession as owner does not itself become adverse as against the true owner until and unless some overt act is done by the defendant to show his hostile title towards the true owner which pleadings were very much lacking in the written statement and as such, the defendant was never proved to be in adverse possession of the suit land as owner. Those findings were rightly reversed by the learned first Appellate Court and the learned first Appellate Court had rightly observed that there was complete lack of animus on the part of the defendant to hold the suit land adversely to the plaintiffs. It was also observed that it has also not been shown as to what time possession of the defendant became hostile to that of the plaintiffs which had ripened into ownership. To my mind, there was nothing for the trial Court to conclude that the defendant has become owner by way of adverse possession in the absence of specific pleadings or proof and, therefore, the learned first appellate Court had come to a right conclusion in reversing the findings under Issue No. 1 in regard to the plea of adverse possession. Once the defendant had failed to prove adverse possession over the suit land, the only conclusion that can be drawn is the plaintiffs were entitled to the relief of possession and it was rightly given by the first appellate Court."

12. This court in **Brij Mohan Sood** vs. **Parshotam Singh and others 2014(1) Him. L.R. 556,** has held as follows:-

"11. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is " nec vi, nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual visible, exclusive, hostile and continued over the statutory period. Therefore, a person who claims adverse possession has to show (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party ; (d) how long his possession is continued; and (e) his possession was open and undisturbed. It has to be remembered that the person pleading

adverse possession has no equity in his favour since he is trying to defeat the right of the true owner, therefore, it is for him to clearly plead and establish all facts necessary to establish his adverse possession (Refer Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others (1996) 8 SCC 128).

12. Having observed so, it is clear from the pleadings of the defendant that he has failed to plead the essential ingredients of adverse possession. In absence of the essential ingredients of adverse possession, no amount of evidence can be looked into by this Court. Even otherwise, the defendant has set-up a title in himself and has not acknowledged or attorned the plaintiffs to be the owners. Apart from preliminary objection No.1 (supra), in paragraph-3 of the preliminary objection, the defendant has made the following averments:

"The plaintiffs are not the owners of the land rather the defendants are its owners and the plaintiffs have got no locus standi to file the suit." Throughout in the written statement, the defendants have claimed themselves to be the owners of the suit property and thus the plea of adverse possession is not available to them. "

13. This court further in **Deepak Parkash** vs. **Sunil Kumar 2014(1) Him. L.R. 654** has emphasized on the requirement of law of pleading the exact date from which the possession became adverse, in the following terms:

"14. It appears that the learned lower Appellate Court completely ignored the pleadings of the parties or else the judgment and decree passed by the learned trial Court on the basis of such pleadings would not have been disturbed much less reversed. A perusal of the written statement would show that pleadings with regard to adverse possession were not only deficient but in fact did not meet the requirement of law. <u>The defendant even failed to specify the definite date on which his possession became adverse.</u>

16. Faced with such situation, learned counsel for the respondent/defendant would contend that he had led sufficient evidence to prove his plea of adverse possession. I am afraid that I cannot agree with the submissions made by learned counsel for the respondent/defendant.

17. It is settled law that no amount of evidence beyond pleadings can be looked into. It is further well settled principle of law that the evidence adduced beyond the pleading would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The Court at the later stage of the trial as also the Appellate Court having regard to the rule of pleading would be entitled to reject the evidence wherefor there does not exist any pleading."

28. It is more than settled that mere possession for a long time does not result in converting permissive possession into adverse possession.

29. The learned counsel for the petitioner has argued that the impugned order is bad in law as the right to live has been gravely infringed. This contention is absolutely fallacious as nobody much-less an encroacher has fundamental right under Article 21 of the Constitution of India to carry on business at the place of his choice and convenience. The right to carry on business cannot be absolute but has to be limited and subservient to

overall public interest. If the right of the petitioner and the similar situated persons is conceded, then they could hold the society to ransom by squatting on the center of busy thoroughfares thereby paralyzing all civic life.

30. The petitioner admittedly is squatting over a prime property at Shimla that too without paying a penny to its owner and has thereby turned the litigation into a fruitful industry. The Hon'ble Supreme Court in **South Eastern Coalfields Limited** vs. **State of M.P. and others (2003) 8 SCC 648,** held as under:

> *"28 .....Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."*

31. It is therefore the duty of this court to neutralize any unjust enrichment and undeserved gain made by the litigants only on account of keeping the litigation alive. In **Indian Council for Enviro-Legal-Action** vs. **Union of India and others (2011) 8 SCC 161,** it is noticed that conduct of the parties is to be taken into consideration and it was held as follows:-

> *"197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view:*
>
> *1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.*
>
> *2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.*
>
> *3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.*
>
> *4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.*
>
> *5. No litigant can derive benefit from the mere pendency of a case in a court of law.*
>
> *6. A party cannot be allowed to take any benefit of his own wrongs.*

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

32. In view of the aforesaid discussion, we find no merit in this petition and the same is dismissed, so also the pending application(s), if any.

33. The petitioner has illegally deprived the respondents of the possession of the property of which he had no right, or title. He illegally retained the same for decades together. Therefore, it is the duty of the court to see that such wrong doers are discouraged at every stage and even if he has succeeded in prolonging the litigation, then he must suffer the costs of all these years and also bear the expenses of such unwanted and otherwise avoidable litigation. Therefore, the petitioner is burdened with costs, which is assessed at Rs.1,00,000/-.

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

Sada Ram ...Petitioner

Versus

Chief Secretary Govt. of H.P. . ...Respondent.

Ex. Petition No. 7 of 2015 in
CWP No. 224 of 2006
Reserved on: 18.5.2015
Date of Decision : May 27, 2015

Code of Civil Procedure, 1908- Order 21- Petitioner filed a Writ Petition before the High Court which was transferred to Administrative Tribunal- petition was allowed and the respondent No. 1 was directed to constitute Review Departmental Promotion Committee and place the cases of the petitioners before the Committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted and in case petitioners are ordered to be promoted they would be entitled to all consequential benefits- respondent promoted the petitioner notionally and denied the benefits of arrears of salary to the petitioner- petitioner claimed the higher pay only on the ground that one 'K' was drawing more pay than him but record showed that 'K' was stagnated on the post of Senior Assistant and was given two proficiency increments- this difference was only on the ground of fortuitous circumstances – the petitioner cannot be equaled to 'K' as he had not suffered the pain and pangs of stagnating on one post for more than 21 years- hence, pay was rightly fixed- petition dismissed. (Para- 14 to 23)

For the petitioner : Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Mr. Anup Rattan, Addl. A.Gs. and Mr. J. K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

It is for the second time that the petitioner has approached this Court for executing the judgment dated 14.5.2010 passed in CWP No. 224 of 2006 in case titled State of H.P. vs. Sada Ram and another whereby the judgment of the learned H.P. State Administrative Tribunal dated 7.12.2005 in TA No. 545 of 1986 was affirmed.

The brief facts of the case may be noticed.

2. The petitioner initially filed CWP No. 134 of 1982 before this Court. However, after constitution of the Administrative Tribunal, it was transferred and registered as TA No. 545 of 1986. The same was allowed by the learned Tribunal vide judgment dated 7.12.2005 and the respondent No.1 was directed to constitute Review Departmental Promotion Committee within eight weeks of the passing of the order and place the cases of the petitioners before such committee for consideration of their promotion with effect from 27.2.1980, the date from which their juniors were promoted. In case the petitioners on such consideration are ordered to be promoted they would be entitled for all consequential benefits and the same would be paid to them.

3. Admittedly, the order passed by the Tribunal has attained finality inasmuch as CWP No. 224 of 2006 filed before this Court challenging the order of the Tribunal was affirmed vide judgment dated 24.3.2006. Though, the same was initially set aside by the Hon'ble Supreme Court vide order dated 18.3.2009 with a direction to hear the same afresh, even thereafter, this Court vide judgment dated 14.5.2010 has again affirmed the judgment passed by the learned Tribunal.

4. When the judgment was not fully implemented, the petitioner alongwith co-petitioner filed Contempt Petition which was treated as Execution Petition (T) No. 29 of 2012 and was disposed of by this Court vide judgment dated 9.9.2013 by directing the respondent to comply with the judgment within three months, failing which the amount was to carry 9% interest.

5. Even before the aforesaid Execution Petition had been disposed of, the respondent themselves on 4.8.2011 issued a notification whereby the petitioner was promoted as Senior Assistant from 27.2.1980 to 15.12.1982 and Superintendent from 29.11.1994 to 29.8.1997 and further Section Officer from 2.2.1998 to 31.3.2002 on notional basis.

6. The petitioner complains that in terms of the judgment of the learned Tribunal as affirmed by this Court, he was entitled to all consequential benefits. Therefore, the arrears of salary becoming due cannot be denied to him by treating his promotion as notional without arrears. The petitioner has been promoted as Under Secretary on notional basis w.e.f. 31.1.2003 to 31.5.2004 vide notification dated 9.12.2013. Thereafter, vide notification dated 21.12.2013, the pay of the petitioner as on 31.1.2003 on promotion as Under Secretary was fixed at Rs.11660/-. His pay as Section Officer on promotion to the said post w.e.f. 2.2.1998 was fixed at Rs.9200/-.

7. The precise grievance of the petitioner is that once his Army service has been ordered to be counted for extending all benefits and he has been treated to be in service in the year 1965 as against one Karam Singh Thanta, who was appointed as Clerk on 26.3.1966, his pay cannot be less than him. It is alleged that Karam Singh Thanta was

appointed as Section Officer on 31.1.2003 and his pay was fixed at Rs.11660/-, on promotion as Under Secretary on 31.1.2003 his pay was fixed at Rs.12375/-. While on the contrary, when the petitioner was promoted as Section Officer on 31.1.2003 his pay has been shown to be Rs.10300/- and upon promotion to the post of Under Secretary on 31.1.2003 he had been fixed at Rs.11660/-. Similarly, on promotion of Karam Singh Thanta as Superintendent Grade-II on 29.11.1994, his pay was fixed at Rs.2775/-. He got next increment on 1.7.1995 raising his pay at Rs.2925/-.It is conceded by the petitioner that he was given promotion pursuant to the judgment in his favour with reference to Karam Singh Thanta, but on promotion as Superintendent Grade-II on 29.11.1994 his pay has been fixed at Rs.2440/- + 50 AP which was less than Karam Singh Thanta. The petitioner furnished the comparative details of his pay fixation vis-à-vis Karam Singh Thanta and the same are reproduced below:

Comparative Statement of pay drawn in respect of Sh. Karam <u>Singh Thanta &</u> <u>Sh. Sada Ram,</u>					
Sh. Karam Singh Thanta			***Sh. Sada Ram***		***Notional***
Sr. No.	*Dates*	*Basic pay*	*Dates*	*Basic pay*	*As per Off. Order*
1.	*29.11.94*	*2775*	*29.11.94*	*2490*	*Promoted as Supdt. Gr-II.*
2.	*01.07.95*	*2925*	*01.03.95*	*2550*	
3.	*01.01.96*	*8925*	*01.01.96*	*7880*	
4.	*01.07.96*	*9200*	*01.03.96*	*8100*	
5.	*01.07.97*	*9475*	*01.03.97*	*8375*	
6.	*02.02.98*	*9750*	*02.02.98*	*8650*	*Promoted as S.O.*
7.	*01.07.98*	*10300*	*01.03.98*	*9200*	
8.	*01.07.99*	*10640*	*01.03.99*	*9475*	
9.	*01.07.00*	*10980*	*01.03.00*	*9750*	
10.	*01.07.01*	*11320*	*01.03.01*	*10025*	
11.	*01.07.02*	*11660*	*01.03.02*	*10300*	
12.	*31.01.03*	*12375*	*31.01.03*	*10640*	*Promoted as U/Sectt.*
13.	*01.01.04*	*12750*	*01.01.04*	*10980*	*11660 Disparity.*

8. It is alleged that despite the directions of this Court, the respondent has not cared to fully implement the judgment. Though, the petitioner in order to give quietus to the matter had himself made a statement to confine the benefits from 1994 i.e. with respect to his pay fixation at par with Karam Singh Thanta, who was promoted as Superintendent on 29.11.1994. But despite this, the respondent till date has not given the benefit of such pay fixation from 29.11.1994.

9. The respondent-judgment debtor, in the reply has stated that the judgment as passed by the learned Tribunal has been implemented both in its letter and spirit and the main reason of difference of pay of both the retired officers i.e. the petitioner and Karam Singh Thanta is on account of their different dates of appointment. The petitioner joined the cadre on 4.8.1979 and within seven months he was promoted as Assistant w.e.f. 27.2.1980, in the pay scale of Rs.600-1120/- and as per Fundamental Rule 22, his pay was fixed at Rs.600/- at the initial of pay of the post, whereas Karam Singh Thanta joined the cadre on 26.3.1966 and was promoted as Assistant on 4.9.1973 and his pay as Assistant was fixed at Rs.225/-. However, due to revision of pay scale w.e.f. 1.1.1978 and by allowing annual increments, his pay as on 27.2.1980 was arrived at Rs.750/-.

10. It is further contended that the dates of promotion of both as Superintendents and Section Officers are identical, yet as per Rule, the pay of the petitioner cannot be fixed at par with the pay of Karam Singh Thanta. The reason as to why the pay of the petitioner cannot be fixed at par with the pay of Karam Singh Thanta is that Karam Singh Thanta was stagnated on the post of Senior Assistant for 21 years and as per instructions of Finance Department issued on 14th June, 1989, two proficiency increments were allowed to him on completion of 8 and 18 years service on the same post. Secondly, Karam Singh Thanta got 28 regular annual increments uptil 1994, whereas the petitioner remained on the post of Senior Assistant for 14 years and got one proficiency increment on completion of 8 years service on the same post and got 14 regular annual increments uptil 1994. Further under FR 22 (I) (a) (1) the junior officer/official can draw higher pay than the senior if the junior officer/official draws from time to time higher rate of pay than the senior by virtue of grant of advance increments. Karam Singh Thanta against whom the parity of pay is being claimed, has always drawn higher pay to the petitioner. Therefore, the pay of the petitioner cannot be fixed at par with Karam Singh Thanta w.e.f. 29.11.1994.

11. Sh. Dilip Sharma, learned Senior counsel assisted by Ms. Nishi Goel, has vehemently argued that the defence taken by the respondent has already been negated by the erstwhile Tribunal and also by this Court on more than one occasion and therefore, the respondent has no option but to implement the judgment not only in its letter but also in spirit.

12. On the other hand, Mr. Shrawan Dogra, learned Advocate General would contend that the reason why the petitioner cannot be fixed at par with the pay of Karam Singh Thanta is because Karam Singh Thanta had stagnated on the post of Senior Assistant for 21 years and therefore, had been extended the benefit of notification dated 14th June, 1989 whereby two proficiency increments were allowed to him on completion of 8 and 18 years service on the same post. In this way, Karam Singh Thanta got 28 regular annual increments uptil 1994, whereas the petitioner remained on the post of Senior Assistant for 14 years and got one proficiency increment on completion of 8 years service on the same post and got 14 regular annual increments uptil 1994.

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

14. Indisputably, the petitioner while filing CWP No. 134 of 1982 had claimed the following substantive reliefs:

(a) That the promotion of respondents No. 2 to 88 be quashed.

(b) That the petitioners be considered for the purpose of promotion to the post of Assistant and be eventually promoted w.e.f.27.2.1980 i.e. from the dates the respondents 27.2.1980 were promoted.

(c) The petitioners may also be paid arrears of pay allowances and allied benefits ensuing from quashing of the promotion.

15. The learned Tribunal vide order dated 7.12.2005 allowed this petition in the following terms:

> *"In view of the above, this TA is allowed to the extent that the respondent No.1 is directed to constitute Review Departmental Promotion Committee within 8 weeks of the passing of this order and place the cases of the applicants before such committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted. In case the applicants on such*

consideration are promoted they will be entitled for all consequential benefits and the same shall be paid to them."

16. For arriving at the aforesaid conclusion, it was observed by the learned Tribunal that while allotting seniority to the petitioner it had not been shown that the same had been worked out after taking into account his military services and therefore, the same was illegal or irregular because the benefit of such seniority could not be denied to the petitioner for the purpose of eligibility for consideration for promotion.

17. The order passed by the learned Tribunal was upheld by a learned Division Bench of this Court vide judgment dated 14.5.2010. The petitioner thereafter filed Execution Petition (T) No. 29 of 2012 and this Court on 12.6.2013 passed the following order:

"In the judgment dated 07.12.2005 passed by the learned Tribunal in O.A. TA-545/86 (Sada Ram & another Versus the State of Himachal Pradesh and others), it has been indicated in paragraph 17, which reads thus:-

"*In view of this, this TA is allowed to the extent that the respondent No.1 is directed to constitute Review Departmental Promotion Committee within 8 weeks of the passing of this order and place the cases of the applicants before such committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted. In case the applicants on such consideration are promoted they will be entitled for all consequential benefits and the same shall be paid to them."*

The said observation of the learned Tribunal has also been affirmed by this Court (DB) vide judgment dated 14.05.2010 passed in CWP No. 224 of 2006 (State of Himachal Pradesh Versus Sada Ram and Another). From the affidavit of the respondent/alleged contemnor, it appears that the Departmental Promotion Committee so constituted to review the earlier recommendations of the DPC, considered and recommended the case of the petitioners for promotion w.e.f. 27.2.1980, the date when juniors to petitioners were considered in its meeting held on 11.7.2011 and the petitioners were shown to have been promoted vide Notification dated 04.08.2011. According to the petitioners, nothing has been indicated in the affidavit as to how the consequential benefit has been given to the petitioners and how the review DPC has considered the case of the petitioners vis a vis their juniors for further promotion.

In the aforesaid facts and circumstances, the respondents are directed to file better affidavit within three weeks from today and the records of the review DPC be also produced before this Court on 3rd July, 2013."

18. The respondent in response to the execution petition had filed their reply-affidavit wherein it was averred that the petitioner while filing CWP No. 134 of 1982 had impleaded 87 persons as respondents over whom he had claimed seniority/promotion w.e.f. 27.2.1980, but out of 87 respondents, respondents No. 2 to 48 were appointed as Clerks between 1966 to 1974. They were further promoted as Assistants in the year 1980 and were working as such at the time of filing the initial petition in the year 1982. But subsequently, on the representations made by the respondents and on the directions of the Tribunal, these respondents were given promotions as Assistants from back dates between the period 4.9.1973 to 7.3.1979, prior to the dates of joining of the petitioners as Clerks. It was further contended that the petitioners therein had joined as Clerks against the post reserved for Ex-Serviceman category on 4.8.1979 and 18.8.1979, respectively. Therefore, the respondents

No. 2 to 48 who were promoted as Assistants prior to 7.3.1979 could not be said to be juniors to the petitioners who had been appointed as Clerks on 4.8.1979 and 18.8.1979.

19. This Court however rejected the aforesaid stand of the respondents and held that the petitioners could not be said to be juniors to respondents No. 2 to 48. As per the judgment, the petitioners were entitled to the benefit of the past service in the Army and, therefore, ranked senior to respondents No. 2 to 48 and accordingly the following order was passed:

> *"14. Since the petitioners as well as private respondents stand already retired from the service, now they are required to be considered for promotion as Under Secretary notionally from the date, it fell due as Shri Karam Singh, who was at Sr.No. 78 below petitioner No.1 at Sr. No. 77-A, was promoted as Under Secretary on 31.1.2003, which is clear from list of Section Officers, Annexure E-4. Similarly, Shamsher Singh, who was at Sr. No. 88, below petitioner No.2 at Sr. No. 87-A in the seniority list of Clerks, was promoted as Under Secretary w.e.f. 4.4.2003, whereas petitioner No.1 stood retired on 31.5.2004 and petitioner No.2 on 31.7.2005 as Section Officers. Therefore, it is clear that the petitioners were to be considered as senior to the aforesaid persons. Hence, the impugned judgment is not fully complied with as the consequential benefits of pay fixation etc. are also to be given to the petitioners at par with their juniors consequent upon their promotions notionally, as stated above."*

20. It would be seen from the judgment passed by the erstwhile Tribunal that the petitioner was held entitled to be considered for promotion w.e.f. 27.2.1980, the date when his juniors were promoted and in case on such consideration he was found eligible for promotion, he would be entitled for all consequential benefits.

21. The respondents in their reply have clearly stated that Karam Singh Thanta was drawing more pay only because he stagnated on the post of Senior Assistant for 21 years and was then given two proficiency increments on completion of 8 and 18 years service respectively on the basis of the instructions of the Finance Department dated 14.6.1989. The petitioner in fact had joined the services of the respondent only w.e.f. 4.8.1979 and had been granted the benefit of his services rendered in the Army.

22. The difference in pay is only on account of fortuitous circumstance which is not uncommon in service. If a junior gets a higher pay that does not mean that the senior also should necessarily get it without a foundation for such a claim in law. Fortuitous events are part of life. Fixation of pay is generally with reference to an individual. Various reasons may account for the grant of higher pay to a junior. Equal protection means the rights of equal treatment in similar circumstance. Different treatment does not per se, amount to discrimination violative of Article 14. It denies equal protection only when there is no basis for differentiation.

23. The petitioner admittedly has not suffered the pain and pangs of stagnating on one post for more than 21 years and cannot therefore claim the benefit similar to those of Karam Singh Thanta because no such benefit has been granted to the petitioner either by the Tribunal or by this Court. It is also not established on record that the contentions as have now been raised by the respondents had already been adjudicated in the earlier litigation, particularly while adjudicating the Execution Petition (T) No. 29 of 2012. Rather this question was never in issue and has cropped up only at the stage when the petitioner has been promoted to the post of Under Secretary.

24. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, so also the pending application(s), if any.

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

The Director, Telecom Project-II ...Appellant.

VERSUS

Smt.Neelam Chadha and another ...Respondents.

LPA No.279 of 2012.
Reserved on : 20.05.2015
Pronounced on: May 27, 2015.

Industrial Disputes Act, 1947- Section 25- Employer contended that workman had not completed 240 days in the preceding 12 months, however, no such plea was taken before the Writ Court- it was further contended that project had come to an end and there is no work, however, Labour Court had specifically found that management was having the work- no material was placed on record to controvert this finding - workman was terminated without any cause and the order was in breach of the principles of natural justice.

(Para- 8 to 10)

Case referred:
Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015) 4 Supreme Court Cases 544

For the Appellant: Mr.Y.P.S. Dhaulta, Advocate.
For the Respondents: Mr.Sameer Thakur, Advocate, for respondent No.1.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

This Letters Patent Appeal has been filed by the appellant-employer (writ petitioner) questioning the judgment and order, dated 17th November, 2011, passed by the learned Single Judge of this Court in CWP No.4378 of 2009, titled The Director, Telecom Project vs. Neelam Chadha and another, whereby the award passed by the Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court-I, Chandigarh, (for short, the Labour Court), in favour of the respondent-workman, came to be modified, (for short, the impugned judgment).

2. Facts of the case, as averred, are that the respondent-workman was engaged as Typist-Casual Worker by the appellant on daily rate basis w.e.f. 12th August, 1995. The respondent-workman continued to work as such till April, 1996 and her services came to be terminated by the appellant-employer verbally w.e.f. May, 1996.

3. Upon a reference having been received from the Government of India, the Labour Court entered into the reference and after examining the pleadings and the evidence adduced by the parties, passed the award in favour of the workman (respondent herein) by

directing the appellant-employer to reinstate the services of the workman and to pay her entire back wages.

4. Feeling aggrieved, the employer challenged the award passed by the Labour Court by filing the writ petition (supra). The Writ Court, after examining the award and the pleadings of the parties, modified the award by providing that the workman would be entitled only to reinstatement and not to the wages for the period during which her services remained terminated.

5. The workman-writ respondent has not questioned the impugned judgment on any count. Only the employer/writ petitioner has questioned the impugned judgment on the grounds taken in the memo of appeal.

6. Before we deal with the grounds on which the impugned judgment has been sought to be assailed, we deem it proper to make a reference to the grounds taken by the writ petitioner in the writ petition, seeking quashment of the award passed by the Labour Court:

> *"(i) That the Ld. Presiding Officer of the Labour Court has based his award on conjectures and surmises. There was no material whatsoever to show that Respondent No.1 has worked with the petitioner in the month of February, 1996. The voucher which has been relied upon for holding that Respondent No.1 has worked in the month of February, 1996 pertains to one Neena Chadha. It will be worthwhile to mention here that it was never the case of Respondent No.1 prior to 1999 that for the month of February, 1996 she was paid the wages in the name of Neena Chadha. As such, the foundation of her case is based upon falsehood and except her bald statement, there is nothing to show that she has worked in the month of February, 1996. As such the findings returned by the Ld. Presiding Officer of the Labour Court are perverse and contrary to the record. Hence, the award Annexure P-4 dated 21.7.2009 is liable to be set aside.*
>
> *(ii) That it was specific case of the petitioner that Respondent No.2 was a casual worker and was engaged on a project work. When the camp office of the project was to be closed, the services of the Respondent No.1 were no longer required. Even the entire project work has come to an end. As such, the Ld. Presiding Officer, Industrial Tribunal has erred in law in granting re-instatement in employment to Respondent No.1. On this ground also, the impugned award is liable to be set aside.*
>
> *(iii) That it was never the case of the Respondent No.1 that she is not in gainful employment after termination of her services. In fact, no body will remain unemployed for a long period of 13 years. The Ld. Presiding Officer has granted full back wages to Respondent No.1 against the well settled law. In the present case, the Respondent No.1 at the most was entitled for compensation not the full back wages and reinstatement. On this ground also, the impugned award is liable to set aside.*
>
> *(iv) That the award of the Ld. Presiding Officer, Industrial Tribunal amounts to undue enrichment of Respondent No.1 at the cost of public money, which is against the public policy and on this ground also, the impugned award is liable to be set aside."*

7. During the course of hearing, the learned counsel for the appellant-employer vehemently argued that the workman-respondent had not completed 240 days in the preceding 12 months, when her services were terminated. The learned counsel for the appellant was specifically asked to show whether any such ground was taken in the writ

petition. The learned counsel frankly conceded that no such ground was urged before the writ Court, as is also evident from a perusal of the grounds of the writ petition reproduced supra.

8. The learned counsel for the appellant also argued that the project has come to an end and there is no work. The Labour Court, after examining the rival contentions of the parties and the evidence adduced, has categorically recorded in the award as under:

> *"As per the evidence available on record the management was having the work and still having the work so there is no force in the contention of the management that project for which the workman was engaged has been closed."*

9. The learned counsel for the appellant has not been able to show from the record that the said findings recorded by the Labour Court, are erroneous or are not based upon correct appreciation of the material placed on record. Thus, the contention raised by the learned counsel for the appellant-employer is repelled, being not sustainable in the eyes of law.

10. The Apex Court in a latest decision in **Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015) 4 Supreme Court Cases 544,** has held that when no positive evidence was adduced in support of the claim of the appellant-Company that the retrenchment was effected on account of closure of the department/unit of the Company, the finding of fact recorded by the Labour Court in that regard against the employer cannot be interfered with. It is apt to reproduce paragraph 33 of the said decision hereunder:

> *"33. On the contention urged on behalf of the appellant-Company that it was a closure of the department/unit of the appellant-Company as per the definition of "closure" under Section 2(cc) of the I.D. Act, we are of the view that with respect to the above contentious issues framed by the Industrial Court have been answered against the appellant-Company based on the finding of fact recorded by it. Therefore, the said contention urged on behalf of the appellant-Company cannot be allowed to sustain in law."*

11. It was also observed by the Apex Court in the decision supra that Court cannot sympathize with a party which gambles in litigation to put off the evil day, and when that day comes, prays to be saved from its own gamble. It is apt to reproduce paragraph 53 hereunder:

> *"53. Further, it is urged by the learned senior counsel on behalf of appellant-Company that there is no question of reinstatement of the workmen concerned and payment of back wages to them since the concerned department/unit of the appellant-Company in which they were employed no longer exists and therefore, requested this Court to mould the relief granted by the courts below. The said contention is rightly rebutted by the learned senior counsel on behalf of the respondent-Union by placing reliance on Workmen of Sudder Workshop , wherein this Court held that the Court cannot sympathise with a party which gambles in litigation to put off the evil day, and when that day comes, prays to be saved from its own gamble. The said contention urged on behalf of the respondent-Union must be accepted by us as the same is well founded. Therefore, we hold that moulding of the relief is not permissible in this case at this stage when the matter has reached this Court keeping in mind the legal principle laid down by this Court on this aspect of the matter in the case referred to supra."*

12. The Labour Court, after examining the evidence and the facts rightly came to the conclusion that the services of the workman were terminated without any cause and that the termination order was in breach of the principles of natural justice.

13. In view of the above discussion, we are of the opinion that the impugned judgment is speaking one and needs no interference.

14. Having said so, there is no merit in the appeal, the same is dismissed and the impugned judgment is upheld.

15. Pending CMPs, if any, also stand disposed of.

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

Vyasa Devi wife of Sh. Shyam Lal ....Petitioner
Versus
State of H.P. & others ....Respondents

CWP No. 6244 of 2013
Order Reserved on 15th May 2015
Date of Order 27th May, 2015

Constitution of India, 1950- Article 226- Petitioner and 1600 workmen were retrenched on 9.2.2004- services of more than 1000 workmen were reinstated but the services of the petitioner were not reinstated- retrenchment order was set aside but the petitioner was not given employment- petitioner raised an industrial dispute but his case was rejected on the ground of delay and was not referred to Industrial Tribunal- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay.(Para-5 and 6)

Cases referred:
Collector Land Acquisition Anantnag and another vs. Mst. Katji and others, 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 Petitioner: Mr. Rahul Mahajan, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

It is pleaded that in the month of December 1998 petitioner was engaged by co-respondent No.3 on daily wages basis on muster roll as Beldar. It is pleaded that thereafter on dated 9.2.2004 the services of 1600 workmen were retrenched by co-respondent No.3 including the services of petitioner. It is pleaded that in the months of April and May 2004 services of more than 1000 retrenched workmen were reinstated by respondents but petitioner was not given opportunity of reemployment despite of senior workman. It is also pleaded that on dated 8.7.2005 services of 1087 workmen again

retrenched by the respondents. It is further pleaded that retrenchment order dated 8.7.2005 was set aside by Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala and services of workmen were reinstated by the respondents but being a senior workman the petitioner was not given the opportunity for re-engagement. It is pleaded that on dated 26.9.2009 petitioner raised her industrial dispute against her illegal termination order dated 9.2.2004 after about five years. It is further pleaded that on dated 9.11.2009 one Smt. Bhichi Devi raised demand notice against her illegal termination of dated June 2004 after elapse of more than five years and five months. It is pleaded that on dated 6.8.2010 case of Inder Singh was referred by co-respondent No.3 to learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala and said Inder Singh has raised his industrial dispute after elapse of more than seven years. It is also pleaded that on dated 31.3.2012 the case of Bhichi Devi was referred by co-respondent No. 2 to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala for adjudication. It is also pleaded that on dated 13.6.2013 case of petitioner was rejected by co-respondent No. 2 and was not referred to Hon'ble Industrial H.P. Tribunal-cum-Labour Court Dharamshala for adjudication. It is pleaded that order dated 13.6.2013 passed by Labour Commissioner H.P. whereby Labour Commissioner has refused to refer the dispute of petitioner to H.P. Industrial Tribunal-cum-Labour Court Dharamshala be set aside and co-respondent Nos. 1 and 2 be directed to refer the dispute of petitioner for adjudication to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of co-respondent Nos. 1 and 2 pleaded therein that petitioner served demand notice on dated 26.9.2009 on co-respondent No.3 and same was submitted to Labour Officer-cum-Conciliation Officer Mandi. It is pleaded that Labour Officer-cum-Conciliation Officer tried to settle the dispute amicably but dispute could not be settled by way of conciliation. It is pleaded that thereafter Labour Officer-cum-Conciliation Officer Mandi sent the report under Sub-section 4 of Section 12 of Industrial Disputes Act 1947 to the Labour Commissioner. It is pleaded that co-respondent No. 2 exercising the powers of appropriate government examined the report sent by Labour Officer-cum-Conciliation Officer Mandi and also perused the reply filed by respondent No.1 and found that petitioner had raised dispute vide demand notice dated 26.9.2009 after a lapse of more than five years without giving any detailed reasons relating to delay. It is pleaded that dispute was not kept alive by petitioner for long period and learned Labour Commissioner came to the conclusion that dispute had faded away after a lapse of long time and demand notice raised by petitioner was found to be vexatious and devoid of any merits. It is pleaded that facts and circumstances of the case always differ and could not be compared with each other. It is pleaded that Government of India has amended the Industrial Dispute Act 1947 whereby direct access has been given to workman for raising any dispute upon termination and dismissal of services directly to the Labour Court-cum-Industrial Tribunal within a period of three years from the date of termination. It is pleaded that as per amended Section 2-A dismissal of services of an individual workman would be deemed to be an industrial dispute. It is pleaded that non-alive issue could not be referred to Labour Court-cum-Industrial Tribunal for adjudication. Prayer for dismissal of civil writ petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the respondents and Court also perused the entire record carefully.

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

1. Whether order of learned Labour Commissioner (H.P.) No.11-23/84(Lab)ID/2013-Mandi dated 13.6.2013 is liable to be set aside as mentioned in memorandum of grounds of civil writ petition?

2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing for the petitioner that matter in dispute is service matter and learned Labour Commissioner Himachal Pradesh has illegally declined to refer the matter to learned Labour Court-cum-Industrial Tribunal for adjudication is accepted for the reasons hereinafter mentioned. Court has carefully perused the order passed by learned Labour Commissioner dated 13.6.2013. Learned Labour Commissioner has specifically mentioned in the order that petitioner did not agitate the matter for more than five years and present dispute faded away with passage of time. 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 the highest that can be happened is that a 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 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 a 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 alone. It was further held that even in case where delay was condoned by Labour Court then Labour Court could mode 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:-

> "10.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-
>
> (d) Refer the dispute to a Board for promoting a settlement thereof.
>
> (e) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry.
>
> (f) Refer the dispute or any matter appearing to be connected with or relevant to the dispute if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication.

6. Submission of learned Additional Advocate General appearing on behalf of the respondents that petitioner did not agitate the matter for more than five years and on this ground civil writ petition filed by petitioner be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Since petitioner is a rustic woman hence it is not expedient in the ends of justice to decline the relief to the petitioner. In view of the above stated facts point No. 1 is answered in affirmative.

Point No.2 (Final Order)

7. In view of above stated facts petition filed by petitioner is allowed. Order No. 11-23/84(Lab)ID/2013-Mandi dated 13.6.2013 passed by learned Labour Commissioner Himachal Pradesh is set aside and co-respondents Nos. 1 and 2 are directed to refer the dispute of petitioner for adjudication to H.P. Industrial Tribunal-cum-Labour Court Dharamshala under Section 10 of Industrial Disputes Act 1947 within one month from today. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Dhameshwar ……Appellant.
Vs.
Gish Pati and others …..Respondents-Proforma respondents.

RSA No. 328 of 2002
Reserved on: 19.05.2015
Date of decision: 28.05.2015

Indian Succession Act, 1925- Section 63- Will was stated to have been executed by 'D', aged more than 78 years old- it was proved on record that the contents of the Will were read over and explained to 'D' who put her thumb impression on the same- marginal witness had signed the Will thereafter- merely because the marginal witness had used different ink will not make the Will suspicious- mere non-registration of the Will is not sufficient to doubt the same. (Para-16 and 17)

For the appellant : Mr. Sanjeev Kuthiala, Advocate.
For the respondents : Mr. Devyani Sharma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Rajiv Sharma, J.

This Regular Second Appeal is directed against the judgment and decree, dated 01.06.2002, passed by the learned Additional District Judge, Mandi in Civil Appeal No. 43 of 1999.

2. Key facts necessary for the adjudication of this Regular Second Appeal are that the appellant-plaintiff (hereinafter referred to as 'the plaintiff' for the sake of convenience), has filed a suit against the respondent-defendant, namely, Gish Pati and proforma respondents-defendants (hereinafter referred to as 'the defendants' for the sake of convenience) for declaration and for permanent prohibitory injunction as a consequential relief. According to the plaintiff, Smt.Drumati Devi had not executed the Will, dated

15.06.1985, Ex. DW2/A in favour of defendant, Sh. Gish Pati. Drumati Devi was 78 years of age in the year 1985. The defendant No. 1 in collusion with the subordinate revenue staff and behind the back of the plaintiff and proforma defendants, got the mutation attested in his favour with regard to the share of late Smt. Drumati Devi. He came to know about this in the month of January, 1994. The Will is unregistered. Smt. Drumati Devi was an old, illiterate and simple lady. She had never expressed her will or desire to disentitle the plaintiff and other proforma defendants from her share in the suit property. The execution of the Will was result of undue influence, mis-representation and coercion. The Will, dated 15.06.1985, was null and void. He also sought the decree of permanent prohibitory injunction against the defendant No. 1. The details of the suit land have been given in paragraphs No. 1(a) & 1(b) of the plaint.

3. The suit was contested by the defendant No. 1. According to him, Smt. Draumati Devi was fully capable and sensible lady. She in lieu of the services rendered by him, executed a Will in his favour. Thereafter, on the basis of the Will, dated 15.06.1985, the mutation was also attested. The revenue entries were in accordance with the law.

4. Replication was filed by the plaintiff. The issues were framed by the learned Sub Judge, Ist Class, Court No. 3, Mandi, H.P. on 09.09.1994 and 24.02.1999. The Sub Judge, Ist Class, Court No. 3, Mandi, H.P. decreed the suit on 31.03.1999. The defendant No. 1, Gish Pati filed an appeal against the judgment and decree, dated 31.03.1999, before the learned Additional District Judge, Mandi, H.P. He allowed the appeal on 01.06.2002. Hence, this Regular Second Appeal.

5. This Regular Second Appeal was admitted on the following substantial questions of law on 24.07.2002:

> *"1. Whether upon proper construction and interpretation of the document Ex.DW2/A, the un-registered Will, the presumption of validly executed Will in favour of the beneficiary/propounder could be raised?*
>
> *2. Whether the learned courts below have misread and misconstrued the oral and documentary evidence especially the statements of PW1 Shyam Lal alias Ghanshyam, PW2 Satya Devi, DW 2 Het Ram, Ex. DW2/A Unregistered Will, Ex. PA Special Power of Attorney?*
>
> *3. Whether the question as to whether the Will was set up by the propounder to be the last will of testator has to be attested in law of the conditions imposed under Sections 67 and 68 of the Indian Evidence Act as also Section 59 and 63 of the Indian Succession Act, specially when challenge is laid as to the genuineness and validity of the document?*
>
> *4. Whether the Court can deny an opportunity to the plaintiff for appearing as his own witness in rebuttal after the discharge of onus of the particular issue by the defendant with respect to the will and whether it is proper for the court after denying the opportunity to dismiss the application under the provision of Section 41 rule 27 CPC seeking to lead evidence in rebuttal to the onus so discharged by the defendant?*
>
> *5. Whether provision of Section 57 of the Indian Evidence Act stood satisfied in the facts of the case when rational of the Will the testatamentary capacity and mental faculty of the testator could be established and whether the Will could be held to be genuine or not?*

6. Mr. Sanjeev Kuthiala, learned counsel for the appellant has vehemently argued that Ex. DW2/A was an unregistered Will. He then contended that the learned first Appellate Court has mis-read and mis-construed the oral as well as documentary evidence.

According to him, there is non-compliance with the mandatory conditions under Sections 67 and 68 of the Indian Evidence Act and Sections 59 and 63 of the Indian Succession Act. He further contended that the application preferred by his client under Order 41 Rule 27 has been wrongly decided. According to him, Smt. Drumati Devi was more than 78 years old at the time of execution of alleged Will, dated 15.06.1985.

7. Ms. Devyani Sharma, learned counsel for the respondent No. 1 has supported the judgment and decree, dated 01.06.2002, passed by the learned Additional District Judge, Mandi, H.P.

8. I have heard the learned counsel for the parties and gone through the pleadings and the records, carefully.

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid the repetition of discussion of evidence.

10. The Will, dated 15.06.1985, Ex. DW2/A was scribed by Dile Ram. Himan and Het Ram have appeared as marginal witnesses. The plaintiff has not appeared as a witness. One Shri Ghanshyam has appeared as PW-1. The Special Power of Attorney was executed in favour of Shri Sham Lal, son of of Shri Sardaru Ram and not in favour of PW-1, Ghanshyam. The plaint was signed by the plaintiff.

11. PW-1, Ghanshyam has produced Special Power of Attorney, Ex.PA. According to him, the age of Drumati Devi was 80 years. She was an old, illiterate and simple lady. She was looked after by both the sons, i.e., the plaintiff and defendant No. 1. The Will is fake and fictitious. In his cross-examination, he has deposed that Dhameshwar used to live towards Kaza side. He has executed Special Power of Attorney Ex.-PA in his favour. Draumati died in 1984-85. He has come to his village after 1 ½ -2 years after the death of his mother.

12. PW-2, Satya Devi, is the wife of Dhameshwar. She testified that her mother-in-law had never executed any Will. Her husband used to work in Kaza. They came to know about the Will after eight years of the death of Draumati Devi.

13. Defendant No. 1, Gish Pati Ram, has appeared as DW-1. According to him, his mother died on 25.08.1985. Dhameshwar has not visited the house after the death of his mother. He came after two months. He used to live in Kaza. He further stated that he used to lookafter his mother. He performed her last rites. The Will was executed in his favour. The mutation was attested in 1986. The Will was got executed by Drumati Devi at home. Het Ram and Himan were present at that time. In his cross-examination, he deposed that the Will was scribed by Dile Ram, who belongs to his village. His mother used to live with him.

14. DW-2 Het Ram has proved Will Ex. DW2/A. He signed the same as a marginal witness. The Will was scribed by Dile Ram. The contents of the same were read over and explained to her. Thereafter, she put her thumb impression on the same. Himan, the marginal was present on the spot. Draumati was in her senses at the time of execution of the Will. In his cross-examination, he has deposed that the Will was scribed in his presence. Himan has come to call him. DW-3, Damoder has testified that the defendant No. 1 used to look after his mother.

15. What emerges after analysis of the statements of the witnesses, is that the Will is dated 15.06.1985. It was scribed by Dile Ram. The contents of the Will were read over and explained to Draumati Devi. She has put her thumb impression on the same. Thereafter, the marginal witnesses, Himan and Het Ram have signed the same. The

defendant No. 1 used to look after his mother. The plaintiff was out of village. The last rites were performed by defendant No. 1. Draumati was in her senses at the time of execution of the Will.

16. The Court has already noticed that the plaintiff has not appeared as a witness. He has executed his Special Power of Attorney in favour of Sh. Sham Lal. But, one Shri Ghanshyam has appeared as PW-1 claiming himself to be as the Special Power of Attorney of the plaintiff. The plaintiff has also filed an application under Order 41 Rule 27 and Order 41 Rule 33 of the Code of Civil Procedure in order to establish that Shyam Lal, son of Sh. Sardaru Ram, R/o Bhalwani was also known as Shyam Lal alias Ghanshyam Lal, S/o Sardaru Ram, R/o Village Bhalwani. This is an afterthought. The application has been filed merely to fill up the legal lacuna. The affidavit cannot be read as evidence. Even if it is assumed that Shyam Lal, S/o Sh. Sardaru Ram is also known as Shyam Lal alias Ghanshyam Lal, the application should have been filed at the earliest, rather, the plaintiff has also moved an application under Order 41 Rule 27, CPC before the learned First Appellate Court, which stood already rejected.

17. Mr. Sanjeev Kuthiala, learned counsel for the plaintiff has drawn the attention of the Court to Ex.DW2/A. According to him, there is a column of date, but there is no date mentioned. However, the date 15.06.1985 is mentioned below the signatures of DW-2 Het Ram. He then contended that the marginal witnesses have used different ink. But, merely the fact that the marginal witnesses have used different ink, will not make the Will suspicious. He then contended that column No. 2 of the right side of the Will is blank. It would not make any difference. Even, in the Will Ex. DW2/A, below this column, Himan has put his signatures with Het Ram as marginal witnesses and the addresses of both the marginal witnesses have been given specifically on the left side of the Will. The Will was executed on 15.06.1985. The mutation was attested in 1986 and Civil Suit has been filed in 1994. It is not believable that the brother, i.e., the plaintiff was not aware of the entries made in the revenue record pursuant to Will, dated 15.06.1985. The first Appellate Court has correctly appreciated the oral as well as documentary evidence. The non registration of the Will will not make it suspicious. The Will has been executed strictly as per the provisions of the Indian Evidence Act and the Indian Succession Act. The substantial questions of law are answered accordingly.

18. Accordingly, in view of the observations and discussions made hereinabove, there is no merit in this Regular Second Appeal and the same is dismissed.

CMP No. 5439 of 2015

19. In view of the discussions made hereinabove, there is no merit in this application and the same is dismissed.

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

Himachal Pradesh Petroleum Dealers Association. ...Petitioner.

Versus

Neeraj Mittal and others. ... Respondents.

COPC No.587 of 2014
Reserved on: 12.5.2015
Decided on: 28.5.2015

Constitution of India, 1950- Article 226- Petitioner claimed that retail outlets are being opened indiscriminately without any regard to distance, volume and growth potential- High Court issued an order that no letter of intent shall be issued without obtaining order from the Court- Government of India issued fresh guidelines stating that existing roster was closed in July, 2012- petitioner contended that order issued by High Court was not complied with in letter and spirit- held, that respondents have complied with major portion of the directions except that the locations already advertised were ordered to be governed as per the old conditions- respondents directed to consider the old cases which are pending at the time of filing of the petition as per new guidelines. (Para-5 to 12)

Cases referred:
Delhi Development Authority vs. Skipper Construction Co. (P) Ltd. and another, (1996) 4 SCC 622
Palitana Sugar Mills Private Limited and another vs Vilasiniben Ramachandran and others, (2007) 15 SCC 218

For the Petitioner:	Ms. Jyotsna Rewal Dua, Advocate.
For the Respondents:	Mr. Sanjay Jain, Addl. Solicitor General of India with Mr. Ashok Sharma, Assistant Solicitor General of India and Mr. Ankit Jain, Advocate for respondent No.1. Mr. K.D. Sood, Sr. Advocate with Mr. Mukul Sood, Advocate for respondents No.2 and 34. Mr. Rahul Mahajan, Advocate for respondent No.4.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

Petitioner had filed CWP No.3723/2010 in this Court. Case of the petitioner, precisely, was that retail outlets were being opened indiscriminately without any regard to distance, volume and growth potential. On 5.7.2010, the following order was passed by this Court:

> "Notice. Short reply within a month. Post on 16.8.2010. Any steps in the matter of opening of new petrol pumps in the meanwhile will subject to the result of the writ petition and it shall be made so clear in the proceedings."

2. On 21.9.2011, the Court passed the following order:

> "Respondents seek two weeks' time to file reply. Post on 19.10.2011. In the meanwhile, no letter of intent shall be issued without obtaining the orders from the Court."

3. CWP No. 3723 of 2010 was allowed by this Court on 17.5.2012. Respondents preferred LPAs No.280 of 2012 and 389 of 2012 against the judgment dated 17.5.2012. LPA No. 280 of 2012 was dismissed as withdrawn on 18.3.2014 and LPA No. 389 of 2012 was dismissed as withdrawn on 5.3.2014.

4. The Government of India has issued letter dated 17.2.2014 whereby new guidelines were framed for selection of retail outlet (RO) dealership for setting up of new ROs. These guidelines came into force with effect from the date of issuance of letter, i.e. 17.2.2014. Thereafter, Indian Oil has framed PSU Oil Marketing Company's Manual for selection of dealers for regular and rural retail outlets. It is at page 85 of the paper book.

5. Mr. Sanjay Jain, learned Additional Solicitor General of India, has drawn the attention of the Court to clause 'D' of this manual. It reads as under:

> "D. Existing Roster of earlier SRMPs and advertisement of Back Log locations-
>
> The existing Roster of old SRMPs made under the earlier guidelines has been frozen and closed in July 2012. The locations already advertised and which are at various stages of commissioning will be governed as per their advertisement conditions."

6. Ms. Jyotsna Rewal Dua, learned counsel for the petitioner, has vehemently argued that direction issued by this Court in CWP No.3723/2010 have not been followed in letter and spirit. According to her, the process for opening new outlets even though advertised prior to judgment dated 17.5.2012 was to be regulated under the new norms. In other words, her submission is that the cut-off date laid down in letter dated 17.2.2014 and PSU Oil Marketing Company's Manual for selection of dealers for regular and rural retail outlets vide clause 'D's is not in conformity with the judgment rendered by this Court on 17.5.2012.

7. It is evident from the interim order dated 5.7.2010 that any steps for opening of new petrol pumps were subject to the result of the writ petition. The Court had specifically issued direction to the respondents not to issue any letter of intent without obtaining orders from the Court on 21.9.2011. These orders were issued to ensure that till the disposal of the petition, status quo is maintained qua those retail outlets for which advertisement had already been issued. Respondents have complied with the major portion of the directions issued on 17.5.2012 except that the location already advertised were ordered to be governed as per the old conditions. This is in contravention of the judgment passed by this Court on 17.5.2012, which was upheld in LPAs No. 280/2012 and 389/2012.

8. Learned counsel appearing on behalf of the respondents have vehemently argued that there is no willful and deliberate disobedience of judgment dated 17.5.2012 rendered by this Court. Rather the judgment has been complied with. However, there is a *bona fide* mistake committed by the respondents while implementing the judgment dated 17.5.2012 by applying new guidelines prospectively, which has resulted into miscarriage of justice. The grievance of the petitioner, as noticed hereinabove, precisely was that new retail outlets were being opened pursuant to old advertisement without taking into consideration the feasibility report. It is for this reason petitioner had come to this Court seeking direction to the respondents to frame guidelines. It is reiterated that new guidelines issued as per letter dated 17.2.2014 for selection of retail outlet dealership for setting up of new retail outlets and clause 'D' of PSU Oil Marketing Company's Manual for selection of dealers for regular and rural retail outlets would relate back to the opening of those retail outlets, which had already been advertised.

9. Mr. Sanjay Jain, learned Addl. Solicitor General of India, has vehemently argued that this Court cannot issue directions once the judgment has already been announced on 17.5.2012. It is the duty of the Court as a policy to set the wrong right and not to allow the perpetuation of the wrong doing by permitting the respondents to enforce the guidelines prospectively. The judgment takes into consideration the facts existing on the date of filing of the petition and the subsequent developments as well upto the stage of delivering the judgment.

10. Their Lordships of the Hon'ble Supreme Court in ***Delhi Development Authority*** vs. ***Skipper Construction Co. (P) Ltd. and another,*** (1996) 4 SCC 622 have

held that imposition of punishment for contempt would not denude the Court of its power to issue directions to remedy the wrong done by the contemner including those so as not to enable the contemner to retain the benefit derived by the contempt and this power cannot be defeated on procedural or other technical objections. Their Lordships have held as under:

> "17. The principle that a contemner ought not to be permitted to enjoy and/or keep the fruits of his contempt is well-settled. In Mohd. Idris v. R. J. Babuji, (1985) 1 SCR 598 : (AIR 1984 SC 1826), this Court held clearly that undergoing the punishment for contempt does not mean that the Court is not entitled to give appropriate directions for remedying and rectifying the things done in violation of its Orders. The petitioners therein had given an undertaking to the Bombay High Court. They acted in breach of it. A learned Single Judge held them guilty of contempt and imposed a sentence of one months' imprisonment. In addition thereto, the learned Single Judge made appropriate directions to remedy the breach of undertaking. It was contended before this Court that the learned Judge was not justified in giving the aforesaid directions in addition to punishing the petitioners for contempt of Court. The argument was rejected holding that "the Single Judge was quite right in giving appropriate directions to close the breach (of undertaking)".
>
> 19. To the same effect are the decisions of the Madras and Calcutta High Courts in Century Flour Mills Limited v. S. Suppiah, AIR 1975 Madras 270 (FB) and Sujit Pal v. Prabir Kumar Sun, AIR 1986 Calcutta 220. In Century Flour Mills Limited, it was held by a Full Bench of the Madras High Court that where an act is done in violation of an order of stay or injunction, it is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrong-doing. The inherent power of the Court, it was held, is not only available in such a case, but it is bound to be exercise it to undo the wrong in the interest of justice. That was a case where a meeting was held contrary to an order of injunction. The Court refused to recognise that the holding of the meeting is a legal one. It put back the parties in the same position as they stood immediately prior to the service of the interim order.
>
> 21. There is no doubt that this salutary rule has to be applied and given effect to by this Court, if necessary, by overruling any procedural or other technical objections. Article 129 is a constitutional power and when exercised in tandem with Article 142, all such objections should give away. The Court must ensure full justice between the parties before it."

11. Similarly, their Lordships of the Hon'ble Supreme Court in ***Palitana Sugar Mills Private Limited and another*** vs ***Vilasiniben Ramachandran and others***, (2007) 15 SCC 218 have held that the Supreme Court has inherent power under to set the wrong right where there has been any disobedience and not to allow to perpetuate the wrongdoing. Their Lordships have held as under:

> 16. .....
>
> It is thus clear and apparent that despite the clear observations of this Court in paragraphs above of the present judgment that no issue raised in prior litigations can be raised again and no attempt to challenge the right and title in respect of the land in question could be made against the petitioners, namely, the respondents have once again sought to raise the same issues with a view to flout the directions of this Court and deprive the petitioners of the legitimate rights accruing to them from the judgment of

this Court. The aforesaid attitude persists notwithstanding that the judgment of this Court has been passed in contempt proceedings and this Court has expressly observed that any further lapse shall be viewed extremely seriously.

17. We have already elaborately dealt with the history of the present litigation between the parties which shows that despite the petitioners having succeeded before this Court in 4 different hotly contested litigations vide judgments dated 14.11.2002, 03.12.2002, 05.12.2002 and 06.02.2003, the respondents have in one way or the other not complied with the judgment or not given the petitioners the development and building permissions required to construct on the lands in question.

19. During the pendency of the contempt petition and the IAs, a letter was written by the Revenue Department to the Collector, Bhavnagar to take steps as the Government has taken a decision to accept the judgment of this Court dated 15.10.2004 for the land admeasuring 17 acres 4 guntas and 0.32 guntas and 1 acre 14 guntas upon which sundervas bungalow is located. The Collector was directed to comply with the said direction. However, in order to nullify the aforesaid acceptance of the judgment in respect of the land mentioned above, permission for non-agricultural use has been given for the recreation use and not for the residential use thus depriving the petitioner of the right to construct residential houses. The action of the respondents and the Collector in issuing permission for non-agricultural use for the recreation use is with an oblique motive to deprive the petitioner of the right to construct residential houses as already ordered in our judgment dated 15.10.2004. We, therefore, direct the Revenue Department and the Collector, Bhavnagar to forthwith issue permission to the petitioner for residential use with a right to construct residential houses for the above survey Nos. as mentioned in the letter dated 10.01.2007 of the Revenue Department to the Collector, Bhavnagar.

24. Courts have held in a catena of decisions that where in violation of an order of this Court, something has been done in disobedience, it will be the duty of this Court as a policy to set the wrong right and not to allow the perpetuation of the wrong doing. In our opinion, the inherent power will not only be available under Section 151 CPC as available to us in such a case but it is bound to be exercised in that manner in the interest of justice and public interest. All the respondents are senior and experienced officers and must be presumed to know that under the constitutional scheme of this country orders of this Court have to be punctually obeyed and should not be trifled with. We have already found hereinabove that they have acted deliberately to subvert the orders of this Court. We, therefore, hold them guilty of contempt of Court and do hereby censure severely their conduct. Though a copy of this order could be sent which shall form part of the annual confidential record of service of each of the said officers, we refrain from doing so by taking a lenient view of the matter considering the future prospects of the officers. As already stated, the officers shall not indulge in any adventurous act and strictly obey the orders passed by the Courts of law. We by this order grant four weeks time to the respondents to comply with all our directions given in the judgment dated 15.10.2004. The petitioner is at liberty to move this Court if the directions are not complied with in its letter and spirit."

12. Thus, in furtherance of implementation of judgment of this Court in CWP No.3723/2010 dated 17.5.2012 in letter and spirit, respondents are directed to consider the old cases, which were pending at the time of filing of the petition also, as per the new guidelines. Accordingly, the petition is disposed of and the notice is discharged. No costs.

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

Jai Kishan and others ...Appellants/Defendants
Versus
Sardari Lal and others ...Respondents/Plaintiff

R.S.A. No. 463 of 2002
Date of decision: 28th May, 2015.

Specific Relief Act, 1963- Article 65- Plaintiff claimed to be the owner in possession of the suit land- he claimed that defendants have got themselves recorded as Kabazan in connivance with settlement staff- defendant claimed to be in adverse possession- held, that there is a distinction between long possession and adverse possession- mere long possession is not equivalent to adverse possession- defendants categorically admitted that he was not in hostile possession of the land- he claimed ownership and it is inherent in the plea that someone else is owner of the land. (Para- 9 to 12)

Cases referred:
P.T. Munichikkanna Reddy and others vs. Revamma and others (2007) 6 SCC 59
Mandal Revenue Officer vs. Goundla Venkaiah and another (2010) 2 SCC 461
P. Periasami (dead) by L.Rs. vs. P. Periathambi and others (1995) 6 SCC 523
Mohan Lal (deceased) vs. Mira Abdul Gaffar and another (1996) 1 SCC 639 and L.N. Aswathama & anr. vs. P. Prakash (2009) 13 SCC 229
Om Parkash & ors. vs. Gian Chand & ors. 2014(2) Him.L.R. 1071

For the Appellants : Mr. Rahul Mahajan, Advocate.
For the Respondents : Mr. Ajay Sharma, Advocate with Mr. Vinod Chauhan, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The defendants are the appellants and have come up in appeal against concurrent findings recorded against them by the learned Courts below.

2. The facts as necessary for the adjudication of the case are that the respondent/plaintiff Sardari Lal filed the suit for declaration to the effect that plaintiff is owner in possession over the land , comprised in Khasra Nos. 414, 416, 420, plots 3, measuring 0-60-52 HM (15 Kanals 15 Marlas), situated in Tika and Mohal Jhagara, Tehsil Indora, District Kangra (hereinafter referred to as the suit land) and the entries showing the defendants as Kabazan are the paper entries and are not binding upon the plaintiff. According to the plaintiff, he is the owner in possession of the suit land. The defendants in connivance with the settlement officials, got themselves recorded as Kabazan. During the settlement, on the basis of the alleged wrong entry, the defendants threatened to interfere in

possession of the plaintiff over the suit land, and as such, the plaintiff filed the suit for declaration and in alternative the suit for possession.

3. The suit was contested and resisted by appellants/defendants by raising preliminary objections of maintainability, plaintiff estopped from filing the present suit on account of his act and conduct and the plaintiff had no cause of action to file the suit. On merits, it was pleaded that the plaintiff has no concern with the suit land as the suit land is in possession of the defendants since the month of January, 1970 and the possession of the defendants is continuous, uninterrupted for more than 12 years and to the knowledge of the plaintiff and as such, they have become owners of the suit land by way of adverse possession.

4. On the pleadings of the parties, the learned trial Court on 18.8.1993 framed the following issues:

1. Whether the plaintiff is owner in possession of the suit land, as prayed? OPP
2. Whether the revenue entries showing the defendants as 'Kabazan' are wrong and illegal? OPP
3. Whether in the alternative, the plaintiff is entitled for possession of the suit land, as prayed? OPP
4. Whether the suit is not maintainable? OPD
5. Whether the defendants have become owners of the suit land by way of adverse possession? OPD
6. Relief.

5. The learned trial Court vide judgment and decree dated 1.3.2000 decreed the suit of the plaintiff. The appeal filed by the defendants/appellants resulted in dismissal and this is how the defendants are before this Court by way of the present regular second appeal.

6. On 18.6.2002 this Court was pleased to admit the appeal on the following substantial question of law:

"Whether the learned appellate Court has erred in law in misinterpreting the revenue record resulting in wrong and erroneous finding on law?"

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

8. Learned counsel for the appellants has vehemently argued that both the learned Courts below, more particularly, the learned lower Appellate Court has misinterpreted the documentary evidence on record. The appellants had produced the copy of jamabandi for the years 1981-82 and 1992-93 wherein the appellants had been shown in possession of the suit land and therefore necessary inference was that they were in adverse possession of the property. I am afraid that such inference cannot readily be drawn.

9. It is more than settled that long possession is not necessarily adverse possession. What would constitute adverse possession has repeatedly been subject matter of the courts. However, this concept was dealt in detail by the Hon'ble Supreme Court in **P.T. Munichikkanna Reddy and others** vs. **Revamma and others (2007) 6 SCC 59,** wherein, it was held as follows:-

"CHARACTERIZING ADVERSE POSSESSION

5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse

possessoror on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird, 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock, 227 Ark. 1085, 303 S.W.2d 569 (1957); Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim.

7. To understand the true nature of adverse possession, Fairweather v St Marylebone Property Co [1962] 2 WLR 1020, [1962] 2 All ER 288 can be considered where House of Lords referring to Taylor v. Twinberrow [1930] 2 K.B. 16, termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law:

> "In my opinion this principle has been settled law since the date of that decision. It formed the basis of the later decision of the Divisional Count in Taylor v. Twinberrow [1930] 2 K.B. 16, in which it was most clearly explained by Scrutton, L.J. that it was a misunderstanding of the legal effect of 12 years adverse possession under the Limitation Acts to treat it as if it gave a title whereas its effect is " merely negative " and, where the possession had been against a tenant, its only operation was to bar his right to claim against the man in possession (see loc. cit. p. 23). I think that this statement needs only one qualification: a squatter does in the end get a title by his possession and the indirect operation of the Act and he can convey a fee simple.
>
> If this principle is applied, as it must be, to the Appellant's situation, it appears that the adverse possession completed in 1932 against the lessee of No. 315 did not transfer to him either the lessee's' term or his rights against or has obligations to the landlord who held the reversion. The appellant claims to be entitled to keep the landlord at bay until the expiration of the term by effluxion of time in 1992: but, if he is, it cannot be because he is the transferee

> or holder of the term which was granted to the lessee. He is in possession by his own right, so far as it is a right: and it is a right so far as the statutes of limitation which govern the matter prescribe both when the rights to dispossess him are to be treated as accruing and when, having accrued, they are thereafter to be treated as barred. In other words, a squatter has as much protection as but no more protection than the statutes allow: but he has not the title or estate of the owner or owners whom he has dispossessed nor has he in any relevant sense an estate "commensurate with" the estate of the dispossessed. All that this misleading phrase can mean is that, since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against, such, for instance, as equitable easements, which axe no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed."

Also see Privy Council's decision in Chung Ping Kwan and Others v. Lam Island Development Company Limited (Hong Kong) [(1997) AC 38] in this regard.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

> 1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
>
> 2. Specific Positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

9. It is interesting to see the development of adverse possession law in the backdrop of the status of Right to Property in the 21st Century. The aspect of stronger Property Rights Regime in general, coupled with efficient legal regimes furthering the Rule of Law argument, has redefined the thresholds in adverse possession law not just in India but also by the Strasbourg Court. Growth of Human Rights jurisprudence in recent times has also palpably affected the developments in this regard.

NEW CONSIDERATION IN ADVERSE POSSESSION LAW

10. In that context it is relevant to refer to JA Pye (Oxford) Ltd v. United Kingdom [2005] 49 ERG 90, [2005] ECHR 921 wherein the European Court of Human Rights while referring to the Court of Appeal judgment ([2001]EWCA Civ 117, [2001]Ch 804) made the following reference:

> "Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even though limitation periods both limited the right of access to the courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was

thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol."

11. This brings us to the issue of mental element in adverse possession cases-intention.

1. Positive Intention

12. The aspect of positive intention is weakened in this case by the sale deeds dated 11.04.1934 and 5.07.1936. Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession case.. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts limitation act and it also assists the court to unearth as the intention to dispossess.

13. At this juncture, it would be in the fitness of circumstances to discuss intention to dispossess vis-`-vis intention to possess. This distinction can be marked very distinctively in the present circumstances.

14. Importantly, intention to possess can not be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialize.

15. The High Court observed:

> "It is seen from the pleadings as well in evidence that the plaintiff came to know about the right of the defendants', only when disturbances were sought to be made to his possession."

16. In similar circumstances, in the case of Thakur Kishan Singh (dead) v. Arvind Kumar [(1994) 6 SCC 591] this court held:

> "5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licencee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession. Apart from it, the Appellate Court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse." (emphasis supplied)

17. The present case is one of the few ones where even an unusually long undisturbed possession does not go on to prove the intention of the adverse possessor. This is a rare circumstance, which Clarke LJ in Lambeth London Borough Council v Blackburn (2001) 82 P & CR 494, 504 refers to:

> "I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the animus possidendi identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention."
>
> (emphasis supplied)

18. On intention, The Powell v. Macfarlane (1977) 38 P & CR (Property, Planning & Compensation Reports) 452 _ 472 is quite illustrative and categorical, holding in the following terms:

> "If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."
>
> ** ** **
>
> If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.
>
> ** ** **
>
> In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.
>
> ** ** **
>
> What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at

the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of Saroop Singh v. Banto and Others [(2005) 8 SCC 330] in that context held:

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)
>
> 30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in Karnataka Board of Wakf v. Government of India and Others [(2004) 10 SCC 779] in the following terms:

> "_Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

24. In Narne Rama Murthy v. Ravula Somasundaram and Others [(2005) 6 SCC 614], this Court held:

> "However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question

whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter." (emphasis supplied)

25. The test is, as has been held in R.V. Oxfordshine County Council :

"... Bright v. Walker (1834) 1 Cr. M. & R. 211, 219, "openly and in the manner that a person rightfully entitled would have used it. . ." The presumption arises, as Fry J. said of prescription generally in Dalton v. Angus (1881) 6 App.Cas. 740, 773, from acquiescence.

26. The case concerned interpretation of section 22(1) of the Commons Registration Act 1965. Section 22(1) defined "town or village green" as including

"...land on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years."

27. It was observed that the inhabitants' use of the land for sports and pastimes did not constitute the use "as of right". The belief that they had the right to do so was found to be lacking. The House held that they did not have to have a personal belief in their right to use the land. The court observed:

"....[the words 'as of right] import the absence of any of the three characteristics of compulsion, secrecy or licence_ 'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements....."

28. Later in the case of Beresford, R (on the application of) v. City of Sunderland [2003] 3 WLR 1306, [2004] 1 All ER 160 same test was referred to.

29. Thus the test of nec vi, nec clam, nec precario i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

30. In Karnataka Wakf Board (Supra), the law was stated, thus:

"11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : S M Karim v. Bibi Sakinal AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D N Venkatarayappa

v. State of Karnataka (1997) 7 SCC 567.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

2. Inquiry into the particulars of Adverse Possession

31. Inquiry into the starting point of adverse possession i.e. dates as to when the paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and Other facts such as the manner in which the possession operationalized, nature of possession: whether open, continuous, uninterrupted or hostile possession - have not been disclosed. An observation has been made in this regard in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254]:

> "Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea." (emphasis supplied)

32. Also mention as to the real owner of the property must be specifically made in an adverse possession claim.

33. In Karnataka Wakf Board (Supra), it is stated:

> "12. Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that –
>
> > "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

> "4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12

years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

(emphasis supplied)

"3. New Paradigm to Limitation Act

34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254] in the following terms:

"... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

[See also M. Durai v. Madhu and Others 2007 (2) SCALE 309]

35. The aforementioned principle has been reiterated by this Court in Saroop Singh v. Banto and Others [(2005) 8 SCC 330] stating:

"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

36. In Mohammadbhai Kasambhai Sheikh and Others v. Abdulla Kasambhai Sheikh [(2004) 13 SCC 385], this Court held:

"But as has been held in Mahomedally Tyebally v. Safiabai the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Therefore, unless the

defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiffs claim."

37. The question has been considered at some length recently in T. Anjanappa and Others v. Somalingappa and Another [(2006) 7 SCC 570], wherein it was opined :

"21. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable."

[See also Des Raj and Ors. v. Bhagat Ram (Dead) By LRs. and Ors., 2007 (3) SCALE 371; Govindammal v. R. Perumal Chettiar & Ors., JT 2006 (10) SC 121 : (2006) 11 SCC 600]."

10. The Hon'ble Supreme Court in **Mandal Revenue Officer** vs. **Goundla Venkaiah and another (2010) 2 SCC 461** held:

"47. In this context, it is necessary to remember that it is well neigh impossible for the State and its instrumentalities including the local authorities to keep every day vigilance/watch over vast tracts of open land owned by them or of which they are the public trustees. No amount of vigil can stop encroachments and unauthorised occupation of public land by unscrupulous elements, who act like vultures to grab such land, raise illegal constructions and, at times, succeeded in manipulating the State apparatus for getting their occupation/possession and construction regularized. It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroachers, unauthorised occupants or land grabbers.

48. In State of Rajasthan v. Harphool Singh (Dead) through Lrs. 2000 (5) SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial Court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State Government were dismissed by the lower appellate Court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below:-

> "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in P. Lakshmi Reddy v. L. Lakshmi Reddy adverted to the ordinary classical requirement -- that it should be nec vi, nec clam, nec precario -- that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."
>
> 49. A somewhat similar view was expressed in A.A. Gopalakrishnan v. Cochin Devaswom Board 2007 (7) SCC 482. While adverting to the need for protecting the properties of deities, temples and Devaswom Boards, the Court observed as under:-
>
> > "The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/ archakas/shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

11. Reverting to the facts, it would be seen that when the defendant Karam Chand appeared in the witness box as DW-1 he in his cross-examination had categorically stated that he is not in hostile possession against anybody meaning thereby he is claiming ownership as of right. It is more than settled that whenever a plea of adverse possession is set up, inherent is the plea that someone is the owner of the land.

12. The plea of ownership simpliciter is based on the concept of title, which one may acquire through various sources like succession, gift, will, sale, exchange, grant etc. etc. and the person in possession is essentially to be treated as being in lawful possession. While on the other hand when the plea of adverse possession is projected inherent is the plea that someone else is the ownership of the property. (See: **P. Periasami (dead) by L.Rs.** vs. **P. Periathambi and others (1995) 6 SCC 523.** Having said so, it can safely be concluded that the pleas based on title and simultaneously on adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. (Ref: **Mohan Lal (deceased)** vs. **Mira Abdul Gaffar and another (1996) 1 SCC 639** and **L.N. Aswathama & anr.** vs. **P. Prakash (2009) 13 SCC 229.**

13. Learned counsel for the appellants would then argue that the findings recorded by the learned Courts below are perverse. I am afraid that this contention of the

appellants cannot be accepted. What is perverse has been dealt with in detail by this Court in ***RSA No. 436 of 2000 titled Smt. Rubi Sood and another*** vs. ***Major (Retd.) Vijay Kumar Sud and others,*** decided on 28.5.2015**,** in the following manner:

> *"(i) A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.*
>
> *(ii) If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the findings so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law.*
>
> *(iii) If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, than the findings may be said to be perverse.*
>
> *(iv) Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."*

None of the principles as enunciated above are attracted or applicable to the facts of this case.

14. The appellants have failed to prove on record the ouster of the real owner and the exact time when they have asserted their right of ownership over the suit property. The mere fact that they are in possession of the land since 1970 would not mean that the same is adverse. The appellants were bound to plead the exact date from when their possession became adverse.

15. In **Om Parkash & ors.** vs. **Gian Chand & ors. 2014(2) Him.L.R. 1071**, this Court dealt in detail with the question of adverse possession particularly when the defendant therein had not spelt out any specific date from which his possession became adverse and it was observed as follows:-

> "11. Therefore, the moot question is as to whether the pleadings set out by the defendants can meet the requirement of law or not. This question assumes importance, because admittedly, the defendants have not spelt out any specific date from which their possession became adverse.
>
> In **Kamla and others** vs. **Baldev Singh and others 2008(1) Shim. LC 215,** this court has held as under:-
>
> *".....Moreover, in case defendant or his father were in possession of the suit land as owner and the possession was never taken by the plaintiffs in pursuance of the decree, they can be said to be in possession as owner, but they cannot be treated to be in adverse possession of the suit land in any manner. The learned trial Court has not given its findings that the defendant or his father continued to be owner of the suit land even after passing of the decree since the decree was never executed, but has given the findings in the alternative that the defendant has become owner by way of adverse possession. <u>This</u>*

plea was taken by the defendant in the alternative but he never pleaded as to from which date his permissive possession as owner became adverse to the true owners i.e. plaintiffs and what overt act was done by him to show his hostile title to the suit land. There were no allegations as to when the possession became adverse, in which year or month or in what manner and the simple general allegation made by the defendant in the alternative were accepted by the trial Court without looking into the question that the original possession of the defendant over the suit land or that of his father was permissive being an owner and it never became adverse as against the true owner and if it became adverse in what manner and from which date, month or year. The permissive possession as owner does not itself become adverse as against the true owner until and unless some overt act is done by the defendant to show his hostile title towards the true owner which pleadings were very much lacking in the written statement and as such, the defendant was never proved to be in adverse possession of the suit land as owner. Those findings were rightly reversed by the learned first Appellate Court and the learned first Appellate Court had rightly observed that there was complete lack of animus on the part of the defendant to hold the suit land adversely to the plaintiffs. It was also observed that it has also not been shown as to what time possession of the defendant became hostile to that of the plaintiffs which had ripened into ownership. To my mind, there was nothing for the trial Court to conclude that the defendant has become owner by way of adverse possession in the absence of specific pleadings or proof and, therefore, the learned first appellate Court had come to a right conclusion in reversing the findings under Issue No. 1 in regard to the plea of adverse possession. Once the defendant had failed to prove adverse possession over the suit land, the only conclusion that can be drawn is the plaintiffs were entitled to the relief of possession and it was rightly given by the first appellate Court."

12. This court in **Brij Mohan Sood** vs. **Parshotam Singh and others 2014(1) Him. L.R. 556,** has held as follows:-

"11. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is " nec vi, nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual visible, exclusive, hostile and continued over the statutory period. Therefore, a person who claims adverse possession has to show (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party ; (d) how long his possession is continued; and (e) his possession was open and undisturbed. It has to be remembered that the person pleading adverse possession has no equity in his favour since he is trying to defeat the right of the true owner, therefore, it is for him to clearly plead and establish all facts necessary to establish his adverse

possession (Refer Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others (1996) 8 SCC 128).

12. Having observed so, it is clear from the pleadings of the defendant that he has failed to plead the essential ingredients of adverse possession. In absence of the essential ingredients of adverse possession, no amount of evidence can be looked into by this Court. Even otherwise, the defendant has set-up a title in himself and has not acknowledged or attorned the plaintiffs to be the owners. Apart from preliminary objection No.1 (supra), in paragraph-3 of the preliminary objection, the defendant has made the following averments:

"The plaintiffs are not the owners of the land rather the defendants are its owners and the plaintiffs have got no locus standi to file the suit." Throughout in the written statement, the defendants have claimed themselves to be the owners of the suit property and thus the plea of adverse possession is not available to them."

13. This court further in **Deepak Parkash** vs. **Sunil Kumar 2014(1) Him. L.R. 654** has emphasized on the requirement of law of pleading the exact date from which the possession became adverse, in the following terms:

"14. It appears that the learned lower Appellate Court completely ignored the pleadings of the parties or else the judgment and decree passed by the learned trial Court on the basis of such pleadings would not have been disturbed much less reversed. A perusal of the written statement would show that pleadings with regard to adverse possession were not only deficient but in fact did not meet the requirement of law. <u>The defendant even failed to specify the definite date on which his possession became adverse.</u>

16. Faced with such situation, learned counsel for the respondent/defendant would contend that he had led sufficient evidence to prove his plea of adverse possession. I am afraid that I cannot agree with the submissions made by learned counsel for the respondent/defendant.

17. It is settled law that no amount of evidence beyond pleadings can be looked into. It is further well settled principle of law that the evidence adduced beyond the pleading would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The Court at the later stage of the trial as also the Appellate Court having regard to the rule of pleading would be entitled to reject the evidence wherefor there does not exist any pleading."

16. In view of the aforesaid discussion, I find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any. The parties are left to bear their own costs.

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

Manbir Singh .....Petitioner/Tenant.
Versus
Suresh Bansal and others .....Respondents/Landlords.

C.R. No.19 of 2006.
Judgment reserved on :22.05.2014.
Date of decision: May 28th, 2015.

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5)- Petitioner claimed that respondent was in arrears of rent, tenant had changed the user of premises and he was causing nuisance by testing and firing the guns in the area- tenant himself stated that he was not carrying the business after the cancellation of his licence, therefore, allegation of the landlord that tenant was causing nuisance by firing and testing gun was not acceptable- tenant pleaded that he had a franchisee of respondent No. 2 but he had failed to place on record any document appointing him as a franchisee – witnesses claiming to be employees failed to produce any document like appointment letter, salary slip etc. – record of employees was not furnished to the shop inspector- tenant was no longer residing at Solan and was not carrying the business of arms and ammunition from the premises – he was not paying any salary to the employees of respondent No. 2 nor he was paying any taxes to the authority- held, that in these circumstances, it can be held that tenant had walked out of the premises and had given possession of the property to sub-tenant who is running business of courier service from the premises. (Para-9 to 26)

Cases referred:
Parvinder Singh versus Renu Gautam and others (2004) 4 SCC 794
Amar Nath Agarwalla versus Dhillon Transport Agency (2007) 4 SCC 306
Celina Coelho Pereira (Ms) and others versus Ulhas Mahabaleshwar Kholkar and others (2010) 1 SCC 217
Hindustand Petroleum Corporation Limited versus Dilbahar Singh (2014) 9 SCC 78
S.F. Engineer versus Metal Box India Limited and Another (2014) 6 SCC 780

For the Petitioner : Mr.R.K.Bawa, Senior Advocate with Mr.Jeevesh Sharma, Advocate.
For the Respondents: Mr.Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate, for respondents No.1 and 2.
Mr.Suneet Goel, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This revision petition under Section 24(5) of the H.P. Urban Rent Control Act (for short the 'Act') is directed against the order passed by the learned appellate authority in a rent appeal whereby the petitioner/tenant has been ordered to be evicted from the premises in dispute and the order to the contrary as passed by the learned Rent Controller has been ordered to be set aside.

The facts, in brief, may be noticed thus.

2. The premises i.e. Shop No.5 situate in Ward No.8, Solan had been let out to the tenant (petitioner herein) for non residential purposes on a monthly rent of `404.25 since

01.04.1994. The tenant had been running business of arms and ammunition in the premises. The premises was alleged to have been sub let by him firstly to M/s Desk to Desk Couriers Service and thereafter to M/s Blaze Flash Couriers Pvt. Ltd. The tenant was also alleged to be in arrears of rent and also to have changed the user of the premises and he was also alleged to be causing nuisance by testing and firing the air guns in the area affecting the passage to the Hotel. Eviction of the tenant was sought on the grounds stated above.

3. The petition was contested by the respondent/tenant by controverting the allegations. The tenant claimed to be Franchisee/Commission agent of respondent No.2. He denied having sublet the premises either to M/s Desk and Desk Couriers or M/s Blaze Flash Couriers Pvt. Ltd. It was averred that no rent was charged from the said Company. It was admitted that he was in arrears of rent but denied change of user or impairing the value and utility of the premises and causing nuisance.

4. During the pendency of the petition, the unpaid rent due to petitioners was paid by the tenant. The eviction of the tenant on this ground was not pressed before the appellate authority.

5. On 19.12.2002 the learned Rent Controller framed the following issues:-

1. Whether the respondent No.1 has sub let the premises, in question to respondent No.2, without the consent of landlord/petitioners, as alleged? OPP.
2. Whether the respondent has changed the user of the premises, as alleged? OPP
3. Whether the respondent had materially impaired the value and utility of the premises as alleged? OPP.
4. Relief.

6. The learned Rent Controller after recording the evidence and evaluating the same dismissed the petition. However, the landlords filed rent appeal before the appellate authority, who allowed the same and this is how the matter is before this Court in revision petition.

7. Shri R.K.Bawa, Senior Advocate, assisted by Shri Jeevesh Sharma, Advocate, has vehemently argued that the appellate authority has misread and misconstrued the pleadings/grounds of petition filed by the landlords, a perusal whereof would show that the same was self-contradictory and self-destructive. On one hand, the landlords have maintained that nuisance is being caused by the tenant in the area wherein the tenanted premises are situated whereas, on the other hand, the landlords have made an averment that the original tenant had left the premises after letting out the same to the proforma respondent. It is further contended that the learned appellate authority has failed to appreciate that it had not at all been proved on record that the premises in question was not with the tenant. It otherwise had not recorded any findings that it was the proforma respondent, who was in exclusive possession of the property.

8. On the other hand, Shri Bhupender Gupta, Senior Advocate, assisted by Shri Neeraj Gupta, Advocate, has supported the findings of the learned lower appellate Court.

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

9. It is the case of the tenant himself that he is no longer carrying on the business of arms and ammunition at Solan after the cancellation of licence in 1983. If that be so, then even if the landlords had sought eviction against the respondent on the ground of nuisance being caused by testing and firing air guns in the area, the same too would be of no avail. It has specifically come in the statement of RW-3 that the respondent is not having arms and ammunition licence after 1996. The licence belonged to his brother Narbir Singh after it was transferred in his name in 1996. He further states that Solan Arms and Ammunition is partnership firm. To similar effect is the statement of RW-4.

10. Now in case the tenant does not have the licence to deal with arms and ammunition, then the allegation of the landlords that respondent was indulging in creating nuisance by testing and firing the arms appears to be an exaggeration. But, then the tenant cannot be permitted to take any advantage, especially, in light of the other facts which have come on record.

11. The tenant has taken a specific plea of being a franchisee on behalf of respondent No.2, a Courier Company, but then he has failed to place on record any document whereby he has been appointed as franchisee. Though a certificate Annexure A issued by Harinder Mohan Singh, General Manager, for M/s Blaze Flash Courier Pvt. Ltd. mentioning therein that M/s Solan Arms and Ammunitions is authorized franchisee to generate the courier business has been placed on record, but the same has not been proved in accordance with law. Therefore, there being no authorization proved on record, it is difficult to hold that the tenant has been appointed as franchisee of respondent No.2.

12. Shri Bawa has taken me through the statements of RW-2 Lokesh Kumar and RW-3 O.N.Bali to try and establish that they are the employees of the tenant, but the tenant cannot derive any benefit from their statements because none of these persons could prove that they were infact the employees of tenant. These witnesses failed to produce any documentary proof in the form of appointment letter, payment of salary etc. etc. whereby there could, prima facie, appear to be an employer/employee relationship between tenant and these two witnesses.

13. The learned lower appellate authority has rightly held that once the provisions of the H.P. Shop Act are applicable, then it is incumbent upon the tenant of the shop to furnish to the Shop Inspector number and names of the employees employed in his shop to carry on the business. He was also required to maintain the records of such employees. But then, as observed the tenant has placed no material whatsoever on record. Another factor which cannot be lost sight of is that the Blaze Flash Courier is a private company and can only speak through resolutions, then why no resolution has been placed on record, is not forthcoming.

14. At this stage, it would be relevant to note that RW-3 had initially admitted that he was paid salary by the Courier Company, but then he changed the statement and said that tenant was making the payment. He further stated that the payment was being made by cheque. This witness failed to produce on record statement of accounts of the concerned bank which could have supported the stand of this witness. The tenant as observed earlier had not at all cared to produce any documentary evidence including his cheque book which could have supported version of RW-3 with regard to payment of salary. On similar grounds is the statement of RW-4 and for this very reason the statement of RW-4 can safely be discarded. Therefore, this Court in such circumstances is left with no other option but to draw an adverse inference against the tenant for withholding the best evidence.

15. The learned counsel for the respondent is perfectly justified when he contends that the petitioner is required to stand on his own legs and not to take advantage of the weaknesses of the case of the opposite party. The onus to prove that the petitioner is a tenant and is still in possession of the premises solely rests upon the tenant. Though the tenant claims to be a franchisee of the respondent No.2, yet tenant does not even know the Managing Director of the company.

16. It is more than settled that it is difficult to produce direct evidence of subletting and is, therefore, to be inferred from the facts and circumstances of the case.

17. The learned counsel for the petitioner has placed reliance upon the judgment of the Hon'ble Supreme Court in ***Parvinder Singh*** *versus* ***Renu Gautam and others (2004) 4 SCC 794*** to contend that once the tenant is actively associated with the business and retains the use and control over the tenanted premises with him may be alongwith the partners, the tenant cannot be said to have parted with possession. It is relevant to reproduce the following observations:-

> *"8. The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations, is subletting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the law, which act is often done with the object of illegitimate profiteering or rack renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sublet the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant.*
>
> *9. A person having secured a lease of premises for the purpose of his business may be in need of capital or finance or someone to assist him in his business and to achieve such like purpose he may enter into partnership with strangers. Quite often partnership is entered into between the members of any family as a part of tax planning. There is no stranger brought on the premises. So long as the premises remain in occupation of the tenant or in his control, a mere entering into partnership may not provide a ground for eviction by running into conflict with prohibition against subletting or parting with possession. This is a general statement of law which ought to be read in the light of the lease agreement and the law governing the tenancy. There are cases wherein the tenant sublets the premises or parts with possession in defiance of the terms of lease or the rent control legislation and in order to save himself from the*

peril of eviction brings into existence, a deed of partnership between him and his sub-lessee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross examination, making out a case of sub-letting or parting with possession or interest in tenancy premises by tenant in favour of a third person. The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Vs. Vedathanni, AIR 1936 PC 70 is an authority for the proposition that oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different. A lease of immovable property is transfer of a right to enjoy such property. Parting with possession or control over the tenancy premises by tenant in favour of a third person would amount to the tenant having 'transferred his rights under the lease' within the meaning of Section 14(2)(ii)(a) of the Act."

18. He further relied upon the judgment of the Hon'ble Supreme Court in ***Amar Nath Agarwalla*** *versus* ***Dhillon Transport Agency (2007) 4 SCC 306*** to contend that the mere fact that another person is also allowed to use the premises would not amount to sub-letting. He in particular relied upon the following observations:-

"8. *In Murli Dhar v. Chuni Lal and Ors.,1969 Ren CR 563 this Court had repelled the contention that the old firm and the new firm being two different legal entities, the occupation of the shop by the new firm was occupation by the legal entity other than the original tenant and such occupation proved sub-letting. Repelling the contention this Court held:-*

> *"This contention is entirely without substance. A firm, unless expressly provided for the purpose of any statute which is not the case here, is not a legal entity. The firm name is only a compendious way of describing the partners of the firm. Therefore, occupation by a firm is only occupation by its partners. Here the firms have a common partner. Hence the occupation has been by one of the original tenants."*

9. In Mohammedkasam Haji Gulambhai v. Bakerali Fatehali (1998) 7 SCC 608 this Court observed: (SCC p.618, para 13)

> *"There is absolute prohibition on the tenant from sub-letting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any contract to the contrary between the landlord and the tenant. In a partnership where the tenant is a partner, he retains legal possession of the premises as a partnership is a compendium of the names of all the partners. In a partnership, the tenant does not divest himself of his right in the premises. On the question of sub-letting etc. the law is now very explicit. There is prohibition in absolute terms on*

the tenant from sub- letting, assignment or disposition of his interest in the tenanted premises."

10. The same principle was reiterated by this Court in Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy, (2005) 1 SCC 481 wherein this Court held: (SCC p.492, para 16)

"The mere fact that another person is allowed to use the premises while the lesses retains the legal possession is not enough to create a sub lease. Thus, the thrust is, as laid down by this Court, on finding out who is in legal possession of the premises. So long as the legal possession remains with the tenant the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub-letting. In Parvinder Singh v. Renu Gautam (2004) 4 SCC 794 a three-Judge Bench of this Court devised the test in these terms: (SCC P. 799, Para 8)

"If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant."

11. Applying these principle to the instant case, it is patent that one of the partners of the firm which was the original tenant has continued in legal possession of the premises as a partner of another firm constituted after dissolution of the original firm. Thus the legal possession is retained by a partner who was one of the original tenants. In these circumstances, we find no fault with the finding of the High Court there was no sub-letting of the premises and hence the suit for eviction deserved to be dismissed."

19. To similar effect is the judgment of the Hon'ble Supreme Court in ***Celina Coelho Pereira (Ms) and others*** *versus* ***Ulhas Mahabaleshwar Kholkar and others (2010) 1 SCC 217*** wherein the legal position regarding subletting was summarized as follows:-

"25. *The legal position that emerges from the aforesaid decisions can be summarized thus:*

(i) In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by tenant in favour of a third party with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

(ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to subletting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.

(iii) The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.

(iv)If tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.

(v) Initial burden of proving subletting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

(vi) In other words, initial burden lying on landlord would stand discharged by adducing prima facie proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted."

20. There can be no quarrel with the aforesaid propositions. But the question is as to whether the petitioner is still occupying the disputed premises or even part thereof. It has come on record that the tenant is no longer residing at Solan and is no longer carrying on the business of arms and ammunition from the premises. It has also been proved that he is not paying salary to the employees of respondent No.2 and is also not paying any taxes to the authorities.

21. This Court in exercise of its revisional jurisdiction cannot interfere with the findings of fact recorded by the first appellate Court/first appellate authority because on reappreciation of the evidence, the Rent Act as applicable to the State does not entitle this Court to interfere with the findings of fact recorded by the first appellate authority merely because on reappreciation of the evidence, its views may be different from the authority below.

22. The legal position has been summed up by the Hon'ble Supreme Court in a Constitution Bench decision in ***Hindustand Petroleum Corporation Limited*** *versus* ***Dilbahar Singh (2014) 9 SCC 78*** wherein it was observed as under:-

"*43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on re-appreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has*

been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re- appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."

23. As observed earlier, sub-tenancy is often created in a clandestine manner and, therefore, subletting can be proved on the basis of legitimate inferences. It shall be apt to reproduce the following observations of Hon'ble Supreme Court in ***S.F. Engineer*** *versus* ***Metal Box India Limited and Another (2014) 6 SCC 780*** wherein it has been held as under:-

"19. In Smt. Rajbir Kaur and another v. S. Chokesiri and Co.(1989) 1 SCC 19, after referring to the decision in Dipak Banerjee v. Smt. Lilabati Chakraborty (1987) 4 SCC 161 and other decisions the Court opined that (Rajbir Kaur case, SCC p.43, para 59)

> *"59……If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration in mind."*

It has been further observed that: (Rajbir Kaur case, SCC p.43, para 59)

> *"59…..Such transactions of subletting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the subtenant and there cannot be direct evidence got and it is not, unoften, a matter for legitimate inference."*

Dealing with the issue of burden it held that:(Rajbir Kaur case, SCC p.43, para 59)

> *"59…..The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial."*

20. In this context, reference to a two-Judge Bench decision in Bhairab Chandra Nandan v. Ranadhir Chandra Dutta (1988) 1 SCC 383 would be apposite. In the said case the tenant had permanently shifted his residence

elsewhere leaving the rooms completely to his brother for his occupation without obtaining the landlord's permission. In that context, the Court observed thus: (SCC pp. 387-88, para 5)

> *"5. Now coming to the question of sub-letting, once again we find that the courts below had adequate material to conclude that the respondent had sub-let the premises, albeit to his own brother and quit the place and the sub-letting was without the consent of the appellant. Admittedly, the respondent was living elsewhere and it is his brother Manadhir who was in occupation of the rooms taken on lease by the respondent. The High Court has taken the view that because Manadhir is the brother of the respondent, he will only be a licensee and not a sub-tenant. There is absolutely no warrant for this reasoning. It is not as if the respondent is still occupying the rooms and he has permitted his brother also to reside with him in the rooms. On the contrary, the respondent has permanently shifted his residence to another place and left the rooms completely to his brother for his occupation without obtaining the consent of the appellant. There is therefore no question of the respondent's brother being only a licensee and not a sub-tenant."*

21. In M/s. Shalimar Tar Products Ltd. v. H.C. Sharma and others(1988) 1 SCC 70 while dealing with parting of legal possession, the two-Judge Bench observed that:(SCC p.78, para 17)

> *"17.....There is no dispute in the legal proposition that there must be parting of the legal possession. Parting to the legal possession means possession with the right to include and also right to exclude others."*

22. In United Bank of India v. Cooks and Kelvey Properties (P) Limited (1994) 5 SCC 9 the question arose whether the appellant-Bank had sublet the premises to the union. This Court set aside the order of eviction on the ground that : (SCC pp. 13-14, para 10)

> *"10....though the appellant had inducted the trade union into the premises for carrying on the trade union activities, the bank has not received any monetary consideration from the trade union, which was permitted to use and enjoy it for its trade union activities. It is elicited in the cross-examination of the President of the trade union that the bank had retained its power to call upon the union to vacate the premises at any time and they had undertaken to vacate the premises. It is also elicited in the cross-examination that the bank has been maintaining the premises at its own expenses and also paying the electricity charges consumed by the trade union for using the demised premises. Under these circumstances, the inference that could be drawn is that the appellant had retained its legal control of the possession and let the trade union to occupy the premises for its trade union activities. Therefore, the only conclusion that could be reached is that though exclusive possession of the demised premises was given to the trade union, the possession must be deemed to be constructive possession held by it on behalf of the bank for using the premises for trade union activities so long as the union used the premises for trade union activities. The bank retains its control over the trade union whose membership is only confined to the employees of the bank. Under these circumstances, the inevitable conclusion is, that there is*

no transfer of right to enjoy the premises by the trade union exclusively, for consideration."

23. In this context we may fruitfully refer to the decision in Joginder Singh Sodhi (supra) wherein the Court, dealing with the concept of subletting, has observed that to establish a plea of subletting two ingredients, namely, parting with possession and monetary consideration, therefor have to be established. In the said case reliance was placed on Shama Prashant Raje v. Ganpatrao (2000) 7 SCC 522 and Smt. Rajbir Kaur (supra). The Court also extensively referred to the principle stated in Bharat Sales Ltd. (supra) wherein it has been observed that it would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Though payment of rent, undoubtedly, is an essential element of lease or sub-lease, yet it may be paid in cash or in kind or may have been paid or promised to be paid, or it may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. The Court further observed that since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.

24. In this regard reference to Celina Coelho Pereira (Ms) and others v. Ulhas Mahabaleshwar Kholkar and others (2010) 1 SCC 217 would be pertinent. In the said case a two-Judge Bench, after referring to number of authorities and the rent legislation, summarized the legal position relating to issue of sub-letting or creation of sub-tenancy. The two aspects which are of relevance to the present case are: (SCC p.231, para 25)

"(i) In order to prove mischief of sub-letting as a ground for eviction under rent control laws, two ingredients have to be established: (i) parting with possession of tenancy or part of it by the tenant in favour of a third party with exclusive right of possession, and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

*(ii)-(iv) * * **

(v) Initial burden of proving sub-letting is on the landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to the tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises."

25. In Vinaykishore Punamchand Mundhada and another v. Shri Bhumi Kalpataru and others (2010) 9 SCC 129 it has been held that : (SCC. 136, para 18)

"18. it is well settled that sub-tenancy or sub-letting comes into existence when the tenant voluntarily surrenders possession of the tenanted premises wholly or in part and puts another person in exclusive possession thereof without the knowledge of the landlord. In all such cases, invariably the landlord is kept out of the scene rather, such arrangement whereby and whereunder the possession is parted

away by the tenant is always clandestine and such arrangements takes place behind the back of the landlord. It is the actual physical and exclusive possession of the newly inducted person, instead of the tenant, which is material and it is that factor which reveals to the landlord and that the tenant has put some other person into possession of the tenanted property."

It has been further observed that (SCC pp.136-37, para 19)

"19....It would not be possible to establish by direct evidence as to whether the person inducted into possession by the tenant had paid monetary consideration to the tenant and such an arrangement cannot be proved by affirmative evidence and in such circumstances the court is required to draw its own inference upon the facts of the case proved at the enquiry."

24. After taking into consideration all the aforesaid judgments, it was held as under:-

"26. We have referred to the aforesaid decisions only to reaffirm the proposition that the Court under certain circumstances can draw its own inference on the basis of materials brought at the trial to arrive at the conclusion that there has been parting with the legal possession and acceptance of monetary consideration either in cash or in kind or having some kind of arrangement. The aforesaid authorities make it further spectacularly clear that the transaction of subletting can be proved by legitimate inference though the burden is on the person seeking eviction. The materials brought out in evidence can be gathered together for arriving at the conclusion that a plea of subletting is established. The constructive possession of the tenant by retention of control like in Cooks and Kelvey Properties (P) Limited (supra) would not make it parting with possession as it has to be parting with legal possession. Sometimes emphasis has been laid on the fact that the sub-tenancy is created in a clandestine manner and there may not be direct proof on the part of a landlord to prove it but definitely it can bring materials on record from which such inference can be drawn."

25. The tenant has failed to establish that he was a franchisee of respondent No.2 and even his plea that he was a booking agent on behalf of respondent No.2 could not be proved as the documents Ex. P-1 to P-109 were admittedly not executed by the respondent in his own hand. In case the tenant would have been carrying out the business from the rented premises, he could have conveniently produced his books of accounts, bank accounts, income tax, sales tax, VAT returns and number of other documents. Having failed to do so, it can conveniently be held that the tenant has walked out of the premises and exclusive possession of the property has been given to a sub-tenant, who is running business or Courier Services from the premises.

26. The findings recorded by the first appellate authority can in no manner be termed to be perverse or said to have been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice. There is no illegality or impropriety in the order passed by the appellate authority.

27. There is no merit in this petition and the same is accordingly dismissed leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

****

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

Smt. Rubi Sood and another ...Appellants
Versus
Major (Retd.) Vijay Kumar Sud & others ...Respondents

RSA No. 436 of 2000
Reserved on 21.5.2015
Date of decision: 28.5.2015

Code of Civil Procedure, 1908- Section 100- Court will not upset the concurrent finding of fact, unless the findings are perverse, without consideration of material evidence based on no evidence or misreading of evidence or is grossly erroneous or if allowed to stand, would result in miscarriage of justice. (Para-25 to 28)

Indian Evidence Act, 1872- Section 114- Defendant No. 1 did not appear in the witness box and did not offer himself for cross-examination- therefore, the presumption can be drawn that case set up by him was not correct. (Para-36 and 37)

Case referred:
Man Kaur (dead) by LRs. Vs. Hartar Singh Sangha, (2010) 10 SCC 512

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

For the Respondents: Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj K. Vashisht, Advocate, for respondents No. 5, 7 and 8.
Mr.Bhupinder Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The defendants/appellants have filed this appeal against the concurrent findings of fact recorded by the learned Courts below. The facts of the case may be noticed as follows:-

The respondents/plaintiffs filed a suit for partition and separate possession, contending therein that Shri Kedar Nath Sud and Sh.Sansar Chand Sud sons of late Shri Shiv Dayal jointly owned 1/4th undivided share in the double storeyed building known as shop No. 72, Lower Bazar, Shimla standing built upon portion of land bearing Khasra No. 313, Bazar Ward, Bara Shimla Tehsil and District Shimla (herein after referred to as suit property) and the remaining 3/4th share in the said building No. 72, Lower Bazar Shimla was owned by Smt.Udhi Devi W/o late Dr. Shiv Dayal and grandmother of late Sh. Ajay Sud (defendant No. 1 in the suit) and respondents Nos. 1, 2, 4, 5 to 7 and 8 and mother-in-law of plaintiffs No. 3 and 9 (plaintiffs in the suit).

2. After death of late Sh. Kedar Nath which occurred in December, 1985, his 1/8th undivided share in the said property No. 72, Lower Bazar, Shimla was inherited by his legal heirs i.e. respondents/plaintiffs No. 5 to 9 and the other 1/8th undivided share owned by Sh. Sansar Chand in the said property was inherited by plaintiffs No. 1 to 4. Smt. Udhi Devi W/o late Dr. Shiv Dayal bequeathed her 3/4th undivided share in the said shop No. 72,

Lower Bazar, Shimla standing built upon land comprised in Khasra No. 313 in favour of her grandson defendant No. 1 vide Will dated 5.11.1974 registered in the office of Sub Registrar, Hamirpur, H.P. Thus 1/4th undivided share in the property known as Shop No. 72, Lower Bazar, Shimla was owned by the plaintiffs jointly and the remaining 3/4th share in the said double storeyed building was owned by defendant No. 1.

3. In the ground floor defendant No. 2 Shri Kanehya Lal Mehra was the tenant for the last many years and in the first floor of the said shop legal heirs of Mangat Ram are doing their business. Therefore, it was the plaintiffs and defendant No. 1, who were the joint owners of the said property and are in constructive and legal possession of the said property through their tenants.

4. The plaintiffs had recently come to know that since the property situated in the commercial heart of the town and its ownership value and premium value runs into lacs, defendant No. 3 had surreptitiously purchased the same for a paltry sum from defendant No. 1 and was trying to oust defendant No. 2 from the ground floor of the said shop No. 72, Lower Bazar, Shimla by paying some money to him for surrendering possession and then was trying to induct some other person in the said shop by pocketing huge amount of *'Pagri'* for which the defendants were colluding with each other. Since defendant No. 3 was not legally entitled to purchase the said property under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 as amended in April, 1988, defendant No. 3 had obtained a General Power of Attorney from defendant No. 1 which was registered in the office of Sub Registrar (Urban), Shimla on 25.7.89 to camouflage and hide the original unlawful sale transaction which was illegal null and void abinitio being directly hit by Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. In fact, the said General Power of Attorney had been made with a view to defeat and frustrate and nullify the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. Therefore, the said power of attorney had been manufactured for unlawful purposes. On the strength of the said document, the defendants were trying to part with the possession of shop in the ground floor of shop No. 72 Lower Bazar, Shimla without the consent of the plaintiffs who were also co-owners to the extent of 1/4th share in the said property. The defendants had no right to induct any new tenant or change the tenancy of the said shop without the consent or permission of the plaintiffs who are the co-owners thereof.

5. It was further averred that the interest of the plaintiffs in the suit property is not safe in the hands of defendants who are out to defraud and cheat the plaintiffs and pocket huge sum of premium by inducting some new person in Shop No. 72, Lower Bazar, Shimla. Therefore, the plaintiffs do not want to keep the property joint. Defendant No. 1 had also realized rents of the said property but had not rendered the accounts for the last about 12 years to the plaintiffs. Defendant No. 1 was also, therefore, liable to render accounts of the income and profits of the said property. The plaintiffs were, therefore, entitled to an injunction restraining the defendants to induct any person in the said property without their consent or permission. If the injunction was not granted the plaintiffs would suffer irreparable loss and injury which could not be compensated in terms of money.

6. The suit was resisted and contested by defendants by filing separate written statements. Defendant No. 1 in written statement had raised preliminary objections to the effect that the plaintiffs had no locus standi to file the present suit because the plaintiffs had no right, title or interest in the suit property, as it was exclusively owned and possessed by late Smt. Udhami Devi as an absolute owner and after her death the property had come to the replying defendant through a Will dated 5.11.1974, the plaintiffs were estopped from filing the present suit on account of their acts, deed and acquiescences, that the present suit was barred in view of the dismissal of earlier suit by Sub Judge Ist Class (1) Shimla, on

19.4.1988 between the same parties pertaining to the same property and that the replying defendant is not the accounting party being the exclusive owner in possession of the property.

7. On merits, it is submitted that the suit property was exclusively purchaded by Smt.Udhami Devi along with 3/4th share in shop No. 72/1 from Sh.Himat Singh through a registered sale deed dated 24.7.1956, duly registered in the office of Sub Registrar, Shimla for a consideration of Rs.18,975/-. Sh. Himat Singh had purchased the same from custodian through a sale certificate in the year 1952 and mutation was attested in his favour. It was denied that Sh. Kedar Nath Sood and Sh. Sansar Chand Sood had any share in the suit property. The relationship of plaintiffs with late Smt.Udhami Devi was not denied. It was submitted that Sh. Kedar Nath Sood had no share in the suit property and as such there was no occasion for the plaintiffs No. 5 to 9 or other plaintiffs to had inherited his share in the suit property. It was admitted that Smt.Udhami Devi had executed a Will dated 5th November, 1974 in favour of replying defendant duly registered in the office of Sub Registrar, Hamirpur by which her 3/4th share in Shop No. 72/1 and the entire property known as Shop No. 72 was bequeathed in favour of replying defendant. It was denied that 1/4th share in the suit property was owned by the plaintiffs, as the entire property was owned by replying defendant on the basis of will executed by Smt.Udhami Devi.

8. It was admitted that Sh. Kanhya Lal Mehra was the tenant in the ground floor of suit property and in the first floor the legal heirs of Sh. Mangat Ram were the tenants. The rent from both the defendants was being realized by Smt.Udhami Devi during her life time and thereafter by replying defendant. It was denied that the plaintiffs were the joint owners with defendant No. 1. It was also denied that they are in constructive and legal possession of the said property through their tenants.

9. Respondent No. 1 further denied that defendant No. 3 had purchased the suit property and defendant No. 3 had been unnecessarily impleaded as a party to the suit. It was also denied that defendant No. 1 was trying to oust defendant No. 2 from the ground floor of the shop in which the business was being run by defendant No. 2. It was also denied that defendant No. 2 was taking any premium from defendant No. 3. Since defendant No. 3 neither purchased nor intended to purchase the property, the applicability of the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 were not attracted in the present case. It was also denied that any power of attorney had been manufactured for unlawful purpose. Since the plaintiffs had no right, title or interest in the suit property, they had no right to object to any new tenant which may be inducted by defendant No. 1 nor there was any necessity to get their consent. The replying defendant being the owner of the suit property was within his rights to let out the same to anyone.

10. It was further submitted that since the plaintiffs had no right, title or interest in the property, there was no question of their being cheated by the replying defendant, who was exclusive owner of the property. The plaintiffs had no right to seek partition of the property nor ask for rendition of accounts. The defendant No. 1 being exclusive owner of the property was not liable to render any accounts to the plaintiffs, who are only strangers to the property in dispute. The plaintiffs also were not entitled to any injunction.

11. Defendant No. 2 in his written statement had also raised preliminary objections that the suit was not maintainable, the plaintiffs had got no locus standi to file the suit against the replying defendant and the plaintiffs were estopped from filing the suit against the replying defendants on account of their own acts, conducts and deeds.

12. On merits, it was submitted that Smt. Udhi Devi was the owner of Shop No. 72, Lower Bazar, Shimla and after her death and as per Will dated 5.11.1974 (which was the subject matter of the suit), Mr. Vijay Kumar Sud, minor son of late Shri Virender Kumar Sud (i.e. defendant No. 1), became the absolute owner qua the said shop, in the tenancy and in the use and occupation of M/s Mehra Bros. Late Sh. Kedar Nath was appointed as a guardian by the Court, only to receive rent on behalf of minor Shri Ajay Kumar, defendant No. 1. After few years of realizing rent from the tenants M/s Mehar Brothers, on behalf of minor Ajay Kumar, Shri Kedar Nath Sud, moved an application before the Court, expressing his desire that some other guardian be appointed for the minor, as he wanted to withdraw.

13. Shri Kedar Nath was only entitled to receive rent on behalf of minor Ajay Kumar, defendant No. 1, which right he even relinquished before his death by moving an application in the Court in the eviction case, which had been filed on behalf of minor Ajay Kumar, defendant No. 1 against defendant No. 2. Smt. Udhi Devi mother of late Shri Kedar Nath had bequeathed the absolute ownership of Shop No. 72, Lower Bazar Shimla (in the tenancy of M/s Mehra Brothers) in favour of Sh. Ajay Kumar who was minor at that time and who was the son of late Sh. Virender Kumar. Late Sh. Kedar Nath or Sh. Sansar Chand had never laid any claim in their individual capacity as owner over the said shop or its rent etc in the tenancy and use and occupation of M/s Mehra Brothers.

14. It was further submitted that M/s Mehra Brothers were the tenants qua the ground floor of Shop No. 72, Lower Bazar, Shimla since the time of custodian department, who had allotted the said shop to M/s Mehra Brothers. Sh. Ajay Sud, defendant No. 1 was the owner/landlord qua the same after death of Smt. Udhi Devi. It was denied that the plaintiffs are the co-owners qua the said shop after the death of Smt.Udhi Devi. It was further averred that the plaintiffs had never laid their claim over the rents of Shop No. 72. It was only defendant No. 1 who had been realizing rent from M/s Mehar Brothers, tenant qua the said shop after death of Smt. Udhi Devi.

15. Defendant No. 3 in his written statement also raised preliminary objections qua maintainability, locus standi, estoppel etc. In addition to it, defendant No. 3 had submitted that the suit was not properly valued for the purpose of court fee and jurisdiction.

16. On merits, it was submitted that Sh.Ajay Kumar Sood S/o ShVarinder Kumar Sood was the owner of Shop No. 72, Lower Bazar, Shimla (two storeyed building) by way of Will executed by Udhi Devi, dated 5.11.1974 registered with Sub Registrar, Hamirpur in favour of Ajay Kumar, defendant No. 1. It was further submitted that late Sh. Kedar Nath or Sh. Sansar Chand had never laid any claims in their individual capacity as owners over the said shop or its rent etc, in the tenancy and use and occupation of M/s Mehar Brothers. It was admitted that M/s Mehra Brothers were the tenants qua the ground floor of Shop No. 72, Lower Bazar, Shimla. It was submitted that Ajay Kumar Sood, defendant No. 1 was the sole owner of Shop No. 72 by way of a will and question of joint ownership did not arise.

17. It was denied that the plaintiffs were the co-owners qua the said shop after the death of Smt. Udhi Devi. The General Power of Attorney of Sh.Ajay Kumar Sood in favour of Sh.Kuldip Singh, defendant No. 3 was admitted, as defendant No. 1 was residing thousand miles away from Shimla, as such, he had executed a general power of attorney in favour of defendant No. 3. Defendant No. 3 had not purchased the property in question, so the question of any Section of Land Reforms Act did not arise. It was submitted that it was only defendant No. 1 who had been receiving rents from the tenants after death of Smt. Udhi Devi.

18. In replication, the plaintiff controverted the allegations of the written statement and re-asserted the averments contended in the plaint. The learned trial Court vide orders dated 21.12.1989 framed the following issues:-

"*1. Whether the plaintiffs are owners to the extent of 1/4th share in shop No. 72 in dispute as alleged? OPP*

2. Whether the plaintiffs are entitled to the relief of partition, separate possession of their share in the suit property as alleged? OPP

3. Whether the plaintiffs are entitled to the relief of rendition of accounts from defendant No. 1 as alleged? OPP

4. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction as claimed? OPP

5. Whether the suit is not maintainable in view of preliminary objection No. 1 in the written statement of defendant No. 2 and preliminary objection No. 3 in the written statement of defendant No. 1? OPD

6. Whether the plaintiffs had no locus standi to file the suit? OPD

7. Whether the suit is not maintainable in view of preliminary objection No. 3 as alleged by defendant No. 2? OPD-2

8. Whether the plaintiffs are estopped from filing the present suit as alleged? OPD

9. Whether the Smt. Udhmi Devi W/o Shiv Dayal was the exclusive owner of shop No. 72 as alleged? OPD

10. If issue No. 9 is held in affirmative, whether defendant No. 1 has become absolute owner of the suit property as alleged? OPD

11. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD

12. Whether the plaintiffs had no cause of action to had file the suit against defendant No. 3, as alleged? OPD-3

13. Whether this Court has no jurisdiction to try the suit as alleged by defendant No. 3? OPD

14. Relief."

19. After recording evidence, the learned trial Court decreed the suit. Aggrieved by the judgment and decree passed by the learned trial Court, the defendants preferred an appeal before the learned lower Appellate Court and the same also was dismissed. Undeterred, the defendants had preferred the present appeal.

20. This Court admitted the appeal on the following substantial question of law:-

"*Whether the Courts below had misconstrued and misread the oral as well as documentary evidence and especially the documents Exhibits P-1 to P-6, P-15, PW-9/A to PW-9/14?"*

21. Mr.G.C. Gupta learned Senior Advocate, duly assisted by Ms. Meera Devi, Advocate has vehemently argued that the findings recorded by the learned Court below though concurrent are yet perverse. Both the Courts below have failed to take into consideration the fact that the plaintiffs/respondents had failed to prove that their predecessor-in-interest had purchased shop bearing No. 72. According to him, the predecessor-in-interest of the respondents had purchased the shop through Ex.P-2, which is the sale deed dated 15.2.1926, which clear shows that what was purchased by Dr.Mukand Lal and Sh. Sansar Chand was 1/4th share of Shop No. 72/1 and 72/2, which they had purchased for a consideration of Rs.6,000/-. Subsequently, vide sale deed Ex. P-1, 1/8th

share in shop No. 72/1 and 72/2, owned by Dr.Mukand Lal was transferred in favor of Sh. Kedar Nath on 8.12.1977 and as such Sh.Kedar Nath became owner of his 1/8th share and the other 1/8th share remained in the ownership of Sh.Sansar Chand. Subsequently, on the death of Sh.Sansar Chand, vide Ex.P-15, 1/8th share in the shop No. 72/1 was mutated in favour of his legal heirs on 18th October, 1969.

22. He further contended that the predecessor-in-interest of the respondents, during their life time till 1983 never claimed any interest in shop No. 72 nor made any application to any authority in regard to the fact that there did not exists any shop bearing No. 72/2 and it was in fact shop No. 72, which was purchased by their predecessor-in-interest to the extent of 1/4th share. Even the documents Ex. PW-9/1 to Ex. PW-9/13 were showing Smt.Udhi Devi as the exclusive owner to the extent of 3/4th share in shop No. 72/1 till her death and after her death Sh.Ajay Kumar was recorded as owner. Prior to the purchase by Smt.Udhi Devi, the tax assessment report for the years 1952 to 1955 shows Sh. Naimant-ullah and others to be the owners of Shop No. 72 and they along with Dr.Mukand Lal and Sh. Sansar Chand as owners of shop No. 72/1. It was only in the year 1983, that too behind the back of the appellants that the name of respondents was added in the column of owners along with Ajay Kumar in the assessment list relating to the year 1982-83.

23. He further contended that map Ex. P-4 had also not been properly considered by the learned Courts below, which clearly shows that there exists three shops on the spot and subsequently the third shop was merged in shop No. 72/1 by the predecessor-in-interest of the respondents. Learned Senior Counsel for the appellants further contended that vide sale deed Ex. P-5, it was established on record that Sh.Himant Singh had sold the property in favour of the predecessor-in-interest of the appellants, wherein also it have been clearly mentioned that he had sold shop No. 72 and 3/4th share in shop No. 72/1. This description tallied with the description of the property as mentioned in the sale certificate Ex. P-6. In this background it was for the respondents to have led cogent and trustworthy evidence to prove that their predecessor-in-interest had in fact purchased shop No. 72, while as a matter of fact no evidence worth the name had been produced.

24. On the other hand, Mr.Ajay Kumar, and Mr.Bhupinder Gupta, learned Senior Advocates, duly assisted by Mr.Dheeraj K. Vashishta and Mr.Neeraj Gupta, Advocates have argued that merely by terming the finding to be perverse, the same cannot be held to be perverse, particularly, when not only the learned trial Court, but even the learned Lower Appellate Court has dealt with the issue thread bare and only thereafter decreed the suit of the plaintiffs. It is further stated that this Court in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure Code ought not to interfere with pure findings of fact.

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

25. It is more than settled that this Court in exercise of its jurisdiction under Section 100 CPC would not upset the concurrent finding of fact, unless the finding so recorded are shown to be perverse. A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, than the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated.

29. The main thrust of the appellants is that by merely by saying that shop No. 72 has wrongly been mentioned as shop No. 72/2 in the sale deed dated 5.2.1926, was not a ground in itself, which would proves the respondents to be owners of remaining part of the property, apart from 3/4th share already owned by him.

30. To my mind, the appellants are trying to take unnecessary advantage of the mis-description of the property. The description otherwise when compared with the other documents on record, clearly establishes that as a matter of fact there were only two shops i.e. shop No. 72 and 72/1, whereas shop No. 72/2 was never in existence. It is established by oral and documentary evidence on record that 1/4th share in the suit property and adjoining shop No. 72/1 originally belonged to Sh.Thiku Mal, S/o Sh. Mukadi Mal and Sh.Khusi Lal S/o Sh. Hira Lal Sood, who vide sale deed dated 15th February, 1926 sold their 1/4th share in the said properties i.e. 72 and 72/1 in favour of Dr.Mukand Lal S/o Bhandari Mal and Sh.Sansar Chand, S/o Sh. Shiv Dayal. This deed was duly registered in the office of Sub Registrar, Shimla. Dr. Mukand Lal thereafter sold his 1/8th share as mentioned above in favour of Sh.Kedar Nath vide sale deed dated 8.12.1977, which was duly registered with the Sub Registrar, Shimla.

31. Obviously, the discrepancy which found its way in the sale deed would form the basis of entry in all the subsequent records kept for this purpose. Later this mistake was also reflected in the municipal records. It would further be seen that in the sale deed of 1926 and the subsequent sale deed of December, 1977, the two shops have been properly identified by permanent boundaries, which fact is also mentioned in the sale certificate of Sh.Himat Singh issued by the Custodian Department, namely, on the North Alley and passage, on the South Lower Bazar, on the East Alley No. 9 and on the West house of Bhedu Mal Mohinder Chand. Not only this, the dimensions of the property on the East are 21 feet, on the West 25 feet, on the South 29 feet and on the north 28 feet, meaning thereby the shops were comprised over a total area of 644 Sq. feet.

32. In such situation, it was incumbent upon the appellants to have proved that the dimensions as mentioned in the sale certificate and the sale deeds are different from those existing on the spot. On failure to do so, the necessary inference and rather the only conclusion which this Court can draw is that there appears to be a mistake in the sale deed of 1926, whereby shop No. 72 by mistake has been referred to as 72/2.

33. Sh.G.C. Gupta, learned Senior counsel for the appellant would then argue that an adverse inference ought to be drawn against the respondents for not examining Dr.Mukand Lal as a witness, though he was cited as a witness and given up. This contention is without any force. The record reveals that apart from the plaintiffs, even the

defendants have summoned Dr.Mukand Lal and the learned counsel for the appellant vide statement dated 29.8.1991 has stated before the learned trial Court as follows:-

> *"I give up Dr.Mukand Lal and Uttam Singh present, as not required to be examined, since they are won over."*

34. The learned counsel for the appellants has vehemently contended that the map Ex. P-4 has not been properly considered by the learned Courts below, which otherwise clearly proves that there exists three shops on the spot and subsequently third shop was merged in Shop No. 72/1 by the predecessor-in-interest of the respondents. I have perused the map Ex. P-4 and find that the contention of the appellants is not factually correct.

35. The map does not in any manner depict three shops, rather it appears to be the area where the window was to be placed. The mere fact that the shops as also the space has been shown in blocks and in contiguity would not if-so-facto prove that this block depicts the third shop.

36. The record reveals that defendant No. 1 in the suit did not appear in the witness box and state his own case on oath and did not offer himself for cross-examine by other side. Therefore, in such situation a presumption would arise that the case set up by him was not correct.

37. In ***Man Kaur (dead) by LRs. Vs. Hartar Singh Sangha,*** *(2010) 10 SCC 512*, the Hon'ble Supreme Court has summarized the legal position as to who should give evidence in regard the matters involving personal knowledge and it was held as follows:-

> *"**18**. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:*
>
> *(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.*
>
> *(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.*
>
> *(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.*
>
> *(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.*
>
> *(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney*

holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

38. The judgment rendered by the learned lower Appellate Court would reveal that though while concurring with the judgment of the learned trial Court, it was not required to re-state the effect of the evidence and even expression of general agreement with reasons given by the learned trial Court would have ordinarily sufficed yet the learned First Appellate Court has given a more elaborate and detailed finding, whereby he had not only discussed the pleadings thread bare, but has also discussed the evidence in its right perspective. The appellants have failed to prove any perversity in the impugned judgments.

Having observed so, I find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their costs.

****

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

Satya Devi and another .....Appellants.

Vs.

Kartar Chand and others .....Respondents.

RSA No. 278 of 2005
Reserved on: 18.05.2015
Date of decision: 28.05.2015

Transfer of Property Act, 1882- Section 123 - Plaintiff claimed that he is owner in possession of the suit land- he had executed gift deed of the suit land in favour of his wife- gift was presented for registration before Sub Registrar but Registrar asked him to come on some other day as he was busy- defendant No. 1 came to the plaintiff and told that he could get the gift deed registered- signatures of the plaintiff were obtained on some documents which were presented for registration – plaintiff was told that documents had been

registered- plaintiff subsequently came to know that sale deed and Special Power of Attorney were got executed from him- it was proved that plaintiff had no other land and, therefore, he had no justification to sell the only piece of land- gift deed was executed earlier in time and the sale deed was executed subsequently- mere non-registration of the gift is not sufficient- since, plaintiff had already executed a gift in favour of his wife, therefore, he could not have intended to sell the same land to some other person. (Para-19 to 24)

Cases referred:
Chennupati Venkatasubbamma Vs. Nelluri Narayanaswami, AIR 1954 Madras 215
Vidhyadhar Vs. Mankikrao, AIR 1999 Supreme Court 1441

For the appellants : Mr. Ajay Sharma, Advocate.
For the respondents: Mr. N.K. Thakur, Senior Advocate, with Mr. Rohit Bharol, Advocate, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Rajiv Sharma, J. (Oral):

This Regular Second Appeal is directed against the judgment and decree, dated 30.04.2005, passed by the learned Additional District Judge, Una, District Una, H.P. in Civil Appeal No. 6/2001.

2. Key facts necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of the appellant-plaintiff, Dalipa (hereinafter referred to as 'the plaintiff' for the sake of convenience), instituted a suit against the respondents-defendants (hereinafter referred to as 'the defendants' for the sake of convenience), stating therein that the land measuring 10 Kanals, 5 marlas, bearing Khewat No. 248, Khatauni No. 383, Khasra Nos. 4667, 4906, 4911, 4922, 4913, 4942, 4947, 4948, 4961, 4962, 5157, as entered in the Jamabandi for the year 1987-1988, situated in Village Rora Baliwal, Sub Tehsil Haroli, District Una (hereinafter referred to as 'the suit land' for the sake of convenience) was owned and possessed by Dalipa. The appellant No. 2, Sarasti Devi, is the wife of Dalipa. Dalipa has executed a gift deed of the suit land on 02.01.1991 at Haroli in her favour. The gift deed was scribed by Ashok Kumar, deed writer. It was accepted by Sarasti Devi. The gift deed was presented before the Sub-Registrar for registration. The Sub-Registrar, Haroli told the plaintiff and his wife Sarasti in the presence of the marginal witnesses that they should present the gift deed for registration on some other date as he was busy in some other work. The fact of the matter is that the gift deed could not be registered on 02.01.1991. The defendant No. 1 was also present at the time of execution of the gift deed. He was familiar and close to defendant No. 4, Sh. Ashok Kumar. The defendant No. 4, deed writer was aware of the fact of the execution of the gift deed and its non-attestation on 02.01.1991. On 03.01.1991, the defendant No. 1 came to the plaintiff in his house while other family members were away and told the plaintiff that Sub Registrar, Haroli is known to him and he could help him in getting the gift deed attested and registered by the Sub Registrar, Haroli. The plaintiff accompanied the defendant No. 1 to Haroli with gift deed. The defendants No. 1 to 4 were aware about the execution of the gift deed. They asked the plaintiff to sit nearby and got some writing from the plaintiff and produced the plaintiff before the Sub Registrar, Haroli, where the plaintiff was told by the Sub Registrar, Haroli that the document is registered. On 03.01.1991, the sale deed and a special power of attorney was got executed by the defendant No. 4. The defendants No. 1 to 4 mis-represented and defrauded the plaintiff to procure the alleged sale deed regarding the suit

land and special power of attorney collusively with concealment of the fact of execution of the gift deed in favour of Sarasti wife of the plaintiff. On 07.01.1991, the plaintiff went to Haroli in the office of Sub-Registrar to get the gift deed, but the Clerk of the Sub Registrar returned the gift deed to the plaintiff on the ground that Sub-Registrar has refused to register it as the plaintiff has already sold the land in question to Kartar Chand, the defendant No. 1 by executing the sale deed. Plaintiff thereafter enquired from the defendant No. 4, deed writer about the alleged sale as well as from the office of Sub Registrar and then came to know about the execution and registration of sale deed in favour of defendant No. 1 and special power of attorney in favour of defendant No. 2. The plaintiff never executed any sale deed and special power of attorney and never received any consideration from the defendant No. 1.

3. The suit was contested by the defendants No. 1 to 4 by filing written statement. On merits, it was admitted that Dalipa was the owner of the suit land, but after the execution of the sale deed, dated 03.01.1991, the defendant No. 1 has become absolute owner in possession of the suit land and the plaintiff was out of possession. It was alleged that the plaintiff executed the sale deed with his free consent and in sound disposing mind and full amount of consideration was received by Dalipa and the same fact was also admitted before the Sub Registrar.

4. Replication was filed by the plaintiff. The issues were framed by the learned Trial Court on 23.12.1998. The suit was dismissed by the learned Sub Judge (II), Una, District Una, H.P. on 19.12.2000.

5. Plaintiff Dalipa died on 01.08.1991 and his daughter Smt. Satya Devi was brought on record. Proforma defendant No. 5 Smt. Sarasti Devi was also added as plaintiff. Sarasti has already filed the written statement admitting the case of the plaintiff (Dalipa).

6. Plaintiffs filed an appeal before the learned Additional District Judge, Una, District Una, H.P. He dismissed the same on 30.04.2005. Hence, this Regular Second Appeal.

7. This Regular Second Appeal was admitted on the following substantial question of law on 18.05.2015

> *"Whether in view of the execution of Ex.P-1, execution of D-1 at later point of time will not convey any title in law to defendants but courts below having over looked the said aspect of the matter vitiated the impugned judgment and decrees?"*

8. Mr. Ajay Sharma, learned counsel for the plaintiffs has vehemently argued that Ex.-D1, sale deed, dated 03.01.1991, is sham transaction. He then contended that Dilapa, predecessor-in-interest of the plaintiffs had already executed a gift deed, dated 02.01.1991, in favour of plaintiff No. 2, Sarasti Devi, thus, there was no occasion for him to sell the suit land by way of Ex.-D1. He lastly contended that the execution of sale deed was the result of fraud played upon his clients.

9. Mr. N.K. Thakur, learned Senior Advocate, for respondents No. 1 and 2 supported the judgments and decrees passed by both the Courts below.

10. I have heard the learned counsel for the parties and gone through the pleadings and the records, carefully.

11. PW-1, Kashmiri Lal, has deposed that he knew Dalipa. Sarasti Devi is his widow. He has only one daughter, Satya. He further deposed that Dalipa has taken him and

Balwan, Lambardar to Haroli for the registration of gift in favour of his wife. His wife was also with him. It was in the month of January, 1991 that the gift deed Ex. P1 was scribed by deed writer, Ashok Kumar. The contents of the same were read over and explained to Dalipa. Dalipa has put his thumb impression on the gift deed and thereafter, he and Balwan Singh put their signatures on the same. Sarasti also accepted the same and put her thumb impression on the document. He alongwith Sarasti and Balwan Singh went to the office of Sub Registrar for registration of the same. However, the Sub Registrar told them that it was not the day meant for registration and he was going out of station. He told that them to come on monday. Dalipa presented the gift before the Sub Registrar, but the Sub Registrar told them that due to subsequent development, the gift deed could not be registered. He also deposed that the land was in possession of Sarasti and it never came in possession of Kartar Chand. In his cross-examination, he has categorically deposed that the relationship of Satya Devi with her parents was cordial. He did not know why the Will was not executed, volunteered that he wanted to execute a gift deed to avoid that his son-in-law may not sell the same.

12. PW-2, Balwan Singh, has corroborated the statement of PW-1. He has signed the gift deed as a marginal witness. The same was presented before the Sub Registrar. The Tehsildar was moving out and told them that they should come on any other date. Thereafter, on monday, he alongwith Dalipa, Sarsati and Kashmiri Lal, went to the office Sub Regisatrar. The Sub Registrar told them that the registry was already effected and, thus, the gift deed could not be executed. Dalipa told him that he had not got any registry executed. In his cross-examination, he deposed that Ashok Kumar was the deed writer of the gift deed.

13. PW-3, Sarasti Devi has deposed that she alongwith marginal witnesses Kashmiri and Balwan, Lamberdar, went to Haroli for the purpose of execution of gift deed. The gift deed was got scribed from the deed writer. The Officer told them that they should come on monday. They went on monday alongwith Kashmiri Lal. However, they came to know that Kartara had already got something executed. No consideration was accepted from Kartara. She was in possession of the suit land. In her cross-examination, she has deposed that Dalipa was in his senses. He has never sold any land in his life.

14. PW-4, Ashok Kumar has admitted that he has scribed the Will in favour of Sarasti Devi in the presence of Sh. Balwan Singh and Kashmiri Lal. The contents of the same were read over and explained to Dalipa. He accepted the same and thereafter put his thumb impression on the same. Sarasti Devi also accepted the same by putting her thumb impression. He has prepared two copies of the Will. One of the copy remained in the office of Sub Registrar.

15. PW-5, Hari Das deposed that the Naib Tehsildar, Haroli has powers of Sub Registrar. PW-6 Kapil Dev has deposed that Dalipa has no land other than the land mentioned in Jamabandis for the years 1987-88 and 1997-98.

16. Ashok Kumar has again appeared as DW-1. He deposed that the sale deed, Ex.D1 was scribed by him on 03.01.1991 at the instance of Dalipa. He has signed the same after admitting the contents of the same to be true and correct. He has identified Ex. D1.

17. DW-2, Rachhpal Singh deposed that he has put his signatures on Ex. D1 as a marginal witness. DW-3 Uttam Chand has signed Ex. D1 as a marginal witness. DW-4, Kartar Chand deposed that he has purchased an area of land measuring 10 Kanals 5 Marlas for a consideration of Rs.11000/- from Dalipa. The sale deed Ex.D1 was signed by the marginal witnesses. Dalipa has also put his thumb impression on the same. The sale deed was produced before the Sub Registrar. The contents of the same were read over and explained by the Sub Registrar to Dalipa and he after admitting the same to be true, has put his thumb

impression on the same. According to him, Dalipa has also executed a power of attorney in favour of Uttam Chand Ex. DW2/A. In his cross-examination, he has admitted that Dalipa was an agriculturist and he has no other source of income.

18. What emerges from the analysis of the statements is that Dalipa has executed a gift deed, dated 02.01.1991. It was scribed by PW-4 Ashok Kumar. PW-1 Kashmiri Lal and PW-2 Balwan Singh have signed the same as a marginal witnesses. The gift deed was also accepted by the wife of Dalipa. It was presented before the Sub Registrar. The Sub Registrar told them that he was going out of station and they should come on monday. They went on monday to the office of Sub Registrar, Haroli. He told them that the same could not be registered, since a sale deed has already been registered in the name of Kartar Chand.

19. Mr. Ajay Sharma, learned counsel for the appellants has vehemently argued that Ex. D1, sale deed, dated 03.01.1991, is an out come of fraud. According to him, his client has never sold the land vide Ex. D1. According to him, fraud has been played upon Dalipa, who was an illiterate person by making him to understand that the document which was presented before the Sub Registrar, was a gift deed only.

20. The sale deed Ex. D-1 was also scribed by PW-4 Ashok Kumar. DW-2, Rachhpal Singh and DW-3, Uttam Chand are the marginal witnesses. The power of attorney was also executed in favour of Uttan Chand vide Ex. DW2/A. The sale deed Ex. D1 was presented before the office of Sub Registrar and accordingly registered. Dalipa has only one daughter, Satya Devi. He was not owner of any land other than the land as per the details given in Jamabandis for the years 1987-88 and 1997-98. Even, DW-1 Ashok Kumar has admitted in his cross-examination that Dalipa has no other source of income. The relationship between Satya Devi and her parents were cordial. The plaintiff has, in fact, gone to Haroli on 02.01.1991 for the registration of gift deed, but he was apprised by the Sub Registrar that the same could not be done and they should come by monday, but by that time the sale deed vide Ex. D1 was already registered. There was no occasion for the plaintiff to sell the only piece of land available with him to defendant No. 1. The only source of livelihood for him and his wife was the land which was alleged to have been sold to defendant No. 1 for consideration of Rs.11000/-.

21. Mr. N.K. Thakur, learned Senior Advocate, has vehemently argued that the plaintiff Dalipa never wanted the land to go in the hands of his son-in-law. Satya Devi is the only daughter of plaintiff and after the death of the plaintiff and her mother, the land was bound to come to her, as legal heir. Once the plaintiff has gone to Haroli for the registration of gift deed, which was scribed by PW-4 Ashok Kumar in the presence of PW-1 Kashmiri Lal and PW-2 Balwan Singh, then where was the occasion for him to sell the land on 03.01.1991 to defendant No. 1. There is considerable force in the contention of Mr. Ajay Sharma, learned counsel for the appellants that in fact his client has been mislead by making him to believe that the documents which were presented before the Sub Registrar were qua the gift deed and not with respect to the sale deed. The relations between Satya Devi and her parents were cordial as per the statement of PW-1 Kashmiri Lal. It has also come on record the Sarasti Devi remained in possession of the suit land. Moreover, the gift deed is prior in time and the sale deed is latter in time. The execution of the Special Power of Attorney, dated 03.01.1991 and sale deed, dated 03.01.1991, Ex. D1, have been procured by defendant No. 1 by playing fraud and mis-representation upon the plaintiff by defendants.

22. In **Chennupati Venkatasubbamma** Vs. **Nelluri Narayanaswami,** AIR 1954 Madras 215, it has been held that what the law requires is acceptance of the gift after its execution though the deed may not be registered. The learned Single Judge has held as under:

"9. This finding is enough to dispose of this second appeal. But even on the other question of fraud and misrepresentation the finding of the learned Judge cannot be said to be justified in law. He seems to think that the evidence of D.Ws. 4, 8 and 9 which they speak to the complaint of Ramachandraiah immediately the documents was received from the post office and was read over to him was inadmissible in evidence as a statement of a deceased person which could not be brought under S.32, Evidence Act. What is sought to be established by the oral evidence is that immediately after the document was received Ramachandriah complained to these people that he was deceived or defrauded by Subbaiah. It affords evidence of his conduct immediately after receipt of the document. The statements are not attempted to be proved as statements made by Ramachandriah but only to establish the conduct of Ramachandriah. I do not see any legal object for the admission of these statements in evidence and there is no reason to eschew the evidence of D. Ws. 4, 8 and 9 on that account.

The learned Judge was also of the opinion that there was no definite pleading regarding the fraud that was complained of by the defendants. The fraud was categorically and clearly stated by Ramachandriah himself in Ex. B, and that is the case which the defendants attempted to prove in the trial Court and which was accepted by it. These defects would undoubtedly warrant a reconsideration of the evidence by the lower appellate Court. It is no doubt true that the learned Judge recorded an alternative finding even on the assumption that the evidence of D.Ws. 4,8 and 9 was admissible. But, it is rather difficult to separate how much of his finding was coloured by the fact that his evidence was in admissible and that the pleading was inadequate or insufficient. However, it is unnecessary to adopt that course, as in my opinion the finding on the first point is sufficient to dispose of this second appeal.

PW-3 Sarsati Devi has already accepted the gift deed and put her thumb impression on the gift deed Ex. P1. It was attested by two witnesses, namely, Kashmiri Lal (PW-1) and Balwan Singh (PW-2)."

23. Their Lordships of the Hon'ble Supreme Court in **Vidhyadhar** Vs. **Mankikrao**, AIR 1999 Supreme Court 1441, has held that in order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in present or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record.

"37. The real test is the intention of the parties. In order to constitute a "sale", the parties must intendd to transfer the ownership of the property and they must also intend that the price would be paid either in praesennti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence of record.

38. Applying these principles to the instant case, it will be seen that defendant No. 2 executed a sale deed in favour of the plaintiff, presented it for registration, admitted its execution before the Sub-Registrar before whom remaining part of the sale consideration was paid and, thereafter, the document was registered. The additional circumstances are that when the plaintiff instituted a suit on the basis of his title based on the aforesaid sale deed, defendant No. 2, who was the vendor, admitted in his written statement, the whole case set out by the plaintiff and further ad mitted in the witness box that he had executed a sale deed in favour of the plaintiff and had also received full amount of consideration. These facts clearly establish that a complete and

formidable sale deed was executed by defendant No. 2 in favour of the plaintiff and the title in the property passed to plaintiff. The findings recorded by the High Court on this question cannot, therefore, be up held.

39. The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4) of the Transfer of Property Act which are set out below:-

"55. In the absence of the contract to the contrary the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such as are applicable to the property sole:

(1) to (3).....
(4) The seller is entitled-
(a) .....
(b) Where the ownership of the property has passed dto the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of non-payment, for the amount of the purchase-money, or nay part thereof remaining unpaid, and for interest on such amount or part from th the date on which possession has been delivered.
(5) *to (6)......"*

In the instant case, since the plaintiff Dalipa has already executed the gift in favour of his wife, the intention cannot be inferred for the sale of the same property vide Ex. D1, moreover, when he would have been rendered landless.

24. Accordingly, the Courts below have not correctly appreciated the oral as well as documentary evidence. It is reiterated that there was no occasion for the plaintiff to sell the land once the gift deed Ex. P1, dated 02.01.1991, was scribed.

25. Accordingly, the Regular Second Appeal is allowed and the judgments and decrees passed by both the Courts below are set aside. Consequently, the Civil Suit No. 80/1991 is decreed and the sale deed Ex. D1, dated 03.01.1991, is declared null and void and the defendant No. 1 is restrained from interfering in the possession of the plaintiff Sarasti Devi. The miscellaneous application(s), if any, also stand(s), disposed of. No costs.

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

Smt. Dev Sundri and others ...Appellants/Plaintiffs.
Versus
State of H.P. and others ...Respondents/Defendants

R.S.A. No. 551 of 2004
Date of decision: 29th May, 2015

Specific Relief Act, 1963- Section 38- Plaintiff claimed that defendants/State had constructed a road in which proper drainage was not provided- flow of water from the road causes damage to the house and orchard of the plaintiff- defendant claimed that proper drainage system was provided and no damage was being caused- version of the plaintiff was proved by his evidence as well as by the inspection made by the Court- suit was decreed but

the decree was reversed on the ground that suit was decreed without impleading 'B', a co-owner of the property- held, that plaintiff had sought relief against the officials of the State who were under obligation to protect the life and properties of its citizens and had failed to abide by their duties- Officers of the State are liable to compensate a person for the loss sustained by him- suit could not have been dismissed on the ground that co-owner was not impleaded in the suit- defendant directed to provide drainage system to ensure that property of the plaintiff and 'B' is not damaged from flow of water. (Para-17 to 24)

For the Appellants : Mr. V.D. Khidtta, Advocate.
For the Respondents : Mr. V.K.Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Addl. A.Gs., for respondents No. 1 and 2.
Respondent No.3, Bhim Singh, in person.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The appellants are the plaintiffs, who are aggrieved by the judgment and decree dated 16.9.2004 passed by learned District Judge, Shimla in Civil Appeal No. 41-S/13 of 2000 whereby he reversed the judgment and decree dated 23.12.1999 passed by learned Sub Judge, Jubbal, District Shimla, in Civil Suit No. 36/1 of 99/98

2. The facts, in brief, are that the predecessor-in-interest of the appellants/plaintiffs namely Durga Dutt Sharma alongwith proforma defendants No. 3 to 9 claimed themselves to be the owner of the land measuring 14-04 bighas, comprising of Khata Khatauni No. 42 min/108, Khasra Nos. 361, 372, 373, 374, 375, 376, 377 and 378 situated in Chak Anu, Tehsil Jubbal, District Shimla. The plaintiff claimed to be in exclusive possession of this land under some family arrangement. The plaintiff also alleged to have constructed a double storeyed house on the aforesaid land. The plaintiff also claimed to have raised an orchard on his aforesaid land about 20 years before the filing of the suit.

3. The defendant/State of Himachal Pradesh, respondents No. 1 and 2 herein, has constructed a road known as "Anti-Rajpuri Road", which is situated at a higher level than the house and the orchard of the plaintiff. The construction of this road was started in the year 1974-75 and the road became as motorable in the year 1980-81.

4. The precise allegation of the plaintiff in the suit was that at the time of construction of the road, the defendant/State of Himachal Pradesh has not made proper arrangement for the drainage of the water being accumulated on the road.

5. It was averred that no culvert or drainage system was provided and resultantly, the water of a distance of one kilometer was accumulating on the road side and was flowing towards the house and the orchard of the plaintiff, which was situated on a lower level. The flowing of this water from the road towards the house of the plaintiff was said to have damaged the house and the orchard of the plaintiff every year more especially in the rainy season.

6. The plaintiff further claimed that he had earlier also filed a suit against the defendant for seeking the defendant/State of Himachal Pradesh to create proper drainage system on the road so as to check and provide the water from the road towards the house of the plaintiff and it was alleged that in the earlier suit filed by the plaintiff, the Divisional Officer, H.P. Public Works Department had given an undertaking on 21.6.1992 before the Lok Adalat that the dimensions of the culvert of the road over the house of Bhim Shall be

increased so as to control the flow of the water over the land and the house of the plaintiff. On the basis of such undertaking, the earlier suit filed by the plaintiff was said to have been compromised on 21st June, 1992. However, the defendants had not honoured or complied with the undertaking given by the Sub Divisional Officer, Public Works Department on 21st June, 1992 and resultantly, the plaintiff had to file an application under Order 21 Rule 32 of CPC against the defendant/State of Himachal Pradesh. This application was dismissed by learned Sub Judge by holding that the earlier suit of the plaintiff had been dismissed and the proceedings initiated by the plaintiff before the High Court of H.P. under Article 227 of the Constitution of India were also dismissed. Resultantly, the plaintiff filed the suit for seeking the relief of mandatory injunction and damages against the defendants.

7. It was claimed that in the year 1997, 22 apple plants of the plaintiff were got totally damaged and the house of the plaintiff had also been damaged and suffered a loss of Rs.2,00,000/- which amount was claimed by the plaintiff against the defendants by way of damages.

8. The plaintiff also claimed that the water flowing from the road towards the house of the plaintiff was causing damage to the house and orchard of the plaintiff every year and he prayed that defendants be directed to control the flow of water from the road side and also to increase the dia of the culvert so that the water may be properly regulated.

9. During the pendency of the appeal before the learned lower Appellate Court, the original plaintiff died and his legal representatives were brought on records, who are the appellants in this appeal.

10. The suit was contested by the defendants/respondents No.1 and 2 by raising preliminary objections regarding limitation, maintainability, valuation, estoppel and non-joinder of necessary parties. On merits, it was denied that any water from the road side was flowing towards the house of the plaintiff. It was contended that at the time of the construction of the road, which was constructed in the year 1974-75 to 1980-81, the proper drainage system was provided and no water was flowing from the road towards the house of the plaintiff. With regard to the undertaking allegedly given by the Sub Divisional Officer in earlier suit on 21st June, 1992, the defendant contended that all the terms of the undertaking had already been complied with and only the dia of the culvert could not be increased from 9 inches to 3 feet, as the same was objected to by Sh. Bhim Singh, respondent No.3 herein, who was having an orchard below the culvert in question.

11. On 20.4.1999, the learned trial Court framed the following issues:

1. Whether the plaintiff is entitled to mandatory injunction as prayed for? OPP
2. Whether the plaintiff is entitled to damages as claimed? OPP
3. Whether the suit is within limitation? OPP
4. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP
5. Whether the plaintiff is estopped from filing the present suit by his act, deeds and conduct? OPD
6. Whether the suit is bad for non-joinder of necessary parties? OPD
7. Relief.

12. The learned trial Court after recording the evidence was pleased to decree the suit for mandatory injunction thereby directed the respondents No. 1 and 2 to provide culvert for a dia of 1½ feet after replacing or nearby the present existing pipe/culvert about 9 inch alongwith proper catchment pit and also to put cause dip/water breaker nearby

alleged spot towards Nandpur road in such a way as to reduce the flow of rain water towards the main catchment pit and also the site map Ex.PW-4/A be also read as part and parcel of the decree for providing the points at spot as per its note 1 and 2.

13. Aggrieved by the judgment and decree dated 23.12.1999 passed by the learned trial Court, the defendant/State of H.P. preferred an appeal before the learned lower Appellate Court, who vide its judgment and decree dated 16.9.2004 has been pleased to set-aside the judgment and decree of the learned trial Court. This is how the plaintiffs are now in appeal before this Court against the judgment and decree passed by the learned lower Appellate Court.

14. On 10.12.2004, this Court admitted the appeal on following substantial questions of law:

> *"1. Whether the learned first Appellate Court has mis-construed and mis-interpreted the oral as well as documentary evidence specially the evidence Ex.PW-1/B, Ext.PW-1/C and also the statement of PW-4 and Ext.PW-4/A?*
>
> *2. Whether the learned first Appellate Court could have dismissed the suit of the plaintiffs on the ground of non-joinder of necessary parties without the objection of the respondents/State and the PWD Department who are the main contestant against whom relief has been sought."*

15. I have heard learned counsel for the respondent and have also gone through the records carefully.

16. Since both the substantial questions of law are inter-connected and interrelated, I proceed to answer them collectively.

17. It has come on record that the house of the appellants is situate below the road and on account of the official respondents having not put in place the proper drainage the same has resulted in water logging and the same thereafter is flowing towards the house of the appellants thereby causing damage to their property. The appellants in order to prove their case had tendered in evidence the previous copy of order Ext. PW-1/B, statement of Sh. B.N. Vaidya, the then SDO Ext.PW-1/C. Perusal of these two documents reveals that before the Lok Adalat, the respondents had admitted the claim of the plaintiffs and agreed to install a culvert nearby the land of respondent No.3 after putting the catchment pit by which the rain water had to be diverted and the proper drainage was to be provided. The plaintiff had examined one Manoj as PW-4, who tendered in evidence copy of site map Ex.PW-4/A which depicted the manner in which the proper drainage could be provided. He deposed that by not providing the proper drainage, the damage is being caused to the land and house of the appellants.

18. Not only this, the learned trial Judge himself had visited the spot alongwith the counsels for the parties and a detailed report to the following terms had been prepared:

> *"Today on 2.12.99, I alongwith plaintiff counsel Sh. Mohan Kalta and Ld. ADA have inspected the spot as provided under Section 18 Rule 18 CPC. The following observations have been gathered after seeing the spot:*
>
> *When we reached the spot at Village Bhajanu, plaintiff showed me that nearby the land of one Sh. Bhim Singh one culbert/pipe has been installed under the road. Plaintiff appraised the site which is sloppy one and he bring to my notice that all the rain water from the different side of the hill has been gathered upon the road during the rain season and thereafter the same moved in the downward direction. He bring to my notice the culbert/pipe about 9", the same has been installed in order to cover the drainage as well as*

the rain fall. Nearby the aforesaid pipe, there was one pipe which is stated to be installed for the irrigation scheme stated to be now a days become defunct. The pipe which is installed by the PWD Deptt. at its one side there is a little hole in order to collect the water and the second end of the same has been affixed in the tank which is stated to be upon the land of Bhim Singh, used for the irrigation scheme which already become obsolete. Plaintiff and his counsel bring to my notice that prior to the alleged road, the complete portion is sloppy and there is one Naala through which the water of the rain have been diverted/carried from the hill. I have seen the actual spot on the side of the alleged pipe, there is stated as the land of one Sh. Bhim Singh having an apple orchard. Below the land of Bhim Singh, there is stated to be the land of one Sh. Pratap.

After passing the land of aforesaid two persons, there are existing sign of Naala stated to be old one.

Now by seeing the aforesaid site, to my mind it appears to be dangerous in case a culbert about 3 feet has been installed on the alleged site. Because if in case the culbert about the dia of 3 ft. has been installed, the same will effect the land of Bhim Singh as well as Pratap Singh. Keeping the reason that the flow of water when the culbert is about 3ft in dia, volume of water becomes so high, it may cause loss to the orchard of the aforesaid person. The aforesaid naala has been stated to be fallen on the road side nearby place known as Annu. From seeing the site, it can be concluded that there are many orchards of different persons lying between the land of one BhimSingh and the said end of Nallah at village Annu. Thus by putting the culbert as proposed by the plaintiff about 3 ft. in dia, the same will effect the lands of many persons those have not represented in the case and it become dangerous. Though, as per the site, there is a slope towards the land of Bhim Singh as well as there after the orchard of plaintiff side by side road. By seeing the site it can observe that the flow of rain has become less effective as the same was scattered but by putting the culbert about 3 ft. the same become more dangerous as to the natural flow.

However, at the site if the pipe of stated to be 9" is replaced by some big pipe having a dia about less than 1 ½ feet, it will not effect the fields of the other persons because in that event the volume of water remain less. By seeing the spot it can also be assessed that the flow of water can be reduced at the site of occurrence by putting a different small culbert/pipe under neath the road at different place by which the flow of water can be reduced.

These are my observations as narrated above, the same has been after seeing the site, be considered at the time of argument."

It was after taking into consideration all the facts cumulatively that the learned trial Court had decreed the suit.

19. The learned lower Appellate Court has reversed these findings only on the ground that the suit of the plaintiff could not have been decreed without impleading Bhim Singh as a necessary party. While as a matter of fact, Bhim Singh already stood impleaded as a party respondent before the appellate Court. If that was so, the suit to say the least could not have been dismissed that too only on the ground that in case there was an enhancement of the diameter of the culvert, the same was likely to affect the land and orchard of Bhim Singh, who was not party to the suit and had a right to oppose the prayer.

20. The learned lower Appellate Court appears to be totally oblivious of the fact that the relief claimed by the appellants was directed only against the officials of the State and in case while protecting the interest of the appellants, the action of State would result in causing damage to the property of Bhim Singh, respondent No.3, then it was the duty of the State to protect even the property of Bhim Singh.

21. It is more than settled that the State has a duty to protect the lives and properties of its citizens. It was only on account of the construction of the road that the problem of water logging has arisen. Under such circumstances, the State owes more than a verbal assurance, a duty to compensate the affected person(s) and they cannot be left in the lurch without there being any relief granted to them by the State. The Constitutional right guaranteed to the citizens to protect their lives and properties cannot be whittled down at any cost much less at the cost of the State.

22. The officers of the State are ordained with duty to protect the life and property of its citizens and in case of failure, the same amounts to dereliction of duty and the State would be liable to make good this loss. Such liability can be enforced through public law remedy or common law remedy. If damage is caused to a person on account of the lapse of the officials of the State, the same would be treated as culpable negligence on the part of these officials.

23. The responsibility to make good the loss cannot be brushed aside in a manner as done by the learned lower Appellate Court where he reversed the findings of the learned trial Court by observing that the flowing of water from higher level towards lower level, more especially during the rainy water, was a natural phenomena in hilly terrain. This reflects a total lack of sensitivity on the part of the learned lower Appellate Court.

24. In view of the aforesaid discussion, it can safely be concluded that the judgment passed by the learned lower Appellate Court is not at all sustainable and is accordingly set-aside. However, in order to do the complete justice to the parties, even the judgment passed by the learned trial Court is required to be modified and is accordingly modified and a decree for mandatory injunction directing the respondents No. 1 and 2 to provide a drainage system by providing culverts of appropriate size and dia so as to ensure that the property of not only the appellants but even the respondent No.3 is protected from the flow of water. The respondents No. 1 and 2 are further directed to put cause dip/water breaker on the road in question in such a way so as to reduce the flow of rain water towards the main catchment pit. The site map Ex.PW-4/A would form part and parcel of the decree.

25. Consequently, the appeal is allowed and the judgment and decree dated 16.9.2004 passed by the learned lower Appellate Court in Civil Appeal No. 41-S/13 of 2000 is set aside and the judgment and decree dated 23.12.1999 passed by the learned trial Court is modified as above, leaving the parties to bear their own costs.

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

Divisional Engineer Telecom Project (BSNL) & another ...Appellants

Versus

Shri Chet Ram & another ...Respondents

FAO No. 274 of 2008

Date of decision: 29.05.2015

Motor Vehicle Act, 1988- Section 166- Mere acquittal in a criminal case is not a ground to defeat the rights of the claimant- the findings recorded by Criminal Court will have no bearing whatsoever in the proceedings competent before MACT. (Para-13 to 21)

Cases referred:

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Himachal Road Transport Corporation and another versus Jarnail Singh and others, reported in Latest HLJ 2009 (HP) 174

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellants :	Mr. Ashok Sharma, Advocate.
For the respondents:	Mr. O.C. Sharma, vice Mr. Ravinder Thakur, Advocate, for respondent No. 1.
	Ms. Leena Guleria, vice Mr. G.R. Palsra, 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 20th February, 2008, passed by the Motor Accident Claims Tribunal, Mandi, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 54 of 2004, whereby compensation to the tune of Rs.1,91,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant-respondent No. 1, herein and against the respondents-appellants, herein (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimant and the driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The Department has questioned the impugned award on the grounds that it is not liable to satisfy the award and the award amount is not just and appropriate.

Brief Facts:

4. Chet Ram injured was on his way from Shimla to his native place at Village Nayali, Tehsil Sundernagar, District Mandi, H.P., on 15th January, 2000, on Motor Cycle bearing registration No. HP-07-1600, was hit by vehicle-Gypsy bearing registration No. HP-06-1514, near Nehru Park Bhojpur, Sundernager, at about 7.45 p.m., which was being driven Gurbachan Singh, driver of respondents No. 1 & 3 in the claim petition-appellants herein, rashly and negligently. He sustained injuries, was taken to the hospital at Sundernagar and referred to Indira Gandhi Medical College, Shimla. He has suffered 30%

disability of the right leg. FIR No. 19 of 2000, under Sections 279 & 337 of the Indian Penal Code was registered in Police Station, Sundernagar.

5. The claimant claimed compensation to the tune of Rs.15,00,000/-, as per the break-ups given in the claim petition.

6. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"*1. Whether the respondent No. 2 was driving the vehicle bearing No. HP-06-1514 on 15.1.2000, at 7.45, near Nehru Park Bhojpur, Tehsil Sundernagar, District Mandi, H.P., in a rash and negligent manner resulting in injuries to the petitioner Chet Ram as alleged? …OPP*

2. If issue No. 1 is proved, whether the petitioner is entitled for compensation, if so, as to what amount and from whom? ..OPP

3. Whether the petition is bad for mis-joinder of necessary parties as alleged? …OPR(1)

4. Whether the petition is barred by Order 2 Rule 2 C.P.C. as alleged? …OPR(1)

5. Whether the petitioner is estopped by his own acts and conduct to file the present petition? ….OPR

6. Relief."

8. The claimant has examined Dr. P.R. Chauhan (PW-1), Suresh Kumar (PW-2) and Dr. Pawan Kumar (PW-3). Claimant also appeared in the witness box as PW-4. The Department has examined Bidhi Chand, Division Engineer as RW-1 and driver Gurbachan Singh appeared in the witness box as RW-2. The parties have also placed on record documents, the details of which are given in the impugned award.

9. The Tribunal, after scanning the evidence, oral as well as documentary, has held that the driver has driven the offending vehicle, rashly and negligently and caused the accident, in which the claimant sustained injuries and awarded compensation to the tune of Rs.1,91,000/-**,** the details of which are given in para-29 of the impugned award.

10. I have perused the impugned award and gone through the record.

Issue No. 1.

11. The claimant has proved by leading evidence, oral as well as documentary that driver, namely Gurbachan Singh, had driven the offending vehicle, rashly and negligently, on 15.1.2000, at 7.45 p.m., near Nehru Park Bhojpur, in which Chet Ram sustained injuries.

12. The learned Counsel for the appellant argued that FIR No. 19 of 2000 was registered against the driver, which has resulted into acquittal.

13. I have gone through the judgment Ext. RW-1/C passed by the Court of competent jurisdiction. The prosecution case was shrouded in doubts and accordingly, the accused came to be acquitted.

14. The moot question is – whether acquittal in the said case can be a ground to deny compensation? The answer is in the negative for the following reasons.

15. It is beaten law of land that granting of compensation is a welfare legislation and the hyper- technicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and to defeat the social purpose of granting compensation.

16. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

17. The findings recorded by the said Court in acquittal cannot be a ground to defeat the rights of the claimants. Even, if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

18. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly; several lost their limbs likewise. The High Court, after examining the materials, concluded:*
>
> > *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R. W. 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*
> >
> > *The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and*

although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."

19. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

" 8. ..... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."

20. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligence or not in causing the accident. ....."

21. Having said so, I am of the considered view that the Tribunal has rightly recorded findings on Issue No. 1. Accordingly, the findings recorded on Issue No. 1 are upheld.

22. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 to 5.

Issues No. 3 to 5.

23. The onus to prove issues No. 3 to 5 was upon the respondents No. 1 to 3 in the claim petition-appellants herein, which they have failed to discharge. The Tribunal has rightly made discussions relating to these issues in the impugned award right from paras 30 to 37. Thus, no interference is required.

Issue No. 2.

24. Now, the question is whether the award amount is excessive.

25. The Tribunal while awarding compensation in injury cases has to award compensation under the heads- pecuniary and non-pecuniary damages.

26. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads.

27. The Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085** in para-7 of the judgment has held as under:

> *"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."*

28. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation in injury cases. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."*

29. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation.

30. The Tribunal has awarded Rs.25,000/- under the head 'cost of medicines', Rs.20,000/-under the head 'pain and sufferings', Rs.10,000/- under the head 'loss of

amenities of life, Rs.10,000/- under the head 'loss of expectation of life', Rs.2,000/- under the head 'taxi charges', Rs.24,000/- under the head 'loss of income for one year and Rs.1,00,000/- under the head 'future loss of income', total compensation amounting to Rs.1,91,000/-. The Tribunal while making the assessment has made discussion right from paras 16 to 29 in the impugned award.

31. Having said so, it is held that the Tribunal has awarded just and appropriate compensation to the claimant. Accordingly, the findings returned by the Tribunal on Issue No. 2 are upheld.

32. Accordingly, the appeal is dismissed and the impugned award is upheld.

33. The Registry is directed to release the awarded amount in favour of claimant, strictly as per the terms and conditions, contained in the impugned award.

34. 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.

FAO No. 224 of 2008 a/w
FAOs No. 225 to 231 of 2008, and
CO No. 604, 611, 612 & 674 of 2008
Reserved on: 22.05.2015
Decided on: 29.05.2015

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1. FAO No. 224 of 2008

Hem Ram & another ...Appellants.

Versus

Krishan Chand & another ...Respondents.

2. FAO No. 225 of 2008

Hem Ram & another ...Appellants.

Versus

Asha Ram & others ...Respondents.

3. FAO No. 226 of 2008

Hem Ram & another ...Appellants.

Versus

Smt. Sita Devi & others ...Respondents.

4. FAO No. 227 of 2008

Hem Ram & another ...Appellants.

Versus

Sh. Inder Parkash & others ...Respondents.

5. FAO No. 228 of 2008

Hem Ram & another ...Appellants.

Versus

Partap Singh & another ...Respondents.

6. FAO No. 229 of 2008

Hem Ram & another ...Appellants.

Versus

Smt. Kanta Devi & others ...Respondents.

7. FAO No. 230 of 2008

Hem Ram & another ...Appellants.

Versus

Laxmi Singh & another ...Respondents.

8. FAO No. 231 of 2008

Hem Ram & another ...Appellants.

Versus

Jaimanti & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Mahindra Utility met with an accident in which five persons died- claimants pleaded that deceased were travelling in the vehicle along with goods/articles - the owner and driver did not deny this fact specifically but had denied it evasively- Insurer had not produced the copies of the registration certificate and the route permit- the risk of '1 + 3' is covered in terms of the insurance contract- therefore, insurer is to be saddled with liability to pay compensation in respect of three person- held, that in these circumstances Insurance Company was wrongly absolved of the liability and the owner was wrongly held liable to pay compensation. (Para-22 to 53)

Cases referred:

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

National Insurance Company Limited versus Anjana Shyam & others, n 2007 AIR SCW 5237

National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others, ILR-2015 Vol.XLV-II, Page 825

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

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

Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674

State of Haryana and another 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

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717

Ningamma & another versus United India Insurance Co. Ltd., n 2009 AIR SCW 4916,

Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

Savita versus Bindar Singh & others, n 2014 AIR SCW 2053

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: Ms. Jyotsna Rewal Dua, Advocate.

For the respondents: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent-insurer in all the appeals.

Mr. Anil God, Advocate, for respondents-claimants in FAO No. 225 of 2008.

Mr. Deepak Kaushal, Advocate, for respondents-claimants in FAO No. 227 of 2008.

Mr. Rupinder Singh & Ms. Shashi Kiran, Advocates, for respondents-claimants in FAOs No. 228 to 231 of 2008 and for cross-objectors in Cross Objections No. 604, 611, 612 & 674 of 2008.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

A vehicular traffic accident has given birth to eight appeals and four cross objections in hand, thus, I deem it proper to determine all these appeals and cross objections by this judgment.

2. The owner-insured and the driver of the offending vehicle are the appellants in all the eight appeals have called in question the award, dated 20.07.2007, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in a batch of eight claim petitions, whereby compensation stood awarded in favour of the claimants and the owner-insured and the driver came to be saddled with liability (for short "the impugned award").

3. Some of the claimants/victims, by the medium of the cross-objections, have questioned the impugned award on the ground of adequacy of compensation.

4. The insurer and some of the claimants/victims have not questioned the impugned award on any ground.

5. In view of the above, the following questions are to be determined in these appeals and cross-objections:

(i) Whether the Tribunal has rightly saddled the owner-insured and the driver of the offending vehicle with liability and exonerated the insurer?

(ii) Whether the amount awarded is just and appropriate?

6. In order to determine the said questions, it is necessary to give brief resume of the case, the womb of which has given birth to these appeals and the cross-objections.

7. The claimants in five claim petitions, i.e. MAC Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 59-N/2 of 2002 and 33-N/2 of 2003 (subject matters of FAO No. 229 of 2008 & CO No. 611 of 2008, FAOs No. 226, 227, 225 of 2008 and FAO No. 231 of 2008 & CO No. 674 of 2008, respectively), are the dependents of the deceased who have lost their lives in the said traffic accident.

8. The claimants in three claim petitions, i.e. MAC Petitions No. 53-N/2 of 2002, 94-N/2 of 2002 and 35-N/2 of 2003 (i.e. subject matters of FAO No. 230 of 2008 &

CO No. 612 of 2008, FAO No. 224 of 2008 and FAO No. 228 of 2007 & CO No. 612 of 2008, respectively), are the victims, who have sustained injuries in the said accident.

9. In all the claim petitions, it is averred that the driver, namely Shri Vijender Singh, had driven the offending vehicle, i.e. Mahindra Utility, bearing registration No. HP-18A-0165, rashly and negligently, on 15.04.2002, at about 8.00 A.M., near Kanlog,Tehsil Pachhad, District Sirmaur, H.P. and caused the accident, in which five persons, namely Randeep Singh, Vikram Singh, Dinesh Kumar, Hoshiar Singh and Om Prakash, sustained injuries and succumbed to the injuries and three persons, namely Krishan Chand, Partap Singh and Laxmi Singh sustained injuries.

10. The claimants have claimed compensation, as per the break-ups given in the respective claim petitions.

11. The owner-insured and the driver of the offending vehicle have filed joint replies in all the eight claim petitions. The insurer has also contested the claim petitions by the medium of the replies.

12. The Tribunal, after noticing the facts of the cases read with the fact that the five claim petitions are outcome of one accident and similar evidence is to be led in all the five claim petitions, clubbed the petitions, being MAC Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 53-N/2 of 2002 and 94-N/2 of 2002 and framed the following issues on 04.12.2002 in the lead case being MAC Petition No. 37-N/2 of 2002:

> *"1) Whether Randeep Singh Son of late Sunder Singh, Vikram Singh son of Sardar Singh and Dinesh Kumar son of Inder Prakash died in a motor accident caused by rash and negligent driving of a Mahindra Utility (No. HP-18 A-0165) by its driver Respondent 2, Vijender Singh, at Kanlog (Beuri) Village in Tehsil Pachhad, on April 15, 2002? ...OPP*
>
> *2) Whether petitioners Laxmi Singh and Krishan Chand sustained grievous injuries in a motor accident caused by rash and negligent driving of a Mahindra Utility (No. HP-18 A-0165) by its driver respondent 2, Vijender Singh at Kanlog (Beuri) village in Tehsil Pachhad, on April 15, 2002? ...OPP*
>
> *3) If above issues are proved, whether the petitioners are entitled to compensation? If so, to what amount and from whom? ...OPP*
>
> *4) Whether the deceased and injured were unauthorised passengers and the Mahindra Utility was being plied in violation of the terms and conditions of the insurance policy. If so, what effect? ...OPR*
>
> *5) Whether the driver of the Mahindra Utility did not possess a valid and effective driving licence at the time of the accident. If so, to what effect? ...OPR*
>
> *6) Relief."*

13. Following issues came to be famed in MAC Petition No. 59-N/2 of 2002 on 4.12.2002:

> *"1) Whether Om Parkash, son of Asha Ram died in a motor accident caused by a Mahindra Utility (No. HP-18-A-0165) at a place known as Kanlog in Tehsil Pachhad, on April 15, 2002 at about 8.00 A.M.? ...OPP*

2) If above issue is proved, whether the petitioners are entitled to compensation? If so, to what amount and from whom? ...OPP

3) Whether the driver of the Mahindra Utility did not possess a valid and effective driving licence at the time of the accident. If so, to what effect? ...OPR-3

4) Whether the vehicle in question was being plied in violation of the terms and conditions of the Insurance Policy?...OPR-3

5) Relief."

14. Similar set of issues were framed by the Tribunal in MAC Petitions No. 33-N/2 of 2003 and 35-N/2 of 2003 on 26.08.2003. I deem it proper to reproduce the issues framed in one of the claim petitions, i.e. MAC Petition No. 33-N/2 of 2003 herein:

"1) Whether Hoshiar Singh died in a motor accident caused by rash and negligent driving of a Mohindra Utility (No. HP-18-A-0165) by respondent 2, Vijender Singh near Kanlog village in Pachhad Tehsil on April 15, 2002? ...OPP

2) If issue 1 is proved, what amount the petitioners are entitled to receive as compensation and from whom? ...OPP

3) Whether the driver of the vehicle in question did not have any valid and effective driving licence at the time of the accident. If so, to what effect? ...OPR-3

4) Whether the vehicle involved in an accident was being plied in violation of the terms and conditions of the insurance policy at the material time. If so, its effect? ...OPR-3

5) Whether the deceased was an unauthorised passenger in the vehicle in question. If so, what effect? ...OPR-3

6) Relief."

15. It is apt to record herein that MAC Petitions No. 33-N/2 of 2003 and 35-N/2 of 2003 were clubbed with MAC Petition No. 37-N/2 of 2002 vide orders, dated 26.11.2003.

16. The claimants in all the claim petitions, except MAC Petition No. 59-N/2 of 2002, led evidence in MAC Petition No. 37-N/2 of 2002 and examined Kanta Devi as PW-1, Sher Singh as PW-2, Laxmi Singh as PW-3, Sardar Singh as PW-4, Surinder Kumar as PW-5, Dr. Sandeep Sharma as PW-6, Jaimanti as PW-7, Inder parkash as PW-8, Kishan Chand as PW-9, Rattan Singh as PW-10 and Partap Singh as PW-11. The respondents have not examined any witness, however, owner-insured-Hem Ram and the driver-Vijender Singh appeared in the witness box as RW-3 and RW-4, respectively.

17. The claimants in MAC Petition No. 59-N/2 of 2002, one of the claimants, namely Asha Ram, appeared in the witness box as PW-1 and examined Kesar Singh as PW-2. The insurer examined Bhim Singh, Criminal Ahlmad of the Court of Sub Judge, Rajgarh as RW-1 and Bishan Thakur, the Investigating Officer, as RW-2.

18. Parties have also produced documents/copies of the documents, which stand exhibited, details of which have been given separately in the prescribed proforma - Form-A and Form-B annexed with the impugned award.

19. It appears that the Tribunal has scanned and discussed the entire evidence together and returned the findings on all issues except assessment of the compensation. The Tribunal has assessed the compensation in each of the claim petitions separately.

20. The claimants in Claim Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 33-N/2 of 2003 and 35-N/2 of 2003 have specifically pleaded that the deceased/injured were travelling in the offending vehicle alongwith goods/articles. It is apt to record herein that in Claim Petition No. 37-N/2 of 2002, it has been pleaded that the deceased had gone to Thakar Dawara Jee in connection with marriage work, had to come back alongwith his articles, hired the vehicle for Rs.100/-, which were paid to the driver of the offending vehicle. In Claim Petitions No. 53-N/2 of 2002, 59-N/2 of 2002 and 94-N/2 of 2002, it has been pleaded that the deceased/injured were walking on the road as pedestrian when the offending vehicle hit them.

21. The owner-insured and the driver of the offending vehicle have not specifically denied the said factum, however, they have made evasively denial. They have admitted that accident has taken place but have stated that the claimants are not entitled to any compensation as the accident was outcome of mechanical defect. Their replies are evasive, which can be said to be admission in terms of the mandate of Order VIII of the Code of Civil Procedure, 1908 (for short "CPC").

22. It was for the insurer to plead and prove that the owner-insured has committed breach by using the vehicle for which route permit and registration was not granted. The insurer has neither produced the copies of the registration certificate and the route permit nor has taken steps to ask the driver and owner-insured for the production of the said documents, not to speak of making request to the Tribunal for summoning the said record from the Registration Authority.

23. The insurer has examined two witnesses in support of its defence. One is the Criminal Ahlmad from the Court of Sub Judge, Rajgarh, who was dealing with the file in criminal case and the another is the Investigating Officer, who had conducted the investigation and presented the charge sheet/final report in terms of the mandate of Section 173 (2) of the Code of Criminal Procedure (for short "CrPC") before the said Court (for short "the Magistrate").

24. On the other hand, the claimants in all the claim petitions have led evidence and all the witnesses have stated that the deceased/injured were travelling in the offending vehicle as owner of goods/articles and some of them were pedestrians.

25. The Magistrate has dismissed the criminal case registered against the driver of the offending vehicle while holding that the prosecution has failed to prove the case beyond reasonable doubt. The Magistrate, while recording the judgment, in paras 14, 15 and 17 held that the evidence is contradictory and prosecution case is shrouded in doubts. It is apt to reproduce paras 18 and 19 of the judgment rendered by the Magistrate, Ext. RW-4/A, herein:

> *"18. The aforesaid evidence as well as law cited shows that death and receiving injuries are not sufficient to hold the accused guilty for the offences for which he is charged. There should must be direct nexus between rashness or negligence between driving and occurrence of accident. In the prosecution case prosecution witnesses have deposed two different versions which has causes doubt in the prosecution case. In view of the same, I have no option*

> *accept to inferred that the insufficient evidence of the prosecution has causes doubt, in the prosecution case. Accordingly, in my opinion, the accused is entitled for benefit of doubt. hence, the points are decided in negatives.*
>
> *19. In view of my aforesaid discussions and findings, the accused is acquitted after giving him benefit of doubt u/ss 279, 337, 338 and 304-A IPC. His bail bonds are discharged. The file after needful be consigned to records room."*

26. The Magistrate has made the foundation of the dismissal order in view of the contradictory evidence brought by the prosecution on record. One set of evidence on record is that all the deceased/injured were travelling in the vehicle and another set is that some were travelling in the vehicle and some of them were walking on the road. There is also evidence on the file that some of the persons were travelling in the vehicle alongwith articles. Even, the Magistrate has held that the evidence of the Investigating Officer is not worth credence, hence, unbelievable.

27. Thus, the prosecution has failed to prove whether the said persons were travelling in the vehicle with articles or without articles or whether some of them were walking on the road. Moreover, that cannot be a ground to show door to the claimants read with the fact, at the cost of repetition, that the owner-insured has made evasive denial, as discussed hereinabove.

28. The question is - whether the findings recorded by the Criminal Court can be made basis for holding that the driver has not driven the vehicle rashly and negligently and the deceased/injured were gratuitous passengers?

29. It is beaten law of land that if conviction is recorded by the Criminal Court, that is the best ground to hold that the driver had driven the vehicle rashly and negligently, but, if the driver earns acquittal, that cannot be a ground for dismissal of the claim petitions.

30. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their*

lives instantly; several lost their limbs likewise. The High Court, after examining the materials, concluded:

> *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R. W. 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*

The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."

31. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

> *" 8. ..... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true ; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."*

32. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

> *"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligence or not in causing the accident. ....."*

33. Having said so, the Tribunal as well as the Appellate Court have to scan the evidence and return findings while keeping in mind the aim and object of granting of the compensation.

34. It is well settled that aim, object and purpose of granting compensation is social one, it is a welfare legislation, is to be achieved as early as possible and cannot be defeated while invoking the hypertechnicalities, mystic maybes and niceties. Procedural

wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions.

35. My this view is fortified by the judgment of the Apex Court in **N.K.V. Bros.'s case (supra).** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard.*
>
> *Emphasis supplied"*

36. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are*

necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."

37. It is also apt to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

38. While going through the pleadings, the evidence and the impugned award read with the judgment made by the Magistrate in the criminal case, *prima facie,* it appears that the claimants have proved that the deceased/injured in Claim Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 33-N/2 of 2003 and 35-N/2 of 2003 were travelling in the offending vehicle as owner of the goods/articles, which has not been denied by the other side, as discussed hereinabove.

39. Deriving support from the judgment in the criminal case, it can be safely said that the insurer has not dislodged the evidence led by the claimants because the insurer has examined only the investigating officer, who has been disbelieved by the Magistrate and his statement was made basis for dismissing the case. Thus, his statement cannot be relied in these proceedings also in the given circumstances.

40. The claimants in other three claim petitions, i.e. 53-N/2 of 2002, 59-N/2 of 2002 and 94-N/2 of 2002, it has been pleaded that the deceased/injured were walking on the road side, were hit by the offending vehicle, which has not been denied specifically.

41. There is evidence on the file and even evidence has come before the Magistrate to this effect, thus, it cannot be said that some of the deceased/injured were not walking on the road side or some of them were not travelling in the vehicle.

42. It was for the insurer to plead and prove that the deceased/injured were gratuitous passengers, which it has failed to do so and the owner-insured & the driver have given evasive replies to the pleadings of the claimants. Even, the driver has stated before the Tribunal, while appearing as RW-4, that none was travelling in the vehicle.

43. It is worthwhile to record herein that the driver of the offending vehicle, while appearing as RW-4, has admitted in his cross-examination that many persons were standing at the place of accident, who were dragged into the gorge alongwith the offending vehicle.

44. Having said so, all the claimants have proved that five persons, namely Randeep Singh, Vikram Singh, Dinesh Kumar, Hoshiar Singh and Partap Singh, were travelling in the offending vehicle alongwith goods/articles at the time of the accident, and three persons, namely Laxmi Singh, Om Prakash and Krishan Chand, were hit by the offending vehicle while walking on the road side.

45. The pedestrians, i.e. Laxmi Singh, Om Prakash and Krishan Chand, are the third parties. The factum of insurance is admitted and the insurer has not proved that the owner-insured has committed willful breach. Thus, the insurer is to be saddled with liability to satisfy the award in three claim petitions, i.e. Claim Petitions No. 53-N/2 of 2002, 59-N/2 of 2002 and 94-N/2 of 2002.

46. In Claim Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 33-N/2 of 2003 and 35-N/2 of 2003, it has been specifically pleaded that the deceased/injured were travelling in the offending vehicle alongwith goods/articles. The risk of '1 + 3' is covered in terms of the insurance contract, Ext. RW-3/A. Meaning thereby, the policy covers the risk of the driver and three passengers. Thus, the insurer is to be saddled with liability of three passengers.

47. 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."*

48. 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."*

49. This Court in a batch of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, has held that the insurer has to satisfy the awards which are on higher side.

50. In view of the judgments (supra), the insurer has to satisfy the award in three claim petitions, wherein compensation awarded is on higher side and the owner-insured has to satisfy the award in two claim petitions, wherein compensation awarded is on the lower side.

51. The insurer has pleaded in all the claim petitions that the driver of the offending vehicle was not having a valid and effective driving licence and the owner-insured has committed breach. The insurer has not led any evidence to prove that the driver was not having a valid and effective driving licence, however the Tribunal has recorded findings that the driver was having a valid and effective driving licence. The said findings have not been questioned by the insurer, have attained finality. However, I have gone through the record. The insurer has not led any evidence to prove the said issue, thus, has failed to discharge the onus.

52. As discussed hereinabove, the insurer has failed to prove that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy and the owner-insured has committed willful breach in terms of the mandate of Section 149 of the Motor Vehicles Act, 1988 (for short "the MV Act"). Thus, the findings on the said issue is

recorded in favour of the claimants, the owner-insured and the driver and against the insurer.

53. Having said so, the Tribunal has fallen in an error in exonerating the insurer and saddling the owner-insured with liability in all the claim petitions.

Cross Objections No. 604 of 2008 in FAO No. 228 of 2008

54. Claimant-injured-Partap Singh has sought enhancement of compensation on the grounds taken in the cross objections read with the claim petition

55. I have gone through the claim petition and the assessment made by the Tribunal in para 85 of the impugned award and am of the considered view that the Tribunal has fallen in an error in assessing the just and appropriate compensation.

56. It is beaten law of land that while assessing compensation in injury cases, guess work is to be made and compensation is to be awarded under two heads : pecuniary damages and non-pecuniary damages, which has not been done in the present case.

57. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

58. It is proved and held that the claimant-injured remained admitted in PGI, Chandigarh w.e.f. 15.04.2002 to 20.04.2002, remained under treatment upto 18.06.2002. On perusal of the cash memos, Ext. PW-11/B to Ext. PW-11/K, amounting to Rs.2,959/- it can be safely said that the claimant-injured would have spent a huge amount for his treatment, special diet and transportation charges.

59. By guess work, it can be safely said that the claimant-injured would have spent at least Rs.30,000/- as treatment charges, special diet charges and transportation charges, also Rs.2,959/- for medicines, has not been able to earn for about two months, is to be granted, by guess work, at least Rs.10,000/- under the head 'loss of earning capacity for the said period'.

60. The Tribunal has awarded Rs.3,000/- under the head 'attendant charges', which is meager, because the claimant-injured remained under treatment for two months, was suffering for a pretty long time and had engaged an attendant, accordingly, Rs.10,000/- is awarded under the head 'attendant charges'.

61. The claimant-injured has sustained head injury with IIIrd, IVth and Vth Rib Fracture right side in terms of medical certificate, Ext. PW-6/C, thus, would have suffered pain and sufferings during the said period and has to undergo the same in future also. Accordingly, Rs. 50,000/- is awarded under both the heads 'pain and sufferings undergone and pain and sufferings in future'.

62. Accordingly, the compensation is enhanced and the claimant-injured is held entitled to compensation to the tune of Rs.30,000/- + Rs.2,959/- + Rs.10,000/- + Rs.10,000/- + Rs.50,000/- = Rs.1,02,959/- in Claim Petition No. 35-N/2 of 2003. The cross-objections are answered/allowed.

Cross Objections No. 611 of 2008 in FAO No. 229 of 2008

63. By the medium of cross-objections, the claimants/dependents of deceased Randeep Singh have sought enhancement of compensation.

64. I have gone through the assessment made. The Tribunal in paras 62 to 65 of the impugned award has made discussion and has arrived at the conclusion and awarded compensation to the tune of Rs.3,56,000/- in favour of the claimants.

65. I am of the considered view that the amount awarded can neither be said to be excessive nor meager, but is just and appropriate, and is accordingly upheld.

66. Viewed thus, cross objections are dismissed.

Cross Objections No. 612 of 2008 in FAO No. 230 of 2008

67. The Tribunal has made discussions in para 73 of the impugned award as to what amount of compensation the claimant-injured-Laxmi Singh was entitled to.

68. I have gone through the pleadings and para 73 of the impugned award and the evidence. Admittedly, the claimant-injured has suffered head injury and multiple injuries, was admitted in Civil Hospital, Sarahan, wherefrom he was referred to PGI Chandigarh, had to go to PGI for follow-up, was admitted there w.e.f. 13.05.2002 to 21.05.2002. The injured-claimant has also placed on record cash memos, Ext. P-18 to Ext. P-52, amounting to Rs.12,909/-.

69. Thus, it can be said that the claimant-injured was dependent on attendants, would have also spent a huge amount as treatment charges, the injuries have also affected his earning capacity for at least two months, had undergone pain and sufferings for the said period and has to undergo the same in future also.

70. Thus, by guess work, it is held that the claimant-injured is entitled to Rs.30,000/- under the head 'treatment charges' in addition to Rs.12,909/-, Rs.50,000/- under the heads 'pain & sufferings undergone and pain & sufferings in future', Rs. 10,000/- under the head 'loss of earning capacity for the said period', Rs.10,000/- under the head 'attendant charges and Rs.10,000/- under the head 'conveyance charges'; the total compensation to the tune of Rs.30,000/- + Rs.12,909/- + Rs.50,000/- + Rs. 10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.1,22,909/-.

71. Accordingly, the cross objections are allowed and the claimant-injured is held entitled to compensation to the tune of Rs.1,22,909/- in Claim Petition No. 53-N/2 of 2002.

Cross Objections No. 674 of 2008 in FAO No. 231 of 2008

72. Perused para 77 of the impugned award. The compensation awarded is just and appropriate, cannot be said to be meager or excessive. The cross-objections are not tenable.

FAO No. 227 of 2008

73. Mr. Deepak Kaushal, learned counsel for the claimants, argued that though the claimants have not filed cross-objections and have not applied for enhancement of compensation, but under law, are entitled to enhanced compensation and the Court can grant the same after considering the argument. Further argued that the Tribunal has fallen in an error in assessing the compensation and has drawn my attention to the assessment made by the Tribunal.

74. After considering para 71 of the impugned award, it is held that the Tribunal has fallen in an error in assessing the compensation.

75. The moot question is - whether the Tribunal or Appellate Court is/are within its/their jurisdiction to enhance the compensation without the prayer being made for the same?

76. It would be profitable to reproduce Section 168 (1) of the MV Act herein:

> *"**168. Award of the Claims Tribunal.** - On receipt of an application for compensation made under section 166 , the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:*
> *....."*

77. The mandate of Section 168 (1) (supra) is to 'determine the amount of compensation which appears to it to be just'.

78. Keeping in view the object of granting of compensation and the legislature's wisdom read with the amendment made in the MV Act in the year 1994, it is for the Tribunal or the Appellate Court to assess the just compensation and is within its powers to grant the compensation more than what is claimed and can enhance the same.

79. This Court in a case titled as **United India Insurance Company Ltd. versus Smt. Kulwant Kaur,** reported in **Latest HLJ 2014 (HP) 174,** held that the Tribunal as well as the Appellate Court is/are within the jurisdiction to enhance the compensation and grant more than what is claimed. It is apt to reproduce paras 41 to 45 of the judgment herein:

> "41. Before I determine what is the just and adequate compensation in the case in hand, it is also a moot question – whether the Appellate Court can enhance compensation, even though, not prayed by the medium of appeal or by cross-objection.
>
> 42. The Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") has gone through a sea change in the year 1994 and sub-section (6) has been added to Section 158 of the MV Act, which reads as under:
>
> > *"**158. Production of certain certificates, licence and permit in certain cases.** -*
> >
> > *.....*
> >
> > *(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is*

completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."

In terms of this provision, the report is to be submitted to the Tribunal having the jurisdiction.

43. Also, an amendment has been carried out in Section 166 of the MV Act and sub-section (4) stands added. It is apt to reproduce sub-section (4) of Section 166 of the MV Act herein:

"166. Application for compensation. *-*

.....

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."

It mandates that a Tribunal has to treat report under Section 158 (6) (supra) of the MV Act as a claim petition. Thus, there is no handicap or restriction in granting compensation in excess of the amount claimed by the claimant in the claim petition.

44. Keeping in view the purpose and object of the said provisions read with the mandate of Section 173 of the MV Act, I am of the view that the Appellate Court is exercising the same powers, which the Tribunal is having. Also, sub-clause (2) of Section 107 of the Code of Civil Procedure (hereinafter referred to as "the CPC") mandates that the Appellate Court is having all those powers, which the trial Court is having. It is apt to reproduce Section 107 sub-clause (2) of the CPC herein:

"107. Powers of Appellate Court. *-*

.....

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."

45. Thus, in the given circumstances, the Tribunal as well as the Appellate Court is within the jurisdiction to enhance the compensation. "

80. The same view was taken by the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

> *"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.*
>
> *8. .....*
>
> *9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.*
>
> *10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."*

81. 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)."*

82. 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**.

83. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

84. 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.

85. 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."*

86. The Apex Court in a latest judgment in a case titled **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce para 9 of the judgment herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."*

87. 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."*

88. Having said so, the Tribunal/Appellate Court is within its powers to enhance the compensation.

89. Admittedly, the age of the deceased-Dinesh Kumar was 19 years at the time of the accident, was studying in 10th class, would have become earning hand after some time. By guess work, it can be safely said that even if he would have been working as a labourer, would have been earning not less than Rs.5,000/-, was the source of hope and help to the parents in their old age. Keeping in view the age of the parents and the deceased, multiplier of '12' is applicable.

90. It can be safely held that the claimants have lost their source of hope and help and dependency/income to the tune of Rs.2,500/- per month 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, the claimants are held entitled to compensation to the tune of Rs. 2,500 x 12 x 12 = Rs. 3,60,000/- in Claim Petition No. 43-N/2 of 2002.

FAO No. 224 of 2008

91. While examining the claim petition and the record, it appears that the compensation awarded to the claimant-injured-Krishan Chand in Claim Petition No. 94-N/2 of 2002 is too meager.

92. The Tribunal has fallen in an error while making assessment in paras 74 to 76 of the impugned award. The disability certificate,Ext. PW-9/B, does disclose that the claimant-injured has suffered 25% disability.

93. The claimant-injured sustained grievous injuries, was taken to Civil Hospital, Sarahan, was referred to PGI, Chandigarh, where he remained admitted w.e.f. 15.04.2002 to 18.04.2002, would have spent a huge amount on his treatment, attendant charges, transportation charges, would have undergone pain and sufferings and has to undergo pain and sufferings in future.

94. Having said so, by exercising guess work, it can be safely held that the claimant-injured is entitled to Rs.20,000/- under the head 'treatment charges', Rs.25,000/- under the head 'pain and sufferings undergone', Rs.25,000/- under the head 'pain and sufferings in future', Rs.10,000/- under the head 'attendant charges, Rs.10,000/- under the head 'transportation charges'. The injury has also affected the earning capacity of the claimant-injured, his physical frame, thus, Rs. 30,000/- is awarded under the said head.

95. Accordingly, the claimant-injured is held entitled to total compensation to the tune of i.e. Rs. 20,000/- + Rs.25,000/- + Rs.25,000/- + Rs.10,000/- + Rs.10,000/- + Rs.30,000/- = Rs.1,20,000/- in Claim Petition No. 94-N/2 of 2002.

96. The Tribunal has awarded interest @ 7.5 % per annum in all the claim petitions, is maintained.

97. Having said so, the impugned award is modified and the insurer is directed to satisfy the award in Claim Petitions No. 53-N/2 of 2002, 59-N/2 of 2002, 94-N/2 of 2002, 43-N/2 of 2002, 37-N/2 of 2002 & 33-N/2 of 2003 and the owner-insured has to satisfy the award in Claim petitions No. 41-N/2 of 2002 & 35-N/2 of 2003.

98. The claimants have been driven because of the negligence of the driver of the offending vehicle right from the Tribunal to this Court read with the fact that the owner-insured and the driver have not taken the specific stand. Had they taken specific stand and not made evasive denial, they would not have been in a position as they are today. Thus, the actions and conduct of the owner-insured demand that he should be saddled with costs throughout. Accordingly, Rs.10,000/- is awarded in each claim petition as costs in favour of the claimants and the owner-insured is directed to satisfy the same in all the claim petitions.

99. The insurer and the owner-insured are directed to deposit the awarded amount within eight weeks before the Registry. On deposit of the amount, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

100. Excess amount, if any deposited by the owner-insured be released in his favour through payee's account cheque.

101. Having said so, all the appeals and the cross-objections are disposed of and the impugned award is modified, as indicated hereinabove.

102. Send down the record after placing copy of the judgment on each of the Tribunal's files.

****

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

Kamal Bahadur Rana. ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Cr.A. No. 109/2013
Reserved on: 28.5.2015
Decided on: 29.5.2015

N.D.P.S. Act, 1985- Section 20- Accused was found to be carrying a bag which was containing 1.800 grams of charas- police officials had not gone to the residence of any person to associate him with investigation, although, houses were located at a distance of 200 meters from the place where the accused was apprehended - there was no entry regarding taking out of the case property from the Malkhana for production in the Court- it is necessary to make entry when the case property is deposited in the Malkhana or is taken out from the same - non-making of the entry makes it doubtful whether the same property was produced before the Court or not- in these circumstances, accused is entitled to be acquitted. (Para-17 and 18)

For the appellant: Ms. Nishi Goel, 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 23.1.2013 rendered by the Special Judge, Shimla in Case No. 3-S/7 of 2012, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to suffer rigorous imprisonment for a period of one year.

2. Case of the prosecution, in a nutshell, is that on 19.8.2011, police party headed by SI Kamal Chand consisting of HC Manoj Kumar, Constables Anil Kumar, Pawan and Sanjeev of SIU, Shimla was on patrol duty on Sanjauli-Dhalli bypass road. At about 12.30 P.M. they spotted a man coming from Dhalli side with a carry bag on his shoulder. On seeing the police party, he got perplexed and started running towards Batish Colony. The police officials over powered him. Option was given to him to be searched either by the Gazetted Officer or Magistrate. However, accused gave consent to be searched by SI Kamal Chand. The bag was searched. It contained 1.800 grams of charas. The recovered contraband was put into the same packets and the packets were sealed with 8 seals of seal impression 'Z'. SI Kamal Chand also filled in NCB forms in triplicate. The case property was produced before the officiating S.H.O. He re-sealed the same. He deposited the case property alongwith other documents with the M.H.C. The contraband was sent to F.S.L. Junga for chemical examination. The report of F.S.L. Junga was obtained. 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 9 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has denied the case of the prosecution in entirety. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Ms. Nishi Goel, 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 Anil Kumar has deposed that on 19.8.2011, police party headed by SI Kamal Chand and other police officials went towards Dhalli from Sanjauli on patrol duty. When they were near Batish Colony at about 12.30 P.M., a person came from Dhalli side. He got confused. He ran towards stairs of Batish Colony. He was over powered. SI Kamal Chand told the accused that he was suspecting that he may be carrying incriminating material with him and he wanted to conduct his search. The accused was also told that it was his legal right to get himself searched in the presence of gazetted officer or the Magistrate. The accused stated that he would give his search to SI Kamal Chand. A consent memo Ex.PW-1/A was prepared. The bag was searched. One transparent plastic bag was taken out from the bag. On opening the plastic bag, two small plastic packets were taken out. The plastic packets were having the stick shaped black substance, which on inspection was found as Charas. It was weighed. The parcel was prepared and sealed with 8 seals of 'Z'. The NCB form was filled up in triplicate. The seals after use were given to HC Manoj Kumar. The case property was produced at the time of recording statement of PW-1. It was sealed with 5 seals of FSL-II, 4 seals of 'T' and 7 seals of 'Z'. It was produced by the learned Public Prosecutor. There were two other seals which were not legible. The seals were intact. On opening, one plastic bag Ex.P-2 was taken out and in that plastic bag, there were two plastic packets Ex.P-3 and P-4. In these plastic packets stick shaped charas Ex.P-5 was contained. Similarly, Ex.P-7 was also produced in the court. In his cross-examination, PW-1 Anil Kumar has admitted that the road was used by vehicles going towards Kufri. They did not go to the residence of any person for calling him to join the investigation.

8. PW-2 Pawan Kumar has also deposed the manner in which the accused was nabbed, search, seizure and sealing process was completed on the spot. He handed over rukka mark A to MHC, Police Station, Dhalli to record FIR. FIR was recorded. In his cross-examination, he has admitted that when they reached Batish Colony at about 12.30 P.M. they were in a vehicle when they spotted the accused. Volunteered that the vehicle was in a very slow speed. According to him, it was not a busy road and after lapse of many minutes, vehicle started crossing the road. Batish Colony was at a distance of 200 meters from the stairs where the accused was arrested. They did not call any person from Batish Colony.

9. Statement of PW-3 Salig Ram is formal in nature.

10. PW-4 Vinesh Kumar has taken the case property to F.S.L. Junga vide R.C. No. 142/2011.

11. PW-5 Vikas Kumar has brought the result of the chemical examination from F.S.L. Junga.

12. Statement of PW-6 Sant Ram is formal in nature.

13. PW-7 Shiv Kumar has deposed that on 19.8.2011, constable Pawan gave two sealed parcels containing 1.800 grams of charas, NCB forms and sample seal Z to ASI Parkash, who was officiating as S.H.O., Police Station, Dhalli. Thereafter, ASI Parkash Chand resealed the parcel containing Charas by putting five seals of 'T'. Separate sample of seal 'T' was taken by him. Ex.PW-7/A was prepared. On the same day, ASI Parkash Chand gave both the parcels to him alongwith NCB forms, sample seals of 'T' and 'Z'. He deposited the same in the Malkhana after making entries in the Malkhana register. The extract of Malkhana register is Ex.PW-7/B. The case property was sent on 20.8.2011 through constable Vinesh to F.S.L. Junga for chemical examination. He sent Constable Vikas Kumar to F.S.L. Junga for collecting the report. He also filled up NCB form.

14. PW-8 Parkash Chand has deposed that Constable Pawan Kumar had brought two sealed cloth parcels sealed with seal 'Z'. He gave him sealed parcels as well as NCB forms and sample of seal Z. He resealed both the parcels by affixing five seals of 'T' on each parcel and gave the parcels to MHC Shiv Kumar. He prepared resealing certificate Ex.PW-7/A. Specimen seal of 'T' was taken separately on cloth vide Ex.PW-8/C. Columns No. 9 to 11 were filled up by him.

15. PW-9 SI Kamal Chand has deposed the manner in which accused was apprehended, search and seizure process was undertaken and other formalities were completed on the spot. Rukka Ex.PW-9/A was prepared. It was sent to Police Station, Dhalli through Constable Pawan Kumar alongwith case property and NCB form for registration of FIR. He has also identified the case property. In his cross-examination, he has admitted that they were in a private vehicle, but he did not remember the number of the vehicle. He did not know who was the owner of the vehicle. He has admitted that they reached near Batish Colony at about 12.30 P.M. He has also admitted that long route buses as well as other vehicles go via Sanjauli bypass road to Dhalli. Many persons reside in Batish Colony.

16. What emerges from the evidence discussed hereinabove is that accused was apprehended at about 12.30 P.M. on 19.8.2011 at Dhalli bypass road. He gave his consent to be searched by the police officer. The bag on search was found to be contained 1.800 grams of charas. The contraband was sealed. Rukka was prepared. NCB forms were filled in. The rukka was taken to Police Station, Dhalli for the registration of FIR. The FIR was registered. Resealing process was undertaken and the case property was deposited with MHC. MHC sent the case property to F.S.L. Junga and the same was received back after analysis alongwith report.

17. Accused has been nabbed at Dhalli bypass road. It is a busy road. PW-1 Anil Kumar has admitted in his cross-examination that they did not go to the residence of any person for calling him to join the investigation, though the accused was nabbed on the stairs of Batish Colony. PW-2 Constable Pawan Kumar, in his cross-examination, has admitted that Batish Colony was at a distance of 200 meters from the stairs where the accused was arrested and they did not call any person from Batish Colony. PW-9 SI Kamal Chand is the Investigating Officer. He has also admitted in his cross-examination that they had reached near Batish Colony and long route buses as well as other vehicles go via Sanjauli bypass road to Dhalli. Many persons reside in Batish Colony. However, fact of the matter is that despite independent witnesses available, either in Batish Colony or on a busy road, no independent witnesses were associated at the time of search and seizure on the spot. Surprisingly, the police party had gone in a private vehicle but PW-9 Kamal Chand did not remember the number of the vehicle and he did not know who was the owner of the vehicle.

18. The case property, as noticed hereinabove, was produced by the learned Public Prosecutor at the time of recording statement of PW-1 Anil Kumar. There is an entry of the case property deposited with the MHC in Ex.PW-7/B and at the time of sending to F.S.L. Junga and received back from F.S.L. Junga. However, there is no entry when the case property was taken again from the Malkhana to be produced in the court. There is also no DDR. Again there is no entry when the case property was deposited in the Malkhana after the statement of PW-1 was recorded. There is no entry in the Malkhana register when the case property was produced again before the Court at the time of recording the statement of PW-9 Kamal Chand on 8.11.2012. Statement of PW-1 Constable Anil Kumar was recorded on 3.10.2012. It is necessary to make an entry when the case property is deposited in the Malkhana (store room) and taken out from the store room. The production of case property in the court is mandatory. However, in this case since no entry has been made in the Malkhana register when the case property was produced on 3.10.2012 and 8.11.2012, it casts doubt whether it was the same property, which was recovered from the accused and sent to F.S.L. and produced in the Court. It has caused serious prejudice to the accused.

19. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for offence under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 beyond reasonable doubt against the accused.

20. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 23.1.2013 rendered in Case No. 3-S/7 of 2012 is set aside. Accused is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already deposited, be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

21. The Registry is directed to prepare the release warrant of accused and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

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

New India Assurance Company Ltd. ...Appellant.

Versus

Smt. Kamla Devi & others ...Respondents.

FAO No. 243 of 2008
Reserved on: 22.05.2015
Decided on: 29.05.2015

Motor Vehicle Act, 1988- Section 149- Driver had a learner licence- held, that a person holding a learner licence is competent to drive motor vehicle for which the licence has been issued. (Para-14 to 22)

Cases referred:

Anuj Sirkek versus Neelma Devi and Ors., ILR, (H.P. Series), 2015 Volume (XLIV)-VI, Page 1145

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Bhuvnesh Sharma, advocate, for respondents No. 1 to 3.
Nemo for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Appellant-insurer has questioned the award, dated 08.01.2008, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (H.P.) (for short "the Tribunal") in M.A.C.T. Petition No. 53-G/II/2005, titled as Smt. Kamla Devi and others versus Ex. Capt. Gian Chand and others, whereby compensation to the tune of Rs. 3,50,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its deposition came to be awarded in favour of the claimants, against the respondents and the appellant-insurer was to satisfy the award (for short "the impugned award").

2. The claimants, the driver and the owner-insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the grounds, details of which have been given in para 1 of the appeal.

4. The questions to be determined in this appeal are:

(i) Whether the impugned award is bad in law?

(ii) Whether the driver of the offending vehicle was not having a valid and effective driving licence?

(iii) Whether the owner-insured has committed any willful breach in terms of Section 149 of the Motor Vehicles Act, 1988 (for short "MV Act") read with the terms and the conditions of the insurance policy?

(iv) Whether the amount awarded is excessive?

5. In order to determine the said questions, it is necessary to give brief resume of the case, the womb of which has given birth to the appeal in hand.

6. Deceased-Mast Ram Rana became the victim of the vehicular accident, which was caused by driver, namely Shri Anurag Rana, while driving offending vehicle, motor cycle, bearing registration No. HP-36-8184, rashly and negligently on 11.11.2004, at about 11.00 A.M. at Adde-Di-Hattian, hit the deceased, who sustained injuries, was taken to Community Health Center, Jawalamukhi, was referred to Zonal Hospital, Dharamshala, was taken to Hoshiarpur wherefrom was referred to Jallandhar (Punjab), where he remained admitted in Intensive Care Unit in Vasal Hospital Private Limited, 37, Kapurthala, Chowk, Jallandhar, and succumbed to injuries at about 10.45 P.M.

7. It is averred in the claim petition that the deceased was 55 years of age at the time of the accident, was proprietor of Rana Rolling Shutter Industries and was earning Rs.15,000/- per month. Further averred that the claimants have spent Rs. 41,000/- as medical expenses and claimed compensation to the tune of Rs. 10,00,000/-, as per the break-ups given in the claim petition.

8. The respondents in the claim petition, i.e. the owner-insured, the driver and the insurer, have resisted the claim petition on the grounds taken in the respective memo of objections.

9. Following issues came to be framed by the Tribunal:

> *"1. Whether on 11.11.2004 the respondent No. 2 was driving the motor cycle No. HP-36-8184 rashly and negligently and hit Sh. Mast Ram who sustained injuries and lateron succumbed to the injuries, as alleged? OPP*
>
> *2. If Issue No. 1 is proved, what amount of compensation the petitioners are entitled to and from whom? OP Parties*
>
> *3. Whether respondent No. 2 was not holding a valid and effective driving licence, as alleged? OPR-2 & 3*
>
> *4. Whether the vehicle in question was not insured with respondent No. 3 at the time of alleged accident? OPR-1 & 3*
>
> *5. Relief."*

10. Parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of Rs. 3,36,000/- with interest @ 7.5% per annum from the date of the claim petition till its deposition in favour of the claimants and the insurer came to be saddled with liability.

Issue No. 1:

11. The findings on issue No. 1 are not in dispute. However, I have gone through the record and scanned the evidence and am of the considered view that the claimants have proved by leading evidence, oral as well as documentary, that on 11.11.2004, driver-Anurag Rana had driven the offending vehicle rashly and negligently, hit the deceased, who sustained injuries and succumbed to the injuries. Therefore, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 & 4.

Issue No. 3:

13. Appellant-insurer had to discharge the onus to prove issue No. 3, which it has failed to do so, for the simple reason that it has not led any evidence. Thus, issue No. 3 was to be decided in favour of the claimants, driver and the owner-insured and against the insurer.

14. However, learned counsel for the appellant-insurer pleaded that the driver of the offending vehicle was having a learner's licence and was not competent to drive the same. The said fact has been discussed by the Tribunal in para 14 of the impugned award and the Tribunal rightly came to the conclusion that the driver was having learner's licence and was competent to drive the offending vehicle, i.e. the motor cycle, in terms of the driving licence, Ext. RW-1/A.

15. Section 2 (19) of the MV Act defines learner's licence. It provides that a person who is holding a learner's licence is authorized to drive a light motor vehicle or a motor vehicle of any specified class or description. It is apt to reproduce Section 2 (19) of the Act herein:

> *"2 .....*
> *(19) "learner's licence" means the licence issued by a competent authority under Chapter II authorising the person*

specified therein to drive as a learner, a motor vehicle or a motor vehicle of any specified class or description;"

16. While going through the said definition, one comes to an escapable conclusion that a person who is having a learner's licence is competent to drive the motor vehicle or a motor vehicle of any specified class or description, for which he has been given the licence.

17. A bare perusal of the driving licence Ext. RW-1/A does disclose that the licence was valid and effective at the time of accident and the driver was competent to drive the motor cycle, i.e., the offending vehicle. It is not the case, either of the claimants or of the insurer, that the driver was not having a learner's licence.

18. This Court has dealt with the issue in the cases titled as **Anuj Sirkek versus Neelma Devi and Ors.,** being **FAO No. 57 of 2014,** decided on 19.12.2014 and **Oriental Insurance Company Ltd. versus Sh. Krishan Dev and others,** being **FAO No. 476 of 2007,** decided on 22.05.2015.

19. It is profitable here to reproduce Section 10 of the MV Act, which reads as under:

"10. Form and contents of licences to drive. - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;
(b) motor cycle with gear;
(c) invalid carriage;
(d) light motor vehicle;
(e) transport vehicle;
(i) road-roller;
(j) motor vehicle of a specified description."

20. The mandate of Section 10 of the Act is that every learner is competent to drive the vehicle, description of which is contained in the driving licence, Ext. RW-1/A in the present case, mention of which is made hereinabove.

21. The issue as to whether a person, who is holding a learner's licence, is competent to drive light motor vehicle, came up for consideration in a case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** and it was held that a person having learner's licence is deemed to have been holding a valid and effective driving licence. It apt to reproduce paras 88 to 90 of the said judgment herein:

"88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence,

he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149 (2) of the said Act.

89. The provisions contained in the said Act provide also for grant of driving licence which is otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation of statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

90. Mandar Madhav Tambe's case (supra), whereupon the learned counsel placed reliance, has no application to the fact of the matter. There existed an exclusion clause in the insurance policy wherein it was made clear that the Insurance Company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". The question as to whether such a clause would be valid or not did not arise for consideration before the Bench in the said case. The said decision was rendered in the peculiar fact situation obtaining therein. Therein it was stated that "a driving licence" as defined in the Act is different from a learner's licence issued under Rule 16 of the Vehicles Rules, 1939 having regard to the factual matrix involved therein."

22. Viewed thus, the Tribunal has rightly held that the driver of the offending vehicle was having a valid and effective driving licence. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

23. It was for the appellant-insurer to prove that the offending vehicle was not insured with it. In one breath, the appellant-insurer has pleaded that the driver of the

offending vehicle was not having a valid and effective driving licence and the owner-insured has committed a willful breach of the terms and conditions of the insurance policy, and in second breath, it has pleaded that the offending vehicle was not insured with it.

24. While going through the record, more particularly, the insurance policy, Ext. R-X, one comes to an inescapable conclusion that the offending vehicle was insured with the appellant-insurer and the insurance policy was in force at the time of the accident. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 2:

25. The claimants have proved that the age of the deceased was 55 years at the time of the accident and was earning Rs.6,000/- per month. The Tribunal has discussed this issue in paras 17 to 20 of the impugned award. I am of the considered view that the Tribunal has rightly held that the deceased was earning Rs.6,000/- per month and the claimants have lost the source of income/dependency to the tune of Rs.4,000/- per month and applied the multiplier of '7' while keeping in view the age of the deceased.

26. Having said so, the amount awarded cannot be said to be excessive, though meager. However, the claimants have not questioned the same, is reluctantly upheld.

27. Having said so, all the four questions framed hereinabove are, accordingly, replied.

28. In view of the above, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

29. 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.

30. Send down the record after placing copy of the judgment on Tribunal's file.

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

New India Assurance Co. Ltd. .....Appellant.

Versus

Smt. Sommaya Shaipy and others ...Respondents

FAO (WCA) No. 48 of 2013.
Judgment reserved on 22nd May,2015
Date of decision: 29th May, 2015.

Workmen Compensation Act, 1923- Section 3- Deceased was a workman- he slipped near the site of work and rolled down in the Nalla- Insurance Company pleaded that it is not liable to pay interest- no such plea was taken in the reply but this plea was taken for the first time in the appeal- terms and conditions of insurance contract were also not proved- held, that Insurance Company was rightly held liable to pay compensation. (Para-11 to 14)

Case referred:
New India Assurance Co. Ltd. vs. Harshadbhai Amrutbhai Modhiya & Anr., 2006 AIR SCW 2352

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr.V.B. Verma, Advocate, for respondents No. 1 to 3.
Mr. Bhupinder Thakur, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Subject matter of this appeal is award dated 29.11.2012, made by the Employees Compensation Commissioner (I), Palampur, District Kangra, H.P. in W.C. Petition RBT No. 17/11/2008, titled *Som Maya Shaipy and others versus The New India Assurance Co. Ltd. and another,* whereby compensation to the tune of Rs.3,94,120/-, was awarded in favour of the petitioners/claimants and insurer/appellant 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 and owner have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The learned counsel for the insurer/appellant has argued that the Commissioner under the Workmen's Compensation Act, has fallen in an error in saddling the insurer with the interest liability and the amount awarded is not in accordance with the mandate of the Workmen's Compensation Act (for short "the Act").

4. In order to determine both these issues, it is necessary to give a flash-back of the case, the womb of which has given birth to the present appeal.

5. The deceased was a workman under the employment of respondent No.2. It is averred that on 3.4.2008, deceased slipped near the site of work at Avah Project, village Spadu PO Kandbari Tehsil Palampur District Kangra, H.P. where the Anubhav company was carrying out construction work of the Electric Power Project and rolled down in the *nullah,* sustained the injuries and succumbed to the injuries in the hospital. He was being paid Rs.100/- per day as wages and Rs.50/- per day as diet money by respondent No.2.

6. The claimants filed petition under the Workmen's Compensation Act, for the grant of compensation to the tune of Rs.5,00,000/-, as per the break-ups given in the petition.

7. The insurer contested the claim petition and owner-respondent No. 2 admitted the claim petition. It is apt to reproduce paras 6 and 7 of the reply filed to the claim petition, by respondent No. 2 herein:

> *"6.That the contents of para No. 6 of the petition are admitted to the extent that the deceased's death is the direct result of said accident and having taken place during the course of his employment and rest of the para is not admitted for want of knowledge. The petitioner has to prove the same.*
>
> *7.That the contents of para No.7 of the petition are admitted to the extent that the deceased was in receipt of Rs.100/- per day from the Opp. Party No.2 and Rs.50/- daily towards diet money, but the contents of rest of the para are wrong and hence denied in toto."*

8. Following issues came to be framed by the Commissioner:

(i) *Whether deceased Nima Lamba was engaged as a mason by respondent No.2 at Avah Project, village Spadu, PO Kandbari Tehsil Palampur District Kangra, H.P. OPP*

(ii) *Whether Nima Lamba slipped near the site of work and rolled down into a deep nala and sustained injuries on his neck and head, as alleged? OPP*

(iii) *Whether Nima Lamba died on 7.4.2008 as a result of injuries sustained by him near the site of work, as alleged? OPP.*

(iv) *Whether Nima Lamba expired at the age of 35 years, as alleged ?OPP*

(v) *Whether the petitioners are entitled for the compensation as claimed? OPP.*

(vi) *Whether the petition is bad for non-joinder of necessary parties? OPR-1.*

(vii) *Whether respondent No. 2 has not entered into any agreement with the Anubhav Company? OPR-1*

(viii) *Whether the respondent No. 2 has violated the terms and conditions of the W.C. Policy, as alleged? OPR-1.*

(ix) *Whether Nima Lamba did not expire during the course of his employment?*

(x) *Relief.*

9. The claimants led evidence, oral as well as documentary. The insurer and owner have not led any evidence. Thus; the evidence led by the claimants remained un-rebutted. The factum of insurance is admitted.

10. The insurer has not taken a defence in the reply that the insurer is not liable to pay interest but for the first time, it has been raised in the memo of appeal.

11. The question is whether the insurer has proved the terms and conditions of the insurance contract whereby interest liability is excluded. Neither such a plea was raised nor any evidence was led by the insurer to prove the said factum. Thus, it cannot lie in the mouth of the insurer that it is not liable to pay interest, as per insurance contract. To fortify his stand, the learned counsel for the insurer has placed reliance on the judgment delivered by the apex Court in case ***New India Assurance Co. Ltd. vs. Harshadbhai Amrutbhai Modhiya & Anr.***, reported in ***2006 AIR SCW 2352***. It is apt to reproduce paras 15 and 24 of the said judgment herein:

> *"15.The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law.*
>
> *16 to 23..... ....*

> *24. Section 17 of the Workmen's Compensation Act voids only a contract or agreement whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment and insofar as it purports to remove or reduce the liability of any person to pay compensation under the Act. As my learned brother has noticed, in the Workmen's Compensation Act, there are no provisions corresponding to those in the Motor Vehicles Act, insisting on the insurer covering the entire liability arising out of an award towards compensation to a third party arising out of a motor accident. It is not brought to our notice that there is any other law enacted which stands in the way of an Insurance Company and the insured entering into a contract confining the obligation of the Insurance Company to indemnify to a particular head or to a particular amount when it relates to a claim for compensation to a third party arising under the Workmen's Compensation Act. In this situation, the obligation of the insurance company clearly stands limited and the relevant proviso providing for exclusion of liability for interest or penalty has to be given effect to. Unlike the scheme of the Motor Vehicles Act, the Workmen's Compensation Act, does not confer a right on the claimant for compensation under that Act to claim the payment of compensation in its entirety from the insurer himself. The entitlement of the claimant under the Workmen's Compensation Act is to claim the compensation from the employer. As between the employer and the insurer, the rights and obligations would depend upon the terms of the insurance contract. Construing the contract involved here, it is clear that the insurer has specifically excluded any liability for interest or penalty under the Workmen's Compensation Act and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid under the Workmen's Compensation Act. The High Court, was therefore, not correct in holding that the appellant-Insurance Company, is also liable to pay the interest on the amount of compensation awarded by the Commissioner. The workman has to recover it from the employer."*

12. The judgment relied upon by the learned counsel for the appellant is not applicable to the facts of the present case for the reasons that neither the insurer has pleaded nor proved the terms and conditions contained in the insurance contract in order to claim that it is not liable to pay interest.

13. I have gone through the insurance policy Ext. R-1. No such condition is contained in the said policy.

14. Thus, the Tribunal has rightly directed the insurer to satisfy the award with interest.

15. The learned counsel for the insurer has argued that the amount awarded is excessive.

16. I have gone through the petition and the reply filed by the owner. The amount awarded cannot be said to be excessive and not in tune with the Act. Respondents have admitted the claim of the claimants and insurer has to indemnify the award.

17. Having said so, the appeal is dismissed. The Registry is directed to release the amount, if received in the Registry, in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payee's cheque account.

18. Send down the records, alongwith a copy of this judgment.

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

Oriental Insurance Company Ltd. ...Appellant

Versus

Sharda Devi & others ...Respondents

FAO No. 283 of 2008
Date of decision: 29.05.2015

Motor Vehicle Act, 1988- Section 149- A cover note showed that vehicle was insured at the time of accident- insurer had failed to prove that owner had committed any breach or the driver of the offending vehicle did not have a valid and effective licence at the time of accident- held, that Insurance Company was rightly held liable to pay compensation.

(Para- 10 and 11)

For the appellant : Mr. G.D. Sharma, Advocate.

For the respondents: Mr. Ajay Dhiman, Advocate, for respondents No. 1 & 2.
Mr. Surinder Saklani, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award, dated 21st November, 2007, made by the Motor Accident Claims Tribunal-III, Kangra at Dharamshala, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 31-P/2003, whereby compensation to the tune of Rs.31,803/- 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 driver, owner and insurer (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimants, driver and owner-insured have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer-Oriental Insurance Company Limited has questioned the impugned award on the grounds that the driver was not having a valid and effective driving licence at the time of accident and the vehicle was not insured at the time of accident.

4. In order to determine the said issues, it is necessary to give brief resume of the case herein.

Brief Facts:

5. The claimants, being victims of the vehicular accident, had filed a claim petition before the Tribunal, for grant of compensation to the tune of Rs.47,000/-, as per the break-ups given in the claim petition, on the ground that driver, namely, Vijay Kumar, while driving vehicle-Tempo bearing registration No. HP-37-8712, rashly and negligently, on 13.12.2002, at about 11.30 p.m., in Nagrota Bagwan Bazar, struck his vehicle against van bearing registration No. DL-2C-C4200 and caused damage to said property, i.e. the van.

6. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"*1. Whether the petitioner has suffered damages on account of rash and negligent driving of the respondent No. 1 resulting into the damages to the van of the petitioners? …OPP*

2. If issue No. 1 is decided in affirmative to what amount of compensation the petitioner is entitled and from whom? …OPP

3. Whether the terms of the insurance policy were violated by the respondents No. 1, 2 and respondent 3 is not liable to pay the compensation? …OPR-3

4. Whether the vehicle involved in the accident was not insured by the respondent No. 3 ? …OPP

5. Relief."

7. The claimants have examined Lady Constable Raksha Devi (PW-1), Ashok Kumar (PW-3) and Narinder Kumar (PW-4). Claimant has also appeared in the witness box as PW-2. The owner and insurer have not led any evidence. However, the driver has appeared in the witness box as RW-1.

8. The Tribunal, after scanning the evidence, oral as well as documentary, has held that driver, namely, Vijay Kumar, has driven the offending vehicle, rashly and negligently, on 13.12.2002, at about 11.30 p.m., in Nagrota Bagwan Bazar and caused damage to van bearing registration No. DL-2C-C4200.

9. The said issue is not in dispute. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

Issues No. 3 & 4

10. It was for the insurer to prove issues No. 3 & 4. It has failed to lead any evidence. However, cover note Ext. R-X is placed on the record, which does disclose that the vehicle was insured at the time of accident. The insurer has failed to prove that the owner has committed any breach. Thus, the findings recorded by the Tribunal on Issues No. 3 & 4 are upheld.

11. The insurer has failed to prove that the driver was not having a valid and effective driving licence at the time of accident. Thus, the plea raised by the insurer in this appeal is without any force.

Issue No. 2.

12. The Tribunal has discussed the facts of the case, assessed the damage caused to the van and made discussion in paras 11 and 12 of the impugned award.

13. I am of the considered view that the Tribunal has rightly made the assessment and awarded the just and appropriate compensation to the claimants, which cannot be said to be excessive. Accordingly, the findings returned by the Tribunal on Issue No. 2 are upheld.

14. Having said so, the appeal is dismissed and the impugned award is upheld.

15. 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.

16. 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.

Raghu Devi .....Appellant.
Versus
Dewan Chand (deceased)& others ...Respondents

FAO (MVA) No. 238 of 2008.
Date of decision: 29th May, 2015.

Motor Vehicle Act, 1988- Section 166- Deceased was working as a mason and his income can be taken at Rs. 6,000/- p.m.- he was aged 21 years and multiplier of '15' has to be applied- Claim Petition was filed by mother and loss of dependency has to be taken as Rs. 3,000/- p.m. - thus, claimant is entitled to compensation of Rs. 5,04,000/- + Rs. 30,000/- for loss of love and affection. (Para-9 to 12)

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 appellant: Mr. Shyam Chauhan, Advocate.
For the respondents: Mr. Dibender Ghosh, Advocate, for respondent No.1.
Mr. Vinay Thakur, Advocate, for respondent No.2.
Mr. Suneet Goel, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *Oral.*

Subject matter of this appeal is the judgment and award dated 29.8.2007, made by the Motor Accident Claims Tribunal, (III), Shimla, H.P. in MACT No. 67-S/2 of 2005/2004 titled *Smt. Raghu Devi versus Dewan Chand and others,* whereby compensation to the tune of Rs.2,10,000/- with 7.5% interest was awarded in favour of the claimant and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Claimant Raghu Devi, mother has lost her son, namely Sanjeev, who was 21 years of age at the time of accident, which was caused by Gobind Singh, who had driven the

vehicle bearing Registration No. HP-06-2689 rashly and negligently on 14.9.2003 at Murthal (Haryana).

3. Mother 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 Sanjeev alias Malku died as a result of accident of vehicle No.HP-06-2689 on 14.9.2003 at Murthal-Sonepat which was being driven in a rash and negligent manner by respondent No.2? OPP.

(ii) Whether the vehicle in question was being driven in contravention of the terms and conditions of the Insurance Policy? OPR-3.

(iii) Whether the deceased was traveling in the vehicle in question as a gratuitous passenger? OPR-3.

(iv) Whether the petition is bad for non-joinder of necessary parties? OPR.

(v) To what amount and from who the petitioner is entitled? OPP.

(vi) Relief.

5. The claimant examined Jitender as PW1 and herself stepped into witness-box as PW2.

6. On the other hand, driver and owner stepped into witness-box and have not examined any witness. Thus, the evidence led by the claimant have remained un-rebutted.

7. The Tribunal held that the driver had driven the vehicle rashly and negligently on the said day and Issue No. 1 came to be decided in favour of the claimant and against the respondents. Thus the findings returned on this issue have attained finality and are accordingly upheld.

8. The insurer has failed to lead any evidence on issues No. 2 to 4 as such it has failed to discharge the onus. The Tribunal has rightly decided these issues in favour of the claimant and against the insurer. The Tribunal held that the claimant is entitled to Rs.2,10,000/-, which, on the face of it, is meager for the following reasons.

9. Admittedly, the deceased was 21 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. It is pleaded that he was a mason by vocation and was earning Rs.15000/- per month. By a guess work, it can be safely said that, he would have been earning, at least, Rs.6000/- per month, as labourer. The Tribunal has fallen in an error in holding that deceased was earning Rs.2500/- per month only.

11. A mother has lost at least Rs.3000/- per month as source of dependency, thus is entitled to Rs.3000x12x14= 5,04,000/-, as compensation. Viewed thus, the claimant

is held entitled to Rs.5,04,000/- + Rs.30,000/- as awarded by the Tribunal for love and affection, total 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 claimant 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.

Sanjay Kumar ...Appellant
Versus
Yashpal Singh ...Respondent.

FAO No.89 of 2012.
Date of Decision: 29.05.2015.

Motor Vehicle Act, 1988- Section 166- Claimant had suffered 100% disability which was permanent in nature- he has not only lost his earning capacity but his whole life has become burden for himself and his family- Court has to pass an award which is fair, just and proper and keeping in view of mind hardships, discomfort, amenities of life, pain and sufferings undergone. (Para-17 to 23)

Cases referred:
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the Appellant: Mr.Adarsh K. Vashista, Advocate.
For the Respondent: Mr.B.L. Soni, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

CMP(M) No.622 of 2015:

This application has been filed by the appellant under Section 5 of the Limitation Act for condoning the delay in filing the application under Order 41 Rule 19, read with Section 151 of the Code of Civil Procedure, (for short, the CPC).

2. Learned counsel for the respondent has no objection in case the application is allowed and the delay in filing the application is condoned.

3. Accordingly, the application is allowed and the delay in filing the application, (CMP no.5945 of 2015), is condoned. The application is disposed of.

CMP No.5945 of 2015:

4. Taken on Board. This application has been filed by the appellant under Order 41 Rule 19, read with Section 151 CPC, for recalling the order, dated 27th February, 2015, passed in the main appeal, whereby the appeal was dismissed for non-prosecution.

5. For the reasons given in the application, the same is allowed, the order dated 27th February, 2015 is recalled and the appeal is readmitted. The application stands disposed of accordingly.

FAO No.89 of 2012:

6. The appeal is taken on the Board and heard finally, with the consent of the learned counsel for the parties.

7. This appeal is directed against the award, dated 31st August, 2011, passed by the Motor Accident Claims Tribunal, Hamirpur, in a Claim Petition No.1 of 2009, titled Yashpal Singh vs. Sanjay Kumar, whereby compensation to the tune of Rs.7,00,127/-, with interest at the rate of 7.5% per annum from the date of the claim petition till realization, was awarded in favour of the claimant and the respondent (appellant herein) was saddled with the liability, (for short, 'the impugned award').

Brief facts:

8. Yashpal Singh, claimant-injured, invoked the jurisdiction of the Motor Accident Claims Tribunal, Hamirpur, (for short, the Tribunal), in terms of Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the Claim Petition. It was averred in the Claim Petition that the claimant was employed by respondent Sanjay Kumar, owner/driver of bus No.HP-67-0346, as Conductor. The said bus was being repaired in a Workshop at Bijhari. On asking by the mechanic, the claimant went beneath the bus to bring a nut and in the meantime, the jack applied to the bus slipped and the claimant got crushed, was taken out with the help of a Joseph Cyril Bamford (for short, the JCB), was taken to Zonal Hospital, fromwhere he was referred to PGI, Chandigarh, where the claimant had undergone operation on 9th January, 2007 and remained admitted till 30th January, 2007. Thereafter, again w.e.f. 22nd February, 2007 to 2nd March, 2007, he remained admitted in the PGI. The petitioner was again taken for check up to PGI on 10th March, 2007 and he remained there till 12th March, 2007. It was averred that the petitioner could not be treated and he became 100% disabled permanently.

9. The Petition was resisted by the owner/driver on various grounds.

10. After considering the pleadings of the parties, the Tribunal framed the following issues:

> *"1. Whether the petitioner-claimant is entitled to the compensation, if so, to what amount? OPP*
>
> *2. Whether the petition is not maintainable, as alleged? OPR*
>
> *3. Whether this Tribunal has no jurisdiction to try the present claim petition, as alleged? OPR*

4. Relief."

11. Parties led their evidence. The petitioner examined as many as six witnesses, including Dr.Ramesh Chouhan (PW-3) and Dr.Surjit Tripathi (PW-5). The petitioner also stepped into the witness box as PW-4. The petitioner has also placed on record Medicine bills (Exts.P-4 to P-34), taxi bills (Exts.P-1 to P-3), treatment chart (Ext.PW-5/A) and disability certificate (Ext.PW-3/A). On the other hand, the respondent/owner/driver appeared as RW-3 and also examined two other witnesses.

12. The Tribunal, after scanning the entire evidence and the rival contentions, came to the conclusion that the claimant-injured has proved on record that he suffered the injuries during the course of employment of the owner/driver and held the claimant entitled for compensation, as discussed above.

13. Feeling aggrieved and dissatisfied, the original respondent i.e. owner/driver has questioned the impugned award on various grounds taken in paragraphs A to H of the memo of appeal. In paragraphs B and D, it has been claimed that the vehicle was insured with the Kangra Cooperative Bank Limited and the insurance policy was issued by the said Bank, being the insurer. Therefore, it was urged that the insurer was liable to be saddled with the liability, meaning thereby that the owner/driver has himself admitted that the claimant was entitled to compensation, but the insurer was to be saddled with the liability.

14. It is apt to reproduce ground D taken in the grounds of appeal hereunder:

> *"D. That the ld. Tribunal below has wrongly held that the vehicle in question was not insured. As submitted supra, the vehicle was being insured by the Kangra Cooperative Bank, therefore, the liability should have been fastened on the Insurance Company and not upon the appellant, therefore, the impugned award is liable to be quashed and set-aside."*

15. Even otherwise, since the claimant-injured suffered injuries during the course of employment, therefore, he was entitled for compensation under the Workmen's Compensation Act, 1923. However, Section 167 of the Act provides for an option to the victims of a vehicular accident to seek compensation in terms of the Act, which option has been exercised by the claimant-injured by filing the Claim Petition under Section 166 of the Act. Thus, the Claim Petition is maintainable.

16. During the course of hearing, the learned counsel for the appellant also submitted that the amount awarded by the Tribunal is excessive and needs to be reduced considerably.

17. To meet the above argument of the learned counsel for the appellant, I may place on record that the claimant-injured has proved on record the disability certificate as Ext.PW-3/A, which shows that he had suffered 100% disability, which is permanent in nature. Thus, owing to the nature of injury suffered by the claimant-injured, he has not only lost his earning capacity, but his whole life has also become a burden for himself and his family. The claimant-injured has to lead a miserable life full of disappointment and frustration. Therefore, in such cases, the courts are expected to pass an award which appears to be fair, just and proper, and keeping in mind the hardships, discomfort, loss of amenities of life, pain and sufferings undergone and has to undergo by the claimant-injured throughout his life.

18. The Apex Court in series of cases has laid certain guidelines as to how compensation has to be granted in injury cases.

19. The Apex Court in case titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads in the cases where permanent disability is suffered by the victim of a vehicular accident. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*
>
> *10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.*
>
> *11. In the case Ward v. James, 1965 (1) All ER 563, it was said:*
>
> > *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The*

Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

20. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085,** while granting compensation in such a case. It is apt to reproduce paragraph 7 of the judgment hereinbelow:

"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."

21. The Apex Court in case titled as **Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787,** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."*

22. The Apex Court in case titled as **Kavita versus Deepak and others, 2012 AIR SCW 4771,** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

> *"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*
>
> *"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation is awarded in personal injury cases are the following:*
>
> *"Pecuniary damages (Special damages)*

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

23. Applying the above tests, the compensation awarded by the Tribunal, by no stretch of imagination, can be said to be excessive, rather it is on the lower side. However, the claimant-injured has not questioned the impugned award on the ground of adequacy of compensation. Therefore, the impugned award is reluctantly upheld.

24. Before parting with this judgment, it is worthwhile to record herein that the owner/appellant has not taken any steps to array the insurer as party either before the Tribunal or before this Court. However, he is at liberty to seek appropriate remedy, in any available, in accordance with law, to recover the compensation amount from the insurer, if at all the vehicle was insured, for the reason that the insurer has to indemnify, provided that the insured is not caught by his own conduct.

25. Having said so, the appeal merits to be dismissed and the same is dismissed accordingly. The Registry is directed to release the award amount strictly in terms of the conditions contained in the impugned award.

26. Send down the records alongwith 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.

Satish Kumar alias Bichhu .....Appellant.
Vs.
State of H.P. .....Respondent.

Cr. Appeal No. 194 of 2011
Reserved on: 27.05.2015
Date of decision: 29.05.2015

Indian Penal Code, 1860- Section 302- An altercation took place in marriage in which accused and the deceased grappled with each other - subsequently at Nerchowk, accused came near the vehicle in which deceased was sitting and asked him to come down as the accused wanted to have duel with the deceased- accused and the deceased started grappling with each other- accused took out a Khukhari and started stabbing the deceased repeatedly due to which deceased fell down and died at the spot- held, that act of the accused was not premeditated- quarrel had taken place, which resulted in subsequent fight- fight had taken place all of a sudden- accused had a knowledge that his act would result in the death of the deceased- his act falls within the preview of Section 304(II) and not Section 302 of IPC.

(Para-12 to 16)

For the appellant : Mr. Sanjeev Kuthiala, Advocate.
For the respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This appeal is instituted against the judgment, dated 08.03.2006, rendered by the learned Presiding Officer, Fast Track Court, Mandi, H.P. in Sessions Trial No. 18/2004, 79/2005, whereby the appellant-accused, who was charged with and tried for offence under Section 302 of the Indian Penal Code, was 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 to undergo further imprisonment for a period of one year.

2. Case of the prosecution, in a nut-shell, is that Karam Singh (PW-1) was employed as a driver in Tata Sumo bearing registration No. HP-01-M-3659. He had gone to Panarsa on 22.01.2004 at about 10:30 a.m. in a barat and about 7-8 persons were occupying the vehicle of Karam Singh. There were two other vehicles carrying baratis. The barat reached panarsa at about 1:00 p.m.. Girdhari Lal (PW-2) was also in the barat. The accused had also gone in a barat to Panarsa. Deceased Suman Kumar had also gone in the barat in the vehicle being driven by Karam Singh (PW-1). When at Panarsa the baratis were taking meals, then some altercation took place between the accused and the deceased, as the deceased objected to the act of dispersing rice by the accused at which the accused and

the deceased grappled with each other. The fight was averted by Girdhari Lal (PW-2). The baratis left for village Jugahan at about 5:30 p.m. While returning to village Jugahan, the deceased and PW-2 were occupying the vehicle of PW-1, whereas the accused was occupying the vehicle in which bridegroom was sitting. The vehicle driven by PW-1 was the last in the convoy of the vehicles and at about 7:00 p.m., the vehicle of PW-1 reached at Nerchowk where the accused was standing by the side of the road. The vehicle was stopped by PW-1 at Nerchowk in order to purchase '*biri*' and cigarette. At that time, accused came near the vehicle of PW-1 and asked the deceased Suman Kumar to alight from the vehicle as he wanted to have one to one duel with the deceased. The deceased alighted from the vehicle and the accused and the deceased started grappling with each other. The accused took out Khukhari concealed inside the T. Shirt by him and started stabbing the deceased repeatedly till the deceased fell flat on the ground. The Khukhari blows were struck by the accused all over the body of the deceased and the accused ran away from the spot. The deceased was taken to hospital. He was declared dead by the Medical Officer. An intimation was sent to the police. The statement of PW-1, Karam Singh was recorded under Section 154 of the Cr. P.C. vide Ex. PW1/A, on the basis of which, an FIR was registered vide Ex. PW10/A. The post mortem of the body was conducted by Dr. Hemant Kapoor (PW-7), Medical Officer, Zonal Hospital, Mandi. He issued the post mortem report Ex. PW7/A and as per his opinion, the deceased died due to bleeding into pericardial sack, left pleural cavity, peritoneal cavity and mediastinum caused by injury Nos. 1 to 9 and 10. He has taken into possession the blood smeared clothes of the deceased bearing cut marks. He has also preserved the viscera of the deceased alongwith blood sample of the deceased and handed over the same to the police for getting the same chemically examined. Spot map Ex. PW10/D was prepared. The accused was arrested and Khukhari Ex. P1 alongwith cover Ex. P2 was recovered from the possession of the accused in the presence of Sh. Mehar Chand (PW-3), which was seized vide seizure memo Ex. PW3/B. The rough sketch of Khukhari was also prepared which is Ex. PW3/A. The statements of the witnesses were recorded by PW-10 as per their version and Khukhari alongwith viscera, blood sample and clothes of the deceased were sent for chemical examination as per report of the Chemical Examiner Ex. PW10/E. The investigation was completed and after the completion of all the codal formalities, the challan was put up in the Court.

3. The prosecution has examined as many as 10 witnessed 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 sentence, as noticed hereinabove. Hence, this appeal.

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

5. Mr. M.A. Khan, learned Additional Advocate General has supported the judgment, dated 08.03.2006.

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

7. PW-1, Karam Singh, has deposed that on 22.01.2004, he carried baratis from his village Jugahan to Panarsa at 10:30 a.m. and 7-8 baratis were occupying his vehicle. There were two other vehicles carrying baratis. The vehicles carrying baratis reached at Panarsa at 1:00 p.m. At Panarsa, the Baratis took meal and tea. Suman Kumar told him that a fight had taken place between him and accused Satish alias Bichhu. He identified the accused in the Court. Suman Kumar was sitting in his vehicle. At 5:30 p.m., the bride left

for matrimonial home and while returning with the bride to their matrimonial home, his vehicle was last in the convoy of vehicles. Suman and Girdhari were occupying front seat alongwith him. On the back of the vehicle, 7-8 baratis were sitting. He did not remember the name of those persons. At 7:00-7:30 p.m., his vehicle reached Nerchowk and Bichhu was standing by the side of the road and two vehicles plying in front of his vehicle had already left. He stopped the vehicle at Nerchowk, as Suman wanted to purchase *biris* and cigarette. When the vehicle stopped at Nerchowk, accused Bichhu came near his vehicle and went to the seat occupied by Suman that he should alight from the vehicle, as he wanted to have one to one duel with him. Suman alighted from the vehicle and walked a few places and thereafter both started grappling. In the course of grappling, the accused took out Khukri concealed inside the T-Shirt and repeatedly started stabbing Suman till he did not fell down. The Khukhari blows were struck all over the body. Suman Kumar was taken to hospital at CHC, Ratti. Accused ran towards Subzi Mandi alongwith Khukhari. The deceased was taken to CHC, Ratti, he was declared dead by the doctor. Police was intimated by the doctor. His statement was recorded under Section 154 Cr. P.C. which is Ex. PW1/A. He identified Khukhari Ex. P1 and sheath Ex. P2. In his cross-examination, he has admitted that the quarrel between the deceased and the accused has taken place in their presence. However, they did not try to avert the fight as the accused was wielding the weapon.

8. PW-2, Girdhari Lal, deposed that he proceeded to attend the marriage in Tata Sumo bearing registration No. HP-01-M-3659 and Karam Singh (PW-1) was driving the same. The deceased was occupying the front seat alongwith him, Moti Ram, Parkash Chand and other baratis including 2-3 children were sitting in the rear of the vehicle. The baratis were being carried in three vehicles. They reached at Panarsa. Accused started dispersing rice, on which deceased Suman objected that food should not be wasted, at which both grappled which fight was averted by him. They left for Jugahan at 5:30 p.m. in the same vehicle. They reached at Nerchowk at 7:15 p.m.. Accused was standing by the side of the vehicle near the seat which was occupied by the deceased. He advanced threat to the deceased that he should alight from the vehicle as he wanted to have one to one duel with him. The deceased alighted from the vehicle. Accused pulled a Khukhari kept inside the T-Shirt and without wasting the time started repeatedly stabbing the deceased. The deceased fell on the ground. Thereafter, the accused fled away from the spot. In his cross-examination, he has admitted that the accused signalled the deceased from a distance of 7 feet and Suman went to the place where the accused was standing on the left side of the vehicle. They raised hue and cry. They immediately got down from the vehicle to save the deceased.

9. PW-3, Sh. Mehar Chand, has deposed that in his presence and Up-Pradhan, Mani Ram of Bhangrotu, the accused handed over Khukhari Ex. P1 alongwith cover Ex. P2 by taking out the same from the pocket of his trouser to the police regarding which sketch Ex. PW3/A was prepared and the same was seized vide seizure memo Ex. PW3/B. He identified his signatures on the recovery memo.

10. PW-4 Sh. Rajinder Singh, PW-5 Shri Arun Sharma and PW-6, Constable Puran Chand are formal witnesses. PW-7, Dr. Hemant Kapoor, Medical Officer conducted the post mortem on the body of the deceased. According to him, the probable time that was left between injury and death was around 10 to 15 minutes and between death and post mortem, it was 12 to 24 hours. He issued post mortem report Ex. PW7/A. According to him, the cause of the death was due to bleeding into pericardial sack, left pleural cavity, peritoneal cavity and mediastinum caused by injuries No. 1 to 9 and 10.

11. PW-8, HC Amar Nath, sent the case property to FSL, Junga through Constable Puran Chand. PW-10, SI Uttam Singh deposed that on 22.01.2004, rapat No. 17, Ex. PW9/A was recorded in Police Station, Balh. He went to the spot where the statement of Karam Singh alias Kalu was recorded under Section 154 Cr. P.C. vide Ex. PW1/A. Thereafter, FIR Ex. PW10/A was recorded. Photographs of the deceased were taken by Rajinder Singh, which are Ex. PW4/A-1 to Ex. PW4/A-6. Accused was arrested on 22.01.2004 and Khukhari was recovered vide seizure memo Ex. PW3/B. It was properly sealed. He deposited the case property with MHC, which was lateron sent for chemical examination alongwith viscera or the deceased and his clothes. The report of the Chemical Examiner is Ex. PW10/E.

12. The case of the prosecution, precisely is that the accused and deceased have gone in a barat to village Panarsa on 22.01.2004. A quarrel took place between the accused and the deceased at Panarsa. When they were coming back to village Jugahan, accused was standing on the side of the road. He challenged the deceased to come out of the vehicle to have duel with him. The deceased came out from the vehicle. They grappled and the injuries were inflicted upon the deceased by the accused with the Khukhari Ex. P1. Suman Kumar was taken to hospital. He was declared dead by the Medical Officer. The post mortem on the body of the deceased was conducted by PW-7.

13. It is evident from the statements of PW-1, Karam Singh and PW-2, Girdhari Lal that when the incident has taken place, there were other baratis in the Jeep who have seen the incident, but they have not tried to separate the accused and the deceased. If PW-1, Karam Singh and PW-2 Girdhari Lal and other baratis had intervened, the life of deceased could be saved. The accused and the deceased had also quarreled as per PW-2 Girdhari Lal at the time of taking their meal. However, in his cross-examination, he has admitted that he has not seen them quarrelling at village Panarsa. Accused has challenged the deceased to come out from the vehicle to have a duel with him and thereafter they grappled in the presence of PW-1 Karam Singh, PW-2 Girdhari Lal and other *baratis.* The deceased was stabbed by the accused with Khukhari Ex. P1.

14. The act of the accused was not premeditated. In fact, the quarrel has taken place earlier at village Panarsa, which has resulted in another fight between the accused and the deceased at Nerchowk.

15. Mr. Sanjeev Kuthiala, learned counsel for the appellant has strenuously argued that it is not a case of murder. According to him, the fight has taken place all of a sudden. Mr. M.A. Khan, learned Additional Advocate General has vehemently argued that it was a case of murder.

16. We are of the considered view after analyzing the evidence that it is not a case of murder, but the accused had the knowledge that his act would result in the death of the deceased and, thus, this case would fall within the ambit of Section 304-I and not under Section 302 of the Indian Penal Code.

17. Accordingly, the appeal is partially allowed and the accused is convicted under Section 304-I of the Indian Penal Code instead of Section 302 of the Indian Penal Code. The respondent-State is directed to produce the accused for hearing on the question of quantum of sentence on 17th June, 2015.

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

FAOs (MVA) No.143 and 144 of 2008.
Date of decision: 29th May, 2015.

FAO No. 143 of 2008.	
Sudesh Bala	.....Appellant.
Versus	
Union of India and others	...Respondents
FAO No. 144 of 2008.	
Smt. Vandana and another	.....Appellants.
Versus	
Union of India and others	...Respondents

Motor Vehicle Act, 1988- Section 166- Deceased 'A' was riding the scooter while other deceased was a pillion rider - scooter was hit by a bus- deceased sustained injuries and subsequently succumbed to the injuries- Claim Petition was filed by the parents of the deceased- Tribunal held that it was a case of contributory negligence and directed the Union of India to satisfy 50% of the award - driver of the bus was court martialled and was convicted - therefore, he cannot take the plea of contributory negligence- held, that Tribunal had wrongly recorded the findings of contributory negligence. (Para-8 to 15)

Motor Vehicle Act, 1988- Section 166- Deceased were students of Class 11th – they would have got employment after 2-3 years or at least they would have become labourers and would have been earning not less than Rs. 5000/- per month each- loss of dependency can be taken as Rs. 2,500/- per month - multiplier of '16' has to be applied- compensation of Rs.4,80,000/- is to be paid to the claimants along with interest @ 7.5% per annum.
(Para-17 to 22)

Cases referred:

NKV Bros. (P) Ltd vs. M. karumai Ammal and others, AIR 1980 SC 1354
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 appellant(s):	Mr. Ramakant Sharma, Advocate.
For the respondents:	Mr. Ashok Sharma, Assistant Solicitor General of India, for respondents No. 1 and 2-Union of India. Nemo 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 vehicular traffic accident thus; I deem it proper to determine both these appeals by this common judgment.

2. Scooter bearing registration No.HP-19A-1021, was hit by vehicle No. 02K-7071W-275-Class-I at Bus stand, Jhangoli at about 2.45 p.m, which was being driven by its driver rashly and negligently. Aayush Banyal was driving the scooter and other was pillion rider, sustained injuries and succumbed to the injuries.

3. The claimants are the parents of the deceased in both the claim petitions and sought compensation as per the break-ups given in the claim petition.

4. The Union of India-respondents herein in the claim petition resisted the claim petitions on the ground that Aayush Banyal has driven the scooter rashly and negligently.

5. After examining the pleadings, the Tribunal framed the issues in both the claim petitions which are similar. Thus, I deem it proper to reproduce the issues framed in one of the claim petitions (FAO No. 143 of 2008) herein:

(i) *Whether Aayush Banyal died in a motor accident caused by rash and negligent driving of a truck (No.02k-7071W-275) by Bijender Pal (respondent No.3) on 29.6.2005. …OPP*

(ii) Whether the petitioner is entitled to compensation, if so, to what amount and from whom. …..OPP

(iii) Whether the accident occurred due to rashness and negligence of the deceased Ayush Banyal, as alleged. …..OPR

(iv) Relief.

6. Parties have examined witnesses.

7. The Tribunal, after scanning the evidence held that the accident was outcome of contributory negligence and awarded compensation to the tune of Rs.2,40,400/ in FAO No. 143 of 2008 and Rs.2,26,000/- in FAO No. 144 of 2008, with interest at the rate of 7.5% per annum and directed the Union of India to satisfy the 50% of the compensation awarded in both the cases.

8. Feeling aggrieved, the claimants have questioned both the awards on following two grounds.

(i) *That the accident is not outcome of contributory negligence but was outcome of rash and negligent driving of the diver of Union of India.*

(ii) The amount awarded is inadequate.

9. I deem it proper to record herein that respondents-Union of India have not taken the plea of contributory negligence in the reply filed before the Tribunal but have pleaded that the accident was outcome of rash and negligent driving of the driver of the scooter.

10. FIR No.105 of 2005 was also lodged at Police Station Amb, investigation was conducted and final report came to be filed before the Court of competent jurisdiction. The Court of competent jurisdiction transferred the case to the Court Martial and Court Martial conducted the proceedings.

11. I have gone through the statement of RW2, namely, Indraj Kumar who has stated that he and driver of the offending vehicle has been convicted by the Court Martial.

12. Mr. Ashok Sharma, learned Assistant Solicitor General of India, was asked to place on record the Court Martial proceedings and has placed on record the photocopies of charge sheet, plea of guilt made by the accused-driver and order of conviction and sentence made by the Court Martial. Thus, it is established, rather admitted that the driver, namely, Bijender Pal has driven the vehicle rashly and negligently and has been convicted. A driver, who is convicted, cannot take the ground of contributory negligence and claimants are not supposed to prove the plea of rashness or negligence. Thus, it can be safely said that the driver Bijender Pal has caused the accident by driving the vehicle rashly and negligently.

13. The apex Court in ***case*** titled ***NKV Bros. (P) Ltd*** *vs.* ***M. karumai Ammal and others reported in AIR 1980 SC 1354*** held that in criminal case acquittal of the driver cannot be a ground to dismiss the claim petition. Applying the test in this case, the driver has been convicted, no more proof was required.

14. The driver and the Union of India have not questioned the impugned awards on any ground, thus, have attained finality so far the same relate to them.

15. Having said so, I hold that the accident was only outcome of rash and negligent driving of the driver of Truck of the Union of India. Accordingly, the finding returned by the Tribunal is set aside and Issue No. 1 is decided in favour of the claimant and against the Union of India.

16. The next question is-whether the amount awarded is adequate? The answer is in negative for the following reasons.

17. Admittedly, both the deceased were students of 11th class and their parents have lost their budding sons, who were their future source of income and hope for old age.

18. By guess work, it can be held that after few years, they would have qualified graduation and would have got employment or, at least, after two or three years they would have become labourers and would have been earning not less than Rs.5000/- per month each.

19. Applying 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***, it can be safely said that the parents have lost source of dependency to the tune of 50%, i.e. Rs.2,500/- per month, in each case.

20. Keeping in view the age of the deceased and the parents, the multiplier of "16" is just and appropriate multiplier in both these cases, while keeping in view the ratio laid down in the judgment, supra. Thus, multiplier of "16" is applied in both these cases. The claimants are held entitled to Rs.2500x12x16= Rs.4,80,000/-, in each case.

21. In view of the above, the compensation to the tune of Rs.4,80,000/- with interest at the rate of 7.5% per annum from the date of claim petition till its realization is awarded in each of the cases.

22. Accordingly, the impugned awards are modified, as indicated hereinabove, and the appeals merit to be allowed and are accordingly allowed.

23. The Union of India is directed to deposit the enhanced amount within eight weeks from today, provided it has already deposited the amount already awarded by the Tribunal. If not deposited, the entire amount be deposited within the above time frame. On deposit, the Registry is directed to release the entire amount in favour of the claimants strictly, in terms of the conditions contained in the impugned awards, through payee's cheque account.

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

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

Sumitra Rani .....Petitioner.
Versus
Vinod Kumar and others .....Respondents.

CMPMO No.171 of 2015.
Date of decision: 29.05.2015.

Code of Civil Procedure, 1908- Order 8 Rule 1- Defendants were granted time for filing written statement on 08.07.2014 and on 01.08.2014- defendant No. 1 died thereafter and application for bringing on record legal representatives was allowed on 25.11.2014 – application was filed for placing on record written statement- held, that main case could not proceed further on account of death of defendant No. 2-delay was not unreasonable which could not be compensated in terms of money- trial Court had rightly exercised the discretion to allow the defendant to file written statement. (Para-3 to 5)

Case referred:
Kailash versus Nanhku and others (2005) 4 SCC 480

For the Petitioner : Mr.Vivek Chandel and Mr.Devender K.Sharma, Advocates.
For the Respondents : None.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner by way of this petition under Article 227 of the Constitution of India has sought quashing of the order dated 20.04.2015 passed by learned Civil Judge (Senior Division), Kasauli, whereby he allowed the application filed by the respondents under Order 8 Rule 1 readwith Section 151 of the Code of Civil Procedure (for short 'Code') and permitted the respondents to file their written statement. It is claimed that the impugned order is not sustainable as the same is not only irregular but illegal and, therefore, is not sustainable in the eyes of law.

2. I have heard learned counsel for the petitioner and have gone through the records.

3. A perusal of the zimini orders upon which a lot of emphasis has been placed by learned counsel for the petitioner would reveal that the respondents were granted time to file written statement on 08.07.2014 and on 01.08.2014. But, thereafter it appears that the defendant No.2 died and the matter remained pending for bringing on record his legal representatives. This application came to be allowed only on 25.11.2014 and by the next date i.e. 06.01.2015 the respondent had already filed application under Order 8 Rule 1 readwith Section 151 of the Code for placing on record the written statement.

4. The Hon'ble Supreme Court in ***Kailash*** *versus* ***Nanhku and others (2005) 4 SCC 480*** has already held the provisions of Order 8 Rule 1 of the Code to be directory in nature. Therefore, the Court has discretionary jurisdiction to condone the delay. This, however, does not mean that the defendants can be permitted to file the written statement after 90 days as a matter of course. It is only in exceptional situation that the Courts may enlarge the period.

5. The perusal of the zimini orders show that the main case had derailed on account of the death of defendant No.2. It also appears that the documents as annexed with the plaint for some reasons were also not made available to the respondents. Be that as it may, the delay is not so unreasonable which cannot be condoned otherwise also the petitioner has already been compensated by awarding costs. Moreover, the petitioner cannot be allowed to get away with a "walk over" that too merely on a technical ground. It has to be remembered that procedure is the handmaid of justice and the Courts must be always anxious to do justice and to prevent victories by way of technical knock outs.

6. In view of the aforesaid discussion, I find no merit in this petition and the same is dismissed in limine alongwith pending application, if any.

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

Kartar Singh son of Sh Tula Ram. .....Appellant.

Vs.

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

Cr. Appeal No. 105 of 2013.
Judgment reserved on: 13.5.2015
Date of Judgment: May 30, 2015.

N.D.P.S. Act, 1985- Section 42- I.O specifically stated that she had prepared special information report and had handed it over to H.C with a direction to take it to SP Crime- HC stated that he had deposited the special report with SP Crime- testimonies are corroborating each other – there is no reason to disbelieve their testimonies – held that the provision of Section 42 of N.D.P.S. Act was complied. (Para- 10)

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of a bag from which 2.1 k.g of charas was recovered- held, that Section 50 is applicable only when the contraband was found on the person of the accused - since the contraband was found from the bag and not from the person of the accused, therefore, Section 50 of N.D.P.S. Act is not applicable. (Para-13)

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 2.1 kg. of charas- driver of the bus was declared hostile- he and conductor of the bus admitted part of the prosecution version- police officials had corroborated their version- conviction can be made on the basis of testimonies of the police official if the same are found to be trustworthy, credible and reliable - minor contradictions are bound to come in the testimonies when they are recorded after a considerable period of time and are not sufficient to reject the prosecution version. (Para-14 to 18)

Cases referred:

Kalema Tumba Vs. State of Maharashtra and another, 1999 (8) SCC 257
State of HP Vs. Pawan Kumar, 2005 (4) SCC 350
Jarnail Singh Vs. State of Punjab, 2011 Crl.L.J. 1738
Lella Srinivasa Rao Vs. State of Andhra Pradesh, AIR 2004 SC 1720
Radha Mohan Singh Vs. State of UP, AIR 2006 SC 951
State of Rajasthan Vs. Bhawani, AIR 2003 SC 4230
appabhai and another Vs. State of Gujarat, AIR 1988 SC 696

Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, 2011 (6) SCC 312
Ramesh Harijan Vs. State of Uttar Pradesh, 2012 (5) SCC 777
Rabindra Kumar Dey Vs. State of Orissa, AIR 1977 SC 170
Khujji Vs. State of Madhya Pradesh, AIR 1991 SC 1853
Sama Alana Abdulla Vs. State of Gujarat, 1996 (1) SCC 427
Tahir Vs. State of Delhi, AIR 1996 (3) SCC 338
Nathu Singh Vs. State of MP, AIR 1973 SC 2783
State of Gujarat Vs. Raghunath Vamanrao Baxi, AIR 1985 SC 1092
Govindaraju Vs. State, 2012 (4) SCC 722
Tika Ram Vs. State of MP, 2007 15 SCC 760
Girja Prasad Vs. State of MP., 2007 (7) SCC 625
Shashidhar Purandhar Hedge and another Vs. State of Karnataka, 2004 (12) SCC 492
Leela Ram Vs. State of Haryana, 1999 (9) SCC 525
C.Muniappan and others Vs. State of Tamil Nadu, 2010 (9) SCC 765
Sohrab and another Vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of UP Vs. M.K.Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan Vs. Om Parkash, AIR 2007 SC 2257
Prithu Chand and another Vs. State of HP, 2009 (11) SCC 588
State of UP Vs. Santosh Kumar and others, 2009 (9) SCC 626
State Vs. Saravanan and another, AIR 2009 SC 152
Appabhai and another Vs. State of Gujarat, AIR 1988 SC 696
Rammi Vs. State of M.P, AIR 1999 SC 3544
State of H.P. Vs. Lekh Raj and another, 2000(1) SCC 247
Laxman Vs. Poonam Singh and others , 2004 (10) SCC 94
Dashrath Singh Vs. State of UP, 2004 (7) SCC 408
Kuriya and another Vs. State of Rajasthan, 2012 (10) SCC 433

For the appellant: Mr. Manoj Pathak, Advocate.
For the respondent: Mr.Ashok Chaudhary, Mr.V.S.Chauhan, Addl. Advocate Generals with Mr.J.S.Guleria, Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment and sentence passed by learned Special Judge Fast Track Court Shimla HP in Session Trial No. 21-S/7 of 2011 titled State of HP Vs. Kartar Singh decided on 31.8.2012.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 1.5.2011 at about 2.15 PM near Hasan valley accused was travelling in bus No. HP-22B-2087. It is further alleged by prosecution that accused was sitting on seat No. 37 and bus was coming from Rampur side and was approaching towards Shimla. It is further alleged by prosecution that Inspector Minakshi received secret information on dated 1.5.2011 at 12.30 PM that one person wearing black coloured jean trouser and having brown colour bag was coming to Shimla side in bus No HP-22B-2087 with charas in his possession. It is further alleged by

prosecution that thereafter Inspector Minakshi recorded information under Section 42 (2) of the Narcotic Drugs & Psychotropic Substance Act 1985 and sent the same through HC Devinder to SP Crime Branch Shimla. It is further alleged by prosecution that thereafter Inspector Minakshi constituted a raiding party by associating HC Balbir Singh, Constable Praveen Kumar and Constable Vikesh Guleria and moved towards Kufri-Theog side on official vehicle No. HP-07B-0324 which was driven by constable Brij Lal vide rapat No.8 (A) Ext PW1/H. It is further alleged by prosecution that thereafter Inspector Minakshi had given her introduction to the driver of the bus. It is further alleged by prosecution that Inspector Minakshi started checking passengers from seat No.1 and when she reached at seat No. 37 then she noticed that accused was carrying contraband. It is further alleged by prosecution that accused was apprised about his legal right to be searched before the magistrate or gazetted officer. It is alleged by prosecution that accused had given his consent that he should be searched by police official at the spot and consent memo Ext PW5/B was prepared. It is further alleged by prosecution that accused was carrying bag on his leg and was sitting at seat No.37 of the bus. It is further alleged by prosecution that 2.100 Kg. charas was found from exclusive and conscious possession of accused. It is further alleged by prosecution that thereafter charas was sealed and NCB form was prepared. It is further alleged by prosecution that specimen of seal on NCB form was obtained on pieces of cloth and seal was handed over to witness Sunil Kumar. It is further alleged by prosecution that thereafter site plan was prepared and statements of the witnesses were recorded. It is further alleged by prosecution that thereafter special report was sent to SP Crime Branch Shimla through HC Devinder. It is further alleged by prosecution that thereafter on dated 2.5.2011 MHC handed over parcel containing charas, NCB-1 form and other relevant documents to HC Neel Kanth vide RC No. 27/11 Ext PW1/E with direction to deposit the same in the office of FSL Junga. It is further alleged by prosecution that articles were deposited in the office of FSL Junga and receipt was obtained. Charge was framed by learned Special Judge Fast Track Court Shimla on dated 18.8.2011. Accused 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	HC Prakash Chand
PW2	HC Neel Kanth
PW3	HC Devinder
PW4	Vijay Bhuria
PW5	HC Balbir Singh
PW6	Bahadur Singh
PW7	Inspector Minakshi
DW1	Sunil Kumar

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description:
Ext.PW1/A	FIR
Ext.PW1/B	Sample Seal
Ext.PW1/C	Resealing certificate
Ext.PW1/D	Entry No.41
Ext.PW1/E	RC

Ext.PW1/F,G & H	Rapats
Ext.PW1/J	Certificate u/s 65 of Evidence Act.
Ext.PW4/A	Route permit
Ext.PW4/B	Copy of time table
Ext. PW5/A	Memo U/S 50 of the Act
Ext.PW5/B	Identification memo
Ext.PW5/C	Seizure memo
Ext.P1	Parcel
Ext.P2	Inner parcel
Ext.P3	Rexen bag
Ext.P4	Yellow coloured tape
Ext.P5	Card board box
Ext.P6	Charas
Ext.PW6/A	Search memo
Ext.PW6/B	Memo
Ext.PW6/B-1	Personal search memo vide which tickets were recovered from the accused.
Ext.PW6/C	Specimen seal
Ext.PW7/A	Special information report
Ext.PW7/B	NCB Form
Ext.PW7/C	Rukka
Ext.PW7/D	Site Plan
Ext.PW7/E	Arrest memo
Ext.PW7/F	Special report
Ext.PW7/G	FSL Report
Ext.P7	Mobile phone
Ext.P8	ID card
Ext.P9	Voter ID card of accused
Ext.P10	Currency notes
Ext.P11	Valet
Ext.P12	Envelope

5. Statement of accused was also recorded under Section 313 Cr PC. Learned trial Court convicted appellant to rigorous imprisonment for a period of ten years and fine to the tune of Rs.1,00,000/- (One lac) . Learned trial Court further directed that in default of payment of fine appellant shall further undergo simple imprisonment for a period of one year.

6. Feeling aggrieved against the judgment and sentence passed by learned Special Judge Fast Track Court Shimla appellant filed present appeal.

7. We have heard learned Advocate appearing on behalf of the appellant 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 did not properly appreciate oral as well as documentary evidence placed on record Court and whether learned trial Court had committed miscarriage of justice to appellant.

9.ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1 PW1 Prakash Chand has stated that he was posted as MHC in Police Station State CID Shimla since November 2009. He has stated that on dated 1.5.2011 at 5.45 PM HC Balbir Singh handed over one rukka mark 'A' to him along with parcel containing charas, NCB-I form in triplicate, sample seal and recovery memo. He has stated that he registered FIR Ext PW1/A which bears his signature. He has stated that he prepared case file and handed over the same to HC Balbir Singh with direction to hand over the same to Inspector Minakshi. He has stated that as no superior officer was present in police station so he resealed parcel with nine seals of seal impression 'P'. He has stated that he prepared certificate regarding resealing of parcel. He has stated that he deposited case property i.e. parcel, NCB form, recovery memo and sample seals in the malkhana and entry at serial No. 41 was recorded. He has stated that extract of register No.19 Ext PW1/D is true copy of original record. He has stated that on dated 2.5.2011 he handed over case property to HC Neel Khanth vide RC No. 27/11 Ext PW1/E which is also true copy of original record. He has stated that thereafter article was deposited at FSL Junga and on the same day HC Neel Khanth had handed over the receipt which was in red circle. He has stated that case property remained intact in his custody. He has denied suggestion that rapat Ext PW1/F to Ext PW1/H were prepared at later stage. He has denied suggestion that case property was not deposited with him on dated 1.5.2011. He has denied suggestion that no parcel was resealed by him. He has denied suggestion that case property was not sent in the office of FSL Junga for chemical examination. He has denied suggestion that resealing certificate was prepared later on just to create evidence against accused.

9.2 PW2 Neel Khanth has stated that he was posted as Head Constable in police station State CID since last four years. He has stated that on dated 2.5.2011 MHC handed over one parcel which was sealed with nine seals of seal impression 'P' along with NCB form, recovery memo and sample seal vide RC No.27/2011 with direction to deposit the same in the office of FSL Junga. He has stated that thereafter he deposited parcel in the office of FSL Junga and handed over receipt to MHC on the same day. He has stated that case property remained intact in his custody. He has denied suggestion that no case property was handed over to him. He has denied suggestion that he did not deposit case property in the office of FSL Junga. He denied suggestion that documents were later on prepared just to create evidence in the present case.

9.3. PW3 Devinder has stated that he was posted as Head Constable in police station State CID since 2010. He has stated that on dated 1.5.2011 Inspector Minakshi police station CID Shimla handed over special information report to him with direction to take same to SP Crime Branch Shimla and handed over the same to Inspector Minakshi. He has stated that on dated 2.5.2011 he took special report to the office of SP Crime Branch Shimla and handed over the same to Reader and obtained receipt. He has denied suggestion that special report was not handed over to him by Inspector Minakshi. He denied suggestion that he did not hand over special report to SP Crime Branch Shimla.

9.4 PW4 Vijay Bhuria has stated that he was posted as Sr. Assistant in RTO office Hamirpur and he brought record pertaining to bus No. HP-22B-2087. He has stated that the route of the bus was from Pragpur to Theog. He has stated that copy of the route permit and time table are Ext PW4/A and Ext PW4/B which are correct as per original record.

9.5 PW5 HC Balbir Singh has stated that he was posted as Investigating Officer in Police Station CID Shimla w.e.f. 2009. He has stated that on dated 1.5.2011 he along with Constable Sunil and Constable Vikesh under the supervision of Inspector Minakshi

approached towards Theog-Kufri side in official vehicle No. HP-07B-0324 which was driven by Brij Lal. He has stated that at about 2.15 PM when they reached near Hasan valley then vehicle having registration No. HP-22B-2087 was stopped. He has stated that Inspector Minakshi disclosed her identity to the driver and conductor of the bus. He has stated that driver of the bus disclosed his name as Bahadur Singh and conductor disclosed his name as Sunil Kumar. He has stated that police officials gave their personal search and memo was prepared. He has stated that thereafter driver and conductor of the bus were associated in the raiding party and thereafter search of the bus was conducted. He has stated that accused was sitting on seat No.37 of bus. He has stated that Inspector Minakshi apprised accused about his legal rights to be searched before Magistrate or gazetted officer. He has stated that accused has given his option to be searched before police official. He has stated that thereafter the bag which was in the possession of accused was searched. He has stated that charas to the quantity of 2.100 Kg. was found from the possession of accused. He has stated that thereafter parcel was sealed with ten seals of seal impression 'N' and NCB form was filled up. He has stated that seal after use and after obtaining specimen of seal on piece of cloth was handed over to conductor of bus. He has stated that copy of seizure memo was supplied to accused free of cost. He has stated that thereafter Inspector Minakshi prepared rukka and handed over the same to him along with parcel containing charas, NCB form and sample seal with direction to take the same to police station CID Crime Branch Shimla and handed over case property and rukka to MHC Prakash Chand. He has stated that MHC Parkash Chand was officiating SHO at the relevant time. He has stated that after opening of rexen bag and card board box charas was found. He has stated that accused present in Court is the same person from whom possession of charas was recovered. He has denied suggestion that he did not give his personal search either to the driver or the conductor. He has denied suggestion that accused was falsely implicated in the present case. He denied suggestion that he deposed falsely in Court.

9.6 PW6 Bahadur Singh has stated that he is driver by profession and working as driver with Parmar RTC Hamirpur. He has stated that on dated 1.5.2011 he was coming from Rampur to Hamirpur and when the bus reached at Hasan valley at about 1.45 PM then one vehicle belonging to police official came and asked the bus driver to stop the bus. He has stated that all police officials asked him to take personal search of police officials and thereafter he and conductor took personal search of police officials and no incriminatory material was found in their possession. He has stated that thereafter search memo Ext PW6/A was prepared which bears his signature in red circle. He has stated that two police officials boarded the bus from back side and other police officials boarded the bus from front door. He has stated that he was also accompanying with police officials. He has stated that at the time of search of bus police officials recovered one brown bag which was kept upon the lap by the passenger sitting on seat No.37. Witness was declared hostile. In cross examination conducted by prosecution PW6 has stated that charas in the shape of wicks and marble recovered from person sitting on seat No.37 of bus. He has stated that accused told his name as Kartar Singh son of Tula Ram. He has stated that Kartar Singh son of Tula Ram had given his option to be searched before police officials. He has stated that charas was weighed with the help of scale which was found 2.100 Kg. He has stated that contraband was sealed with ten seals of seal impression 'N'. He has stated that NCB form was filled. He has stated that seal after use was handed over to conductor Sunil Kumar. He has stated that copy of seizure memo was supplied to accused free of cost. He has stated that site plan was prepared and his statement was recorded. He proved charas Ext P6 in the Court. He has stated that owner of bus came to the spot within one hour and he took the bus to its destination and he remained at the spot for two hours. He has stated that police officials conducted search of all passengers and they remained inside bus throughout checking. He has stated that seat No.37 was just in front of back door. He has stated that

one document was signed inside bus and rest of documents were signed outside but. He has denied suggestion that no incriminating substance was recovered from the passenger sitting on seat No.37. He has denied suggestion that police officials called him at Police Station Bharari and obtained signature on various documents just to create evidence against accused. He has denied suggestion that police officials obtained signatures on various documents at police station Bharari.

9.7. PW7 Inspector Minakshi has stated that on dated 1.5.2011 when she was in police station CID at Bharari at 12.30 PM then she received secret information relating to contraband. She has stated that on the basis of information she prepared special report under Section 42 of NDPS Act. She has stated that special information report was handed over to HC Devinder with direction to take the same to SP Crime Shimla. She has stated that after sending special information she along with HC Balbir, Constable Praveen Kumar, Constable Vikesh Guleria proceeded towards Kufri-Theog on official vehicle No HP-07B-0324 which was driven by Constable Brij Lal. She has stated that when they reached near Hasan valley then she spotted bus No. HP-22B-2087 coming from Chharbra side and she gave signal to the bus to stop. She has stated that she gave her identification to the driver of bus. She has stated that driver of the bus disclosed his name as Bhadur Singh and conductor disclosed his name as Sunil Kumar. She has stated that thereafter driver and conductor were associated in raiding party. She has stated that she and police officials have also given their personal search and memo Ext PW6/A was prepared. She has stated that she boarded the bus from front side and other four constables were deputed to check the passengers. She has stated that thereafter she started checking passenger from seat No.1. She has stated that accused was sitting upon seat No.37 of the bus. She has stated that she apprised the accused about his legal right to be searched before Magistrate or gazetted officer. She has stated that accused had given his option to be searched before police officials and consent memo Ext PW5/A was prepared. She has stated that charas was kept by accused in a bag. She has stated that charas was weighed and 2.100 Kg. charas was found from the possession of accused. She has stated that parcel of charas was sealed with ten seals of seal impression 'N' and NCB form was filled up in triplicate. She has stated that seal after use and after taking specimen of seal on pieces of cloth was handed over to witness Sunil Kumar. She has stated that she prepared rukka Ext PW7/C and handed over the same to HC Balbir Singh along with case property, NCB form in triplicate, recovery memo and specimen seal with direction to take the same to police station Bharari. She has stated that she prepared site plan Ext PW7/D and also recorded statement of witnesses under Section 161 Cr.PC. She has stated that ground of arrest was informed to accused. She has stated that charas was recovered from accused. She has stated that special report was prepared and sent. She has stated that she received chemical analyst report from FSL Junga and thereafter challan was presented in Court after completion of investigation. She has denied suggestion that no charas was recovered from the accused. She has denied suggestion that all the documents were prepared later on at police station Bharari. She has denied suggestion that she did not disclose ground of arrest to accused.

9.8 Statement of accused Kartar Singh was recorded under Section 313 Cr.PC. He has stated that he was travelling in bus and coming from Rampur side on dated 1.5.2011. He has stated that police party stopped bus at Dhalli and asked the passengers to come down from the bus. He has stated that police officials took him to police station Dhalli. He has stated that one bag was already in the possession of police officials. He has stated that police officials asked other four persons to go to their home and planted false case upon him.

9.9 Accused examined DW1 Sunil Kumar conductor of the bus as defense witness. DW1 Sunil Kumar has stated that in the year 2010-11 he remained conductor with Parmar bus service. He has stated that on dated 1.5.2011 he was conductor of the bus having registration No. HP-22B-2087 and bus was going from Hamirpur to Rampur. He has stated that bus started from Hamirpur at 6.30 AM and when he reached at Theog then he received telephone call from the owner of bus who directed to change the bus with another bus which was coming from Rampur to Hamirpur because the bus had developed some mechanical defect. He has stated that passengers alighted from bus No.1587 and boarded in bus No.2087 and sat on the seats as per their convenience. He has stated that there were about 47 passengers in the bus and in the meantime one jeep came from Theog side and jeep overtook bus No.HP-22B-2087 and asked the driver to stop the bus near Hasan valley. He has stated that police officials told him that they want to conduct search of the bus. He has stated that some police officials boarded the bus from front door and 3/4 police officials boarded the bus from rear door. He has stated that thereafter bus was locked and police officials asked 3/4 passengers sitting on the rear seats to come out of the bus. He has stated that police officials took up one bag from the rack and came out of bus. He has stated that police officials asked him and driver of bus to come to police station CID Bharari. He has stated that he along with driver and Manger of Parmar bus went to police station Bharari in the evening. He has stated that police officials obtained his signatures on some documents. He has stated that he does not know that accused present in Court was the same person who was apprehended by police officials. He has denied suggestion that bus No.2087 was coming from Rampur. Self stated that bus having registration No. 2087 started from Hamirpur to Rampur. He has admitted that accused was apprehended from bus No.2087 at Hasan valley. He denied suggestion that he took money from accused for deposing in his favour.

10. Submission of learned Advocate appearing on behalf of the appellant that prior information received by police official was not sent to immediate police official as per Section 42(2) of the Narcotic Drugs & Psychotropic Substance Act 1985 and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reason hereinafter mentioned. PW7 Inspector Minakshi has specifically stated when she appeared in witness box that she prepared special information report Ext PW7/A under Section 42(2) of the Narcotic Drugs & Psychotropic Substance Act and thereafter handed over the same to HC Devinder with direction to hand over special information report prepared under Section 42 (2) of NDPS Act in the office of SP Crime Branch Shimla. Court has carefully perused testimony of PW3 HC Devinder. PW3 has specifically stated that PW7 Inspector Minakshi had handed over him special information report prepared under Section 42(2) of NDPS Act with direction to deposit the same in the office of SP Crime Branch Shimla and thereafter he handed over the same to SP Crimes Shimla at his residence. Testimony of PW7 Inspector Minakshi and testimony of PW3 HC Devinder relating to sending of special information report by PW7 Inspector Minakshi to her superior officer are trustworthy, reliable and inspire confidence of Court. There is no reason to disbelieve the testimony of PW7 Inspector Minakshi and PW3 HC Devinder relating to sending special information report prepared under Section 42(2) of the Narcotic Drugs & Psychotropic Substance Act 1985 to SP Crimes Shimla. Even testimonies of PW7 Minakshi and PW3 HC Devinder are corroborated by documentary evidence Ext PW7/A placed on record.

11. Another submission of learned Advocate appearing on behalf of appellant that no information of ground of arrest was given to appellant as required under Section 52 of Narcotic Drugs & Psychotropic Substance Act 1985 and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. PW7 Inspector Minakshi Investigating Officer has specifically stated in positive

manner that information relating to ground of arrest was given to accused vide document Ext PW7/E placed on record. Court has carefully perused document Ext PW7/E placed on record. It is proved beyond reasonable doubt that information as required under Section 52 of the Narcotic Drugs & Psychotropic Substance Act 1985 relating to grounds of arrest was given to the appellant. Testimony of PW7 Inspector Minakshi is corroborated by documentary evidence Ext PW7/E placed on record which remains un-rebutted on record.

12. Another submission of learned Advocate appearing on behalf of appellant that no special report under Section 57 of NDPS Act relating to arrest and seizure of contraband was sent as required under law and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Court has carefully perused the testimony of PW7 Inspector Minakshi. PW7 has specifically stated in positive manner that special report under Section 57 relating to arrest and seizure Ext PW7/F was sent to the office of SP Crime Shimla and special report Ext PW7/F placed on record is also proved on record in accordance with law. PW3 HC Devinder has specifically stated when he appeared in witness box that he took special report prepared under Section 57 of the NDPS Act relating to arrest and seizure in the office of SP Crime Branch Shimla. Testimony of PW7 Inspector Minakshi and testimony of PW3 Devinder corroborated with documentary evidence Ext PW7/F placed on record proved beyond reasonable doubt that special report prepared under Section 57 of NDPS Act relating to arrest and seizure was sent to SP Crime Branch Shimla in accordance with law.

13. Another submission of learned Advocate appearing on behalf of appellant that compliance of Section 50 of the Narcotic Drugs & Psychotropic Substance Act 1985 was not effected in the present case and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Although in the present case consent of accused under Section 50 of the NDPS Act was obtained vide documentary evidence Ext PW5/A placed on record. It is the case of the prosecution that 2.100 Kg. charas was found from the exclusive and conscious possession of accused when accused was sitting on seat No.37 in bus having registration No. HP-2B-2087. It is the case of prosecution that charas to the quantity of 2.100 Kg. was recovered from the bag which was kept upon lap of the accused. It is well settled law that Section 50 of NDPS Act is attracted when the contraband is found from the person of accused. In the present case contraband was not found from the person of accused but contraband was found from the bag of the accused. It was held in case reported in 1999 (8) SCC 257 titled Kalema Tumba Vs. State of Maharashtra and another that when contraband was found from the bag then compliance of Section 50 is not mandatory. Also See 2005 (4) SCC 350 titled State of HP Vs. Pawan Kumar. Also see 2011 Crl.L.J. 1738 titled Jarnail Singh Vs. State of Punjab.

14. Another submission of learned Advocate appearing on behalf of the appellant that in view of the testimony of PW6 Bahadur Singh driver of bus No. HP-22B-2087 and in view of the testimony of DW1 Sunil Kumar conductor of bus No. HP-22B-2087 appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW6 Bahadur Singh driver and DW1 Sunil Kumar conductor of bus No. HP-22B-2087. PW6 Bahadur Singh was declared hostile by prosecution and thereafter he was cross-examined at length by prosecution. PW6 Bahadur Singh has stated in positive manner when he was cross examined by prosecution that when police official inquired from the person sitting upon seat No.37 of bus then he disclosed his name as Kartar Singh son of Tula Ram resident of Nirmand. PW6 Bahadur Singh has specifically stated that thereafter it was informed to accused Kartar Singh that he has legal right to be searched before the Magistrate or gazetted officer and memo Ext PW5/A was prepared which bears his signature in red circle 'X'. PW6 has specifically stated in

positive manner that thereafter accused had given his option to be searched by police officials present at the spot. PW6 has stated in positive manner that rexen bag which was kept upon the leg of accused was searched by police officials and black coloured substance in the shape of wicks and marbles were recovered. PW6 has specifically stated that thereafter charas was weighed with the help of scale which was found 2.100 Kg. PW6 has specifically stated in positive manner that thereafter parcel was sealed with ten seals of seal impression 'N' and NCB form was filled up. It is well settled law that principle of falsus in uno falsus in omnibus is not applicable in criminal trials. See AIR 1980 SC 957 titled Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana. It is well settled law that testimony of hostile witness should not be discarded altogether. It is well settled law that testimony of hostile witness could be considered by criminal Court which is trust worthy, reliable and inspire confidence of Court. See AIR 2004 SC 1720 titled Lella Srinivasa Rao Vs. State of Andhra Pradesh. Also see AIR 2006 SC 951 titled Radha Mohan Singh Vs. State of UP. Also see AIR 2003 SC 4230 titled State of Rajasthan Vs. Bhawani. Also see AIR 1988 SC 696 titled appabhai and another Vs. State of Gujarat. Also See: 2011 (6) SCC 312 titled Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat. Also see 2012 (5) SCC 777 titled Ramesh Harijan Vs. State of Uttar Pradesh, also see AIR 1977 SC 170 titled Rabindra Kumar Dey Vs. State of Orissa, also see AIR 1991 SC 1853 titled Khujji Vs. State of Madhya Pradesh. We have carefully perused the testimony of DW1 Sunil Kumar. DW1 has specifically stated in positive manner that one jeep came from Theog side and jeep overtook the bus and asked the driver to stop the bus near Hasan valley. DW1 has specifically stated that thereafter police officials told that they want to conduct search of the bus some police officials boarded the bus from front door and 3/4 police officials boarded bus from rear door and they locked the bus. Search of bus having registration No. HP-22B-2087 on dated 1.5.2011 at Hasan valley is also proved as per testimony of DW1 Sunil Kumar.

15. Another submission of learned Advocate appearing on behalf of appellant that no possession of 2.100 Kg. charas was found from exclusive possession of accused and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. PW7 Inspector Minakshi has specifically stated in positive manner when she appeared in witness box that 2.100 Kg. charas was found from the exclusive and conscious possession of the accused. Testimony of PW7 Inspector Minakshi is corroborated by PW5 HC Balbir Singh. PW5 Balbir Singh has specifically stated in positive manner when he appeared in witness box that 2.100 Kg. charas was found from the possession of accused. Even PW6 Bahadur Singh driver of the bus has specifically stated when he was cross-examined by the prosecution that charas was recovered from the possession of person sitting on seat No.37 of bus in his presence. There is no evidence on record in order to prove that police officials have prior hostile animus against accused at any point of time. It is well settled law that conviction could be sustained upon the testimony of police official if the same is trustworthy, reliable and inspire confidence of Court. See 1996 (1) SCC 427 titled Sama Alana Abdulla Vs. State of Gujarat. Also see AIR 1996 (3) SCC 338 titled Tahir Vs. State of Delhi. It was held in case reported in AIR 1973 SC 2783 titled Nathu Singh Vs. State of MP that the mere fact that witnesses examined in support of prosecution case were police officials is not strong enough to discard their evidence. It was held that police officials should not be treated as interested witnesses. See AIR 1985 SC 1092 titled State of Gujarat Vs. Raghunath Vamanrao Baxi . Also see 2012 (4) SCC 722 titled Govindaraju Vs. State. Also see 2007 15 SCC 760 Tika Ram Vs. State of MP. Also see 2007 (7) SCC 625 titled Girja Prasad Vs. State of MP.

16. Another submission of learned Advocate appearing on behalf of appellant that it is not proved on record beyond reasonable doubt that charas was found from the

conscious possession of appellant and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Under Section 35 of the Narcotic Drugs & Psychotropic Substance Act 1985 there is presumption of culpable mental state**.** Accused did not adduce any positive, cogent and reliable evidence on record in order to prove the fact that he had no culpable mental state. Even there is presumption against accused under Section 54 of the Narcotic Drugs & Psychotropic Substance Act 1985 relating to possession of contraband article and accused did not rebut presumption mentioned under Section 54 of the NDPS Act 1985 satisfactorily. See 2010 (9) SCC 608 titled Dharampal Singh Vs. State of Punjab.

17. Another submission of learned Advocate appearing on behalf of appellant that re-sealing process in NCB form was not conducted by Station House Officer and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused NCB form placed on record. There is recital in column No.9 of NCB form that NCB form was resealed with seal impression 'P' by MHC/SHO. PW5 Balbir Singh has specifically stated when he appeared in witness box that MHC Parkash Chand was also officiating SHO at the relevant time in police station. Testimony of PW5 HC Balbir Singh that PW1 Parkash Chand was officiating SHO at the relevant time remained un-rebutted on record. Accused did not adduce any positive, cogent and reliable evidence on record in order to prove that PW1 Parkash Chand was not officiating SHO at the relevant time.

18. Another submission of learned Advocate appearing on behalf of appellant that there is material contradictions in the prosecution case and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Appellant did not point out any material contradictions in the testimony of prosecution case which goes to the root of the case. It is well settled law that minor contradictions are bound to come in criminal case when testimony of prosecution witness is recorded after a gap of sufficient time. In the present case contraband was recovered from the exclusive and conscious possession of accused on dated 1.5.2011 and testimonies of prosecution witnesses were recorded on dated 17.1.2012, 18.1.2012, 21.3.2012, 21.4.2012, 21.5.2012 and 15.6.2012. It is held that minor contradictions are bound to come in criminal case when testimony of prosecution witness is recorded after gap of sufficient time. It was held that minor discrepancy should be ignored in criminal case. See 2004 (12) SCC 492 titled Shashidhar Purandhar Hedge and another Vs. State of Karnataka. Also see 1999 (9) SCC 525 titled Leela Ram Vs. State of Haryana. Also see 2010 (9) SCC 765 titled C.Muniappan and others Vs. State of Tamil Nadu. See AIR 1972 SC 2020 titled Sohrab and another Vs. The State of Madhya Pradesh, see AIR 1985 SC 48 titled State of UP Vs. M.K.Anthony, see AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, see AIR 2007 SC 2257 titled State of Rajasthan Vs. Om Parkash, see 2009 (11) SCC 588 titled Prithu Chand and another Vs. State of HP, see 2009 (9) SCC 626 titled State of UP Vs. Santosh Kumar and others, see AIR 2009 SC 152 titled State Vs. Saravanan and another,see AIR 1988 SC 696 titled Appabhai and another Vs. State of Gujarat, see AIR 1999 SC 3544 titled Rammi Vs. State of M.P, see 2000(1) SCC 247 titled State of H.P. Vs. Lekh Raj and another, see 2004 (10) SCC 94 titled Laxman Vs. Poonam Singh and others also See 2004 (7) SCC 408 titled Dashrath Singh Vs. State of UP. See 2012 (10) SCC 433 titled Kuriya and another Vs. State of Rajasthan. Even as per chemical analysis report placed on record Ext PW7/G it is proved on record that after various scientific tests such as physical identification, chemical and chromatograph analyses carried out in the laboratory contraband was found to be sample of charas.

19. In view of above stated facts it is held that learned trial Court has properly appreciated oral as well documentary evidence placed on record and it is held that no miscarriage of justice has been caused to the appellant. Appeal filed by appellant is dismissed and judgment and sentence passed by learned trial Court are affirmed. Appeal is disposed of. Pending application if any also disposed of.

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

Raj Pal Singh ...Petitioner.

Versus

Central Bureau of Investigation & others ...Respondents.

CWP No. 2526 of 2015-C
Reserved on: 18.05.2015
Decided on: 30.05.2015

Constitution of India, 1950- Article 226- Petitioner sought the transfer of investigation in FIR to CBI or to Delhi- record shows that closure report had been submitted to the Court of competent jurisdiction- interference by High Court will amount to taking over the jurisdiction and powers of the Magistrate- petitioner had filed similar petition before Delhi, High Court which was withdrawn in view of submission of cancellation report- when investigation is complete, it is not permissible to direct the police to conduct further investigation- there can be further investigation but no fresh investigation- second FIR cannot be registered when an FIR had already been registered- petition dismissed.

(Para-6 to 31)

Cases referred:

Bhagwant Singh versus Commissioner of Police and another, AIR 1985 Supreme Court 1285

Chittaranjan Mirdha versus Dulal Ghosh & Anr., 2009 AIR SCW 3873.

Samaj Parivartan Samudaya & Ors. versus State of Karnataka & Ors., 2012 AIR SCW 3323

Vinay Tyagi versus Irshad Ali alias Deepak and Ors., 2013 AIR SCW 220.

State of Bihar and another vs. J.A.C. Saldanna and others, AIR 1980 Supreme Court 326

Ramachandran versus R. Udayakumar & Ors., 2008 AIR SCW 5469

Reeta Nag versus State of West Bengal & Ors., 2010 AIR SCW 476

Anju Chaudhary versus State of U.P. and Anr., 2013 AIR SCW 245,

Amitbhai Anilchandra Shah versus Central Bureau of Investigation and Anr., 2013 AIR SCW 2353

For the petitioner: Mr. Hamender Chandel, Advocate.

For the respondents: Mr. Sandeep Sharma, Senior Advocate, with Mr. Prashant Sharma, Advocate, for respondent No. 1.

Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Petitioner has invoked the jurisdiction of this Court by the medium of the writ petition in hand seeking transfer of the investigation of FIR No. 128 of 2014, registered at Police Station Dharampur, District Solan, H.P. to the Central Bureau of Investigation (for short "CBI"); for declaring the cancellation report, if any filed by the police during the pendency of the writ petition, to be illegal and in the alternative, has also sought transfer of investigation of the said FIR to Delhi, on the grounds taken in the memo of writ petition.

2. It is averred that deceased-Satish Bosaya, a businessman, was having some dispute with respondent No. 5 and were trying to arrive at a settlement. On 08.08.2014, the petitioner received information that Shri Satish Bosaya sustained injuries in a car accident on 07.08.2014 at 7.45 p.m. at Dharampur, District Solan, H.P., constraining him, his friend and the driver to rush to Dharampur. In the post-mortem report conducted at Indira Gandhi Medical College and Hospital, Shimla (for short "IGMC") (Annexure P-1), it is recorded that the deceased died due to firearm injury. A complaint was lodged on 10.08.2014 at Amar Colony Police Station, Delhi (Annexure P-2) and representation was also made to the Director General of Police, Himachal Pradesh on 11.08.2014 (Annexure P-3) for registration of a case. Accordingly, FIR No. 128 of 2014 was registered under Section 302 of the Indian Penal Code (for short "IPC") at Police Station Dharampur, District Solan, on 12.08.2014 (Annexure P-4) and FIR No. 673 of 2014 was registered at Amar Colony Police Station, South East District, New Delhi on 14.08.2014 (Annexure P-5). On 21.08.2014, the Deputy Commissioner of Police, South East District, New Delhi, issued a letter to the SSP, District Solan, Himachal Pradesh for transfer of the investigation of FIR No. 128 of 2014 from Dharampur to Delhi (Annexure P-6). The petitioner also filed various representations to the authorities in Himachal Pradesh for transferring the investigation of the said FIR to Delhi (Annexure P-8). However, the Investigating Officer at Dharampur, District Solan, H.P. conducted the investigation and reported that it was a case of suicide. Accordingly, the Superintendent of Police, Solan, vide its letter, dated 14.11.2014 (Annexure P-9) informed the Director General of Police, Shimla that no case for transfer of the investigation to Delhi was made out, constraining the petitioner to file a writ petition before the Hon'ble High Court of Delhi being W.P. (CRL) No. 1847 of 2014, which was withdrawn on 16.04.2015 (Annexure P-10).

3. We have heard learned counsel for the petitioner.

4. The following questions arise for consideration in this writ petition:

(i) Whether after submission of the final report in terms of Section 173 of the Code of the Criminal Procedure (for short "CrPC") before the Court of competent jurisdiction, a writ can be filed for transferring the investigation?

(ii) Whether this Court has the jurisdiction to transfer the investigation of a case from Police Station Dharampur, District Solan, H.P. to Delhi?

(iii) Whether in the given circumstances, investigation can be entrusted to any other agency, i.e. CBI?

(iv) Whether this Court is having power to declare the closure report submitted in terms of Section 173 (2) CrPC as illegal?

5. The writ petition merits to be dismissed in limine for the following reasons:

6. Chapter XII of the CrPC contains Sections 154 to 176, which provide the mechanism how to conduct investigation. It provides that in case a report is made about commission of any offence, First Information Report (for short "FIR") is to be registered in terms of Section 154 CrPC, which sets the investigating agency into motion, investigation is to be conducted in terms of the mandate of the said Chapter and on completion, report is to be submitted in terms of Section 173 CrPC before the Court of competent jurisdiction. The final report is to be considered by the Court of competent jurisdiction in order to pass appropriate orders after perusal of the record. In case, closure report is made, it is for the Magistrate/Court of competent jurisdiction either to accept the report or to direct further investigation or to take cognizance and issue process. But, in case the Magistrate decides not to take cognizance and accepts the closure report, then it has to hear the informant.

7. Admittedly, in the case in hand, closure report has been submitted to the Court of competent jurisdiction and it is for that Court/Magistrate to decide whether the closure report is to be accepted or otherwise. Thus, the alternate remedy is available to the writ petitioner. In the given circumstances, the writ Court cannot interfere.

8. A similar matter came up for consideration before the Apex Court in a case titled as **Bhagwant Singh versus Commissioner of Police and another,** reported in **AIR 1985 Supreme Court 1285,** wherein it has been held that in case the Magistrate decides not to take cognizance of offence or to drop the proceedings against some persons mentioned in the FIR, the Magistrate must give notice and hear the informant. It is apt to reproduce relevant portion of para 4 of the judgment herein:

> *"4. .....But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced because the First Information Report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the First Information Report lodged by him is clearly recognised by the provisions contained in sub-sec. (2) of S. 154, sub-sec. (2) of S. 157 and sub-sec. (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the First Information Report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of S. 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of S. 173 decides not to take cognizance of the offence and to*

> *drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the First Information Report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(i) of S. 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate."*

9. The same principle has been laid down by the Apex Court in a case titled as **Chittaranjan Mirdha versus Dulal Ghosh & Anr.,** reported in **2009 AIR SCW 3873.** It is apt to reproduce paras 14 and 17 of the judgment herein:

> *"14. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate, he has again the option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3) . The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take*

cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See M/s. India Sarat Pvt. Ltd. v. State of Karnataka and another (AIR 1989 SC 885)]. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in Bhagwant Singh's case (supra) that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

15. .....

16. .....

17. Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in Bhagwant Singh's case (supra) the right is conferred on the informant and none else."

10. It would also be profitable to reproduce paras 17 and 20 of the judgment rendered by the Apex Court in a case titled as **Samaj Parivartan Samudaya & Ors. versus State of Karnataka & Ors.,** reported in **2012 AIR SCW 3323,** herein:

"17. The machinery of criminal investigation is set into motion by the registration of a First Information Report (FIR), by the specified police officer of a jurisdictional police

station or otherwise. The CBI, in terms of its manual has adopted a procedure of conducting limited pre-investigation inquiry as well. In both the cases, the registration of the FIR is essential. A police investigation may start with the registration of the FIR while in other cases (CBI, etc.), an inquiry may lead to the registration of an FIR and thereafter regular investigation may begin in accordance with the provisions of the CrPC. Section 154 of the CrPC places an obligation upon the authorities to register the FIR of the information received, relating to commission of a cognizable offence, whether such information is received orally or in writing by the officer in-charge of a police station. A police officer is authorised to investigate such cases without order of a Magistrate, though, in terms of Section 156(3) Cr.P.C. the Magistrate empowered under Section 190 may direct the registration of a case and order the police authorities to conduct investigation, in accordance with the provisions of the CrPC. Such an order of the Magistrate under Section 156(3) CrPC is in the nature of a pre-emptory reminder or intimation to police, to exercise their plenary power of investigation under that Section. This would result in a police report under Section 173, whereafter the Magistrate may or may not take cognizance of the offence and proceed under Chapter XVI CrPC. The Magistrate has judicial discretion, upon receipt of a complaint to take cognizance directly under Section 200 CrPC, or to adopt the above procedure. [Ref. Gopal Das Sindhi & Ors. v. State of Assam & Anr., [AIR 1961 SC 986]; Mohd. Yusuf v. Smt. Afaq Jahan & Anr., [AIR 2006 SC 705]; and Mona Panwar v. High Court of Judicature of Allahabad Through its Registrar & Ors., [(2011) 3 SCC 496 : (AIR 2011 SC 529)].

18. .....

19. .....

20. Thus, the CrPC leaves clear scope for conducting of further inquiry and filing of a supplementary charge sheet, if necessary, with such additional facts and evidence as may be collected by the investigating officer in terms of sub-Sections (2) to (6) of Section 173 CrPC to the Court."

11. The Apex Court also discussed this issue in the judgment rendered in a case titled as **Vinay Tyagi versus Irshad Ali alias Deepak and Ors.,** reported in **2013 AIR SCW 220.** It is apt to reproduce para 21 of the judgment herein:

"21. Referring to the provisions of Section 173 of the Code, the Court observed that the police has the power to conduct further investigation in terms of Section 173(8) of the Code but also opined that even the Trial Court can direct further investigation in contradistinction to fresh investigation, even where the report has been filed. It will be useful to refer to the following paragraphs of the judgment wherein the Court while referring to the case of Mithabhai

Pashabhai Patel v. State of Gujarat (AIR 2009 SC (Supp) 1658 : 2009 AIR SCW 3780) (supra) held as under:

"13. It is, however, beyond any cavil that 'further investigation' and 'reinvestigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a 'State' to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayat, J. in Ramachandran v. R. Udhayakumar, (2008) 5 SCC 413 : (AIR 2008 SC 3102 : 2008 AIR SCW 5469) opined as under: (SCC p. 415, para 7) : (Para 6 of AIR, AIR SCW)

'7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation.' A distinction, therefore, exists between a reinvestigation and further investigation.

xxx xxx xxx

15. The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The precognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code."

12. Admittedly, in this case, closure report has been submitted, the matter is sub judice and if this Court interferes, that will amount to take over the jurisdiction and powers of the Magistrate, who is having the power and jurisdiction in terms of the mechanism contained in the CrPC, as discussed hereinabove. The first question is answered accordingly.

13. It is worthwhile to record herein that the writ petitioner had also filed a Writ Petition (Criminal) on 09.09.2014 before the Hon'ble High Court of Delhi, which was withdrawn on 16.04.2015, i.e. after a lapse of more than seven months.

14. Learned counsel for the writ petitioner has filed copy of the said writ petition, made part of the file. The writ petitioner had sought almost the same relief in the said writ petition, which he has sought in the present writ petition. It is apt to reproduce the prayer clause of the said writ petition herein:

"It is therefore most respectfully prayed that this Hon'ble Court may be pleased to:

a) issue a Writ, Order or Direction in the nature of mandamus or any other Writ, Order or Direction that the

> *FIR No. 128/2014 dated 12.08.2014 under Section 302 of the Indian Penal Code 1860 registered in the State of Himachal Pradesh at Police Station Dharampur, Solan, Himachal Pradesh be transferred to New Delhi and investigated along with FIR No. 673/2014 registered under Section 364 IPC at Delhi, Amar Colony Police Station or*
>
> *b) Alternatively issue a Writ, Order or Direction in the nature of mandamus or any other Writ, Order or Direction that the FIR No. 128/2014 dated 12.08.2014 under Section 302 of the Indian Penal Code 1860 registered in the State of Himachal Pradesh at Police Station Dharampur, Solan, Himachal Pradesh and FIR No. 673/2014 registered under Section 364 IPC at Delhi, Amar Colony Police Station, both be investigated by an Independent Agency*
>
> *c) Pass such other further Order(s) as deemed fit and proper in the facts and circumstances of the case and in the interest of justice."*

15. In that writ petition, learned counsel for the State had brought to the notice of the Hon'ble High Court that investigations were complete and cancellation report had been prepared. Thereafter, the writ petitioner withdrew the writ petition with liberty to take other legal remedies.

16. It is apt to reproduce the relevant portion of the order made by the Hon'ble High Court of Delhi in the said writ petition (Annexure P-10) herein:

> *"Learned counsel for respondent No. 2 submits that investigations are complete and cancellation report has been prepared which is likely to be filed in the Court. In view of this statement, learned counsel for the petitioner seeks leave to withdraw present writ petition with liberty to take other legal remedies as may be available to the petitioner under the law.*
>
> *Writ petition is disposed of as withdrawn."*

17. A perusal of the order (supra) reveals that the writ petitioner has withdrawn the said writ petition with liberty to seek other legal remedies. The words *'other legal remedies'* mean *'the remedies other than the writ petition'*. Thus, the writ petition is not maintainable.

18. The next question is - when the investigation is already complete, can the High Court direct further investigation and transfer the investigation to other agency? The answer is in the negative for the following reasons:

19. Investigation has been completed and it is yet to be determined by the Court of competent jurisdiction as to whether the closure report is to be accepted or otherwise? So, it is the domain of the Magistrate to pass appropriate orders and the Writ Court cannot interfere at this stage.

20. The writ petition is not maintainable for the reason that the writ petitioner had sought the same relief before the Hon'ble High Court of Delhi by the medium of writ petition (supra), at the cost of repetition, which was withdrawn.

21. Whether further investigation is permissible, is also to be thrashed out by the Magistrate/Court of competent jurisdiction in terms of Section 173(8) CrPC. Re-investigation is unknown to law.

22. This issue has been discussed in a series of judgments by the Apex Court.

23. The Apex Court in a case titled as **State of Bihar and another versus J.A.C. Saldanna and others,** reported in **AIR 1980 Supreme Court 326,** held that power of the police to investigate into a cognizable offence is ordinarily not to be interfered with. It is apt to reproduce paras 19, 25 and 26 of the judgment herein:

> *"19. The power of the Magistrate under Section 156 (3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out hereinbefore. The power conferred upon the Magistrate under Section 156 (3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the c ase even after submission of the report as provided in Section 173 (8). Therefore, the High Court was in error in holding that the State Government in exercise of the power of superintendence under S. 3 of the Act lacked the power to direct further investigation into the case. In reaching this conclusion we have kept out of consideration the provision contained in Section 156 (2) that an investigation by an officer-in-charge of a police station, which expression includes police officer superior in rank to such officer, cannot be questioned on the ground that such investigating officer had no jurisdiction to carry on the investigation; otherwise that provision would have been a short answer to the contention raised on behalf of respondent 1.*
>
> *20 to 24. .....*
>
> *25. There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the*

offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognisance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in Section 173 (8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate. This has been recognised way back the King Emperor v. Khwaja Nazir Ahmad, (1944) 71 Ind App 203 at p. 213, where the Privy Council observed as under :

> *"In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it, and not until then".*

26. This view of the Judicial Committee clearly demarcates the functions of the executive and the judiciary in the field of detection of crime and its subsequent trial and it would appear that the power of the police to investigate into a cognizable offence is ordinarily not to be interfered with by the judiciary."

24. The Apex Court in a cases titled as **Ramachandran versus R. Udayakumar & Ors.,** reported in **2008 AIR SCW 5469,** and **Reeta Nag versus State of West Bengal & Ors.,** reported in **2010 AIR SCW 476,** held that there can be further investigation if required, but not fresh investigation or re-investigation. It is apt to reproduce para 19 of the judgment in **Reeta Nag's case (supra)** herein:

> *"19. What emerges from the above-mentioned decisions of this Court is that once a charge-sheet is filed under Section 173(2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit further investigation under Section 173(8) . The Magistrate cannot suo motu direct a further investigation under Section 173(8) Cr.P.C. or direct a re-investigation into a case on account of the bar of Section 167(2) of the Code."*

25. The Apex Court in **Samaj Parivartan Samudaya's case (supra)** held that further investigation is permissible, however, re-investigation is prohibited. It is apt to reproduce para 18 of the judgment herein:

> *"18. Once the investigation is conducted in accordance with the provisions of the CrPC, a police officer is bound to file a report before the Court of competent jurisdiction, as contemplated under Section 173 CrPC, upon which the Magistrate can proceed to try the offence, if the same were triable by such Court or commit the case to the Court of Sessions. It is significant to note that the provisions of Section 173(8) CrPC open with non-obstante language that nothing in the provisions of Section 173(1) to 173(7) shall be deemed to preclude further investigation in respect of an offence after a report under sub-Section (2) has been forwarded to the Magistrate. Thus, under Section 173(8), where charge-sheet has been filed, that Court also enjoys the jurisdiction to direct further investigation into the offence. {Ref., Hemant Dhasmana v. Central Bureau of Investigation & Anr., [(2001) 7 SCC 536v: (Air 2001 SC 2721)]}. This power cannot have any inhibition including such requirement as being obliged to hear the accused before any such direction is made. It has been held in Shri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandha Maharaj v. State of Andhra Pradesh and Ors., (JT 1999 (4) SC 537 : (AIR 1999 SC 2332) that the casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all potential accused to be afforded with the opportunity of being heard."*

26. It is also apt to reproduce paras 16, 18, 22, 23, 30, 31, 33 and 40 of the judgment rendered by the Apex Court in **Vinay Tyagi's case (supra)** herein:

> *"16. However, in the case of a 'fresh investigation', 'reinvestigation' or 'de novo investigation' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would*

be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'de novo' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation'. In the case of Sidhartha Vashisht v. State (NCT of Delhi), [(2010) 6 SCC 1 : (AIR 2010 SC 2352 : 2010 AIR SCW 4302)], the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. The maxim contra veritatem lex nunquam aliquid permittit applies to exercise of powers by the courts while granting approval or declining to accept the report. In the case of Gudalure M.J. Cherian & Ors. v. Union of India & Ors., [(1992) 1 SCC 397], this Court stated the principle that in cases where charge-sheets have been filed after completion of investigation and request is made belatedly to reopen the investigation, such investigation being entrusted to a specialized agency would normally be declined by the court of competent jurisdiction but nevertheless in a given situation to do justice between the parties and to instil confidence in public mind, it may become necessary to pass such orders. Further, in the case of R.S. Sodhi, Advocate v. State of U.P., [1994 SCC Supp. (1) 143 : (AIR 1994 SC 38 : 1994 AIR SCW 4039), where allegations were made against a police officer, the Court

ordered the investigation to be transferred to CBI with an intent to maintain credibility of investigation, public confidence and in the interest of justice. Ordinarily, the courts would not exercise such jurisdiction but the expression 'ordinarily' means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. 'Ordinarily' excludes extra- ordinary or special circumstances. In other words, if special circumstances exist, the court may exercise its jurisdiction to direct 'fresh investigation' and even transfer cases to courts of higher jurisdiction which may pass such directions.

17. .....

18. Next question that comes up for consideration of this Court is whether the empowered Magistrate has the jurisdiction to direct 'further investigation' or 'fresh investigation'. As far as the latter is concerned, the law declared by this Court consistently is that the learned Magistrate has no jurisdiction to direct 'fresh' or 'de novo' investigation. However, once the report is filed, the Magistrate has jurisdiction to accept the report or reject the same right at the threshold. Even after accepting the report, it has the jurisdiction to discharge the accused or frame the charge and put him to trial. But there are no provisions in the Code which empower the Magistrate to disturb the status of an accused pending investigation or when report is, filed to wipe out the report and its effects in law. Reference in this regard can be made to K. Chandrasekhar v. State of Kerala, [(1998) 5 SCC 223 : (AIR 1998 SC 2001 : 1998 AIR SCW 1852)]; Ramachandran v. R. Udhayakumar, [(2008) 5 SCC 413 : (AIR 2008 SC 3102 : 2008 AIR SCW 5469)], Nirmal Singh Kahlon v State of Punjab & Ors., [(2009) 1 SCC 441 : (AIR 2009 SC 984 : 2009 AIR SCW 60)]; Mithabhai Pashabhai Patel & Ors. v. State of Gujarat, [(2009) 6 SCC 332 : (AIR 2009 SC (Supp) 1658 : 2009 AIR SCW 3780)]; and Babubhai v. State of Gujarat, [(2010) 12 SCC 254 : (2010) AIR SCW 5126)].

19 to 21. .....

22. In the case of Minu Kumari & Anr. v. State of Bihar & Ors., [(2006) 4 SCC 359 : (AIR 2006 SC 1937 : 2006 AIR SCW 2330)], this Court explained the powers that are vested in a Magistrate upon filing of a report in terms of Section 173(2)(i) and the kind of order that the Court can pass. The Court held that when a report is filed before a Magistrate, he may either (i) accept the report and take cognizance of the offences and issue process; or (ii) may disagree with the report and drop the proceedings; or (iii) may direct further investigation under Section 156(3) and require the police to make a further report.

23. This judgment, thus, clearly shows that the Court of Magistrate has a clear power to direct further investigation when a report is filed under Section 173(2) and may also exercise such powers with the aid of Section 156(3) of the Code. The lurking doubt, if any, that remained in giving wider interpretation to Section 173(8) was removed and controversy put to an end by the judgment of this Court in the case of Hemant Dhasmana v. CBI, [(2001) 7 SCC 536 : (AIR 2001 SC 2721 : 2001 AIR SCW 3064)] where the Court held that although the said order does not, in specific terms, mention the power of the court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the court. When any such order is passed by the court, which has the jurisdiction to do so, then such order should not even be interfered with in exercise of a higher court's revisional jurisdiction. Such orders would normally be of an advantage to achieve the ends of justice. It was clarified, without ambiguity, that the magistrate, in exercise of powers under Section 173(8) of the Code can direct the CBI to further investigate the case and collect further evidence keeping in view the objections raised by the appellant to the investigation and the new report to be submitted by the Investigating Officer, would be governed by sub-Section (2) to sub-Section (6) of Section 173 of the Code. There is no occasion for the court to interpret Section 173(8) of the Code restrictively. After filing of the final report, the learned Magistrate can also take cognizance on the basis of the material placed on record by the investigating agency and it is permissible for him to direct further investigation. Conduct of proper and fair investigation is the hallmark of any criminal investigation.

24 to 29. .....

30. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code :

1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (de novo) in the case initiated on the basis of a police report.

2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.

3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singh's case by a three Judge Bench and thus in conformity with the doctrine of precedence.

4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.

6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue 'further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

31. Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kind of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the First Information Report. Then, upon completion of the investigation, the police are required to file a report in terms of Section 173(2) of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the Court. It is the record of the case and the documents annexed thereto, which are considered by the Court and then the Court of the Magistrate is expected to exercise any of the three options afore-noticed. Out of the stated options with the Court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the magistrate to direct 'further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall

be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code.

32. .....

33. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct 'further investigation', 'fresh' or 'de novo' and even 'reinvestigation'. 'Fresh', 'de novo', and 'reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.

34 to 39. .....

40. We have already noticed that there is no specific embargo upon the power of the learned Magistrate to direct 'further investigation' on presentation of a report in terms of Section 173(2) of the Code. Any other approach or interpretation would be in contradiction to the very language of Section 173(8) and the scheme of the Code for giving precedence to proper administration of criminal justice. The settled principles of criminal jurisprudence would support such approach, particularly when in terms of Section 190 of the Code, the Magistrate is the competent authority to take cognizance of an offence. It is the Magistrate who has to decide whether on the basis of the record and documents produced, an offence is made out or not, and if made out, what course of law should be adopted in relation to committal of the case to the court of competent jurisdiction or to proceed with the trial himself. In other words, it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to the appropriate conclusion in consonance with the principles of law. It will be a travesty of justice, if the court cannot be permitted to direct 'further investigation' to clear its doubt and to order the investigating agency to further substantiate its charge sheet. The satisfaction of the learned Magistrate is a condition precedent to commencement of further proceedings before the court of competent jurisdiction. Whether the Magistrate should direct 'further investigation' or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of competent jurisdiction would direct 'further investigation'

or 'reinvestigation' as the case may be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, re-investigation or even investigation de novo depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation. In this regard, we may refer to the observations made by this court in the case of Sivanmoorthy and Others v. State represented by Inspector of Police, [(2010) 12 SCC 29 : (AIR 2011 SC (Cri) 2082)]. In light of the above discussion, we answer the questions formulated at the opening of this judgment as follows:

Answer to Question No. 1

The court of competent jurisdiction is duty bound to consider all reports, entire records and documents submitted therewith by the Investigating Agency as its report in terms of Section 173(2) of the Code. This Rule is subject to only the following exceptions;

a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

b) Where an order is passed by the higher courts in exercise of its extra- ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on 'fresh investigation' or 're-investigation' or any part of it be excluded, struck off the court record and be treated as non est.

Answer to Question No. 2

No investigating agency is empowered to conduct a 'fresh', 'de novo' or 're-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate."

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.

28. Now, the next question is - whether second FIR is permissible on the same allegations for the same cause, one at P.S. Dharampur, District Solan and second at Delhi?

29. The Apex Court in the case titled as **Anju Chaudhary versus State of U.P. and Anr.,** reported in **2013 AIR SCW 245**, held that second FIR for the same incident is not permissible. It is apt to reproduce para 23 of the judgment herein:

"23. The First Information Report is a very important document, besides that it sets the machinery of criminal

law in motion. It is a very material document on which the entire case of the prosecution is built. Upon registration of FIR, beginning of investigation in a case, collection of evidence during investigation and formation of the final opinion is the sequence which results in filing of a report under Section 173 of the Code. The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. Other materials and information given to or received otherwise by the investigating officer would be statements covered under Section 162 of the Code. The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of 'sameness' to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed. However, in case the contrary is proved, whether the version of the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible, This is the view expressed by this Court in the case of Babu Babubhai v. State of Gujarat and Ors., [(2010) 12 SCC 254 : (2010 AIR SCW 5126)]. This judgment clearly spells out the distinction between two FIRs relating to the same incident and two FIRs relating to different incident or occurrences of the same incident etc."

30. In another case titled as **Amitbhai Anilchandra Shah versus Central Bureau of Investigation and Anr.,** reported in **2013 AIR SCW 2353,** the Apex Could has laid down the same law. It is apt to reproduce relevant portion of para 52 and para 53 of the judgment herein:

"52. .....

d) Further, on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering FIR in the Station House Diary, the officer-in-charge of the police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code. Sub-section (8) of Section 173 of the Code empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report (s) to the Magistrate. A case of fresh investigation based on the second or successive FIRs not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same

transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173(2) has been forwarded to the Magistrate, is liable to be interfered with by the High Court by exercise of power under Section 482 of the Code or under Articles 226/227 of the Constitution.

e) First Information Report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the first FIR.

.....

53. In the light of the specific stand taken by the CBI before this Court in the earlier proceedings by way of assertion in the form of counter affidavit, status reports, etc. we are of the view that filing of the second FIR and fresh charge sheet is violative of fundamental rights under Article 14, 20 and 21 of the Constitution since the same relate to alleged offence in respect of which an FIR had already been filed and the court has taken cognizance. This Court categorically accepted the CBI's plea that killing of Tulsiram Prajapati is a part of the same series of cognizable offence forming part of the first FIR and in spite of the fact that this Court directed the CBI to "take over" the investigation and did not grant the relief as prayed, namely, registration of fresh FIR, the present action of CBI filing fresh FIR is contrary to various judicial pronouncements which is demonstrated in the earlier part of our judgment."

31. Admittedly, now, the investigation is complete and the Hon'ble High Court of Delhi has dismissed the writ petition as withdrawn while directing the writ petitioner to take recourse to the other legal remedies available. Thus, we deem it proper not to decide the issue.

32. Having said so, the writ petition is misconceived and is dismissed in limine.

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

State of H.P. through Secretary (GAD) .....Appellant

Versus

Shri Purushottam Sharma ...Respondent.

LPA No. 68 of 2015

Date of decision: 30th May, 2015.

Constitution of India, 1950- Article 226- State pleaded that it was not in a position to consider the cases of employees for the allotment of Government accommodation as per

their entitlement and prayed that government be directed to examine the cases of government servant and to make allotment as per the rule - statement is acceptable to the Counsel for the respondent - accordingly State directed to make allotment as per rules which would be subject to the outcome of the Writ Petition. (Para-4 and 5)

For the appellant: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan & Mr. Romesh Verma, Addl. AGs, and Mr. Kush Sharma, Deputy Advocate General.

For the respondent: Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

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

CMP No.5902/2015.

This application has been filed for preponement of date fixed in this appeal, i.e., 15th June, 2015. The learned counsel for the respondent has no objection in pre-poning the date fixed in this appeal. Thus, the application is granted and the appeal is taken up for hearing today itself. The application stands disposed of.

CMP (M) No. 338 of 2015.

2. The learned counsel for the respondent has no objection in case, the delay in filing the appeal is condoned. His statement is taken on record. Therefore, for the reasons stated in the application coupled with the statement made by the learned counsel for the respondent, the application is granted and the delay in filing the appeal is condoned. The application stands disposed of.

LPA No. 68 of 2015.

3. Issue notice. Mr. Subhash Sharma, Advocate waives notice on behalf of the respondent.

4. The learned Advocate General stated at the Bar that in terms of the interim orders passed by the learned Single Judge, the State/Competent Authority is not in a position to consider the cases of the employees for the allotment of government accommodation, as per their entitlement and prayed that the State/Competent Authority may be directed to examine their cases and make allotment, as per rules, occupying the field read with their eligibility. His statement is taken on record. The learned counsel for the respondent has no objection to this proposition. He stated at the Bar that the State/Competent Authority may be directed to make decision as per rules occupying the field but allotment may be kept subject to outcome of the writ petition. His statement is also taken on record.

5. In the given circumstances, we deem it proper to dispose of the appeal by providing that any exercise to be made shall be subject to outcome of the writ petition. Ordered accordingly.

6. We request the learned Single Judge to decide the writ petition, as early as possible, preferably within two weeks from today. List the writ petition before the appropriate Single Bench on **1st June, 2015.**

7. Accordingly, the LPA is disposed of, alongwith pending applications, if any. Dasti copy.

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