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SUBJECT INDEX

the operative portion of the judgment passed by the appellate court was silent regarding the relief granted – hence, the judgment and decree ordered to be rectified.

Title: Parkash Chand Sharma alias Mitter Dev Vs. Prem Kumar & ors. Page-1068

Code of Civil Procedure, 1908- Order 2 Rule 2- Plaintiffs had earlier filed a suit regarding 14 kanals 13 marlas, which was decreed- matter was carried to the Hon'ble High Court and was ultimately decided by High Court- plaintiffs were in possession of 57 kanals 13 marlas - they claimed that area was reduced to 14 kanals 13 marlas in 1951-52- this was not challenged by them in earlier suit- held, that it was not permissible for them to file a suit for the remaining land due to the bar created by the principles of res-judicata read with Order 2 Rule 2 of C.P.C.

Title: Premu and others Vs. Krishnu & ors. Page-1160

Code of Civil Procedure, 1908- Order 6 Rule 17- In a suit for injunction, the defendants conceded in the written statement that plaintiffs were owners in possession of half share of the property and they had inherited 1/4th share in the property- Defendants sought amendment of written statement claiming his share to the extent of ½ half share against the conceded share of 1/4th – application allowed by the trial court – no cause shown in the application, which necessitated the amendment- it was also not shown as to how the amendment was necessary for the just decision of the case – amendment sought was not clarificatory as claimed but would withdraw the admission about the share in the property - amendment wrongly allowed – petition allowed and application dismissed.

Title: Harbrinder Singh Vs. Rabinder Sidhu and others Page-1506

Code of Civil Procedure, 1908- Order 7 Rule 14- Petitioner filed an application for placing certain documents on record on the ground that the witnesses had wrongly mentioned that there was no tree, however, Khasra Girdawari showed that there were number of trees standing on the suit land- a prayer was made to place on record copy of Khasra Girdawari, Akas Musabi, certificate of Gram Panchayat, Will and the photographs-the application was rejected on the ground that it was filed late and the documents were not per se as permissible in law- held, that only those documents which have some semblance or are connected with lis can be place on record under Order 7 Rule 14 CPC- no issue was framed regarding the existence of trees on the suit land and thus the documents have no bearing on the dispute- the documents cannot be produced on record to contradict the testimonies of witnesses- the application was rightly dismissed by Court.

Title: Jeet Lal Vs. Kamaljeet Singh and others Page-1430

Code of Civil Procedure, 1908- Order 9 Rule 9 & order 17 Rule 2- Suit dismissed in default - application for restoration dismissed on merits-appeal there against dismissed by appellate court; hence revision-Advocate engaged by the plaintiff did not appear before the court - since there were no directions by the trial court to the parties to appear personally, therefore, absence of the plaintiffs was bona fide—plaintiff's rights cannot be foreclosed for negligence of his counsel - Revision allowed and suit restored to its original number.

Title: Jai Singh s/o late Sh. Narayan Singh & Ors. Vs. Santo Devi d/o Sh. Mansha Ram & Others Page-1427

Code of Civil Procedure,1908- Order 17 Rule 3- Plaintiff filed a suit for specific performance of agreement- during trial evidence of the plaintiff was closed by order of the Court as witnesses not produced- defendant's evidence also closed after few opportunities-

plaintiff was ill and had undergone surgery - plaintiff has taken all necessary steps by engaging his counsel and instructing him to take necessary steps to produce witnesses- plaintiff came to know about the closure of his evidence by the Court in November, 2014 and filed a petition in December, 2014- evidence wrongly closed by the trial Court by taking a hyper technical view- medical evidence placed by the plaintiff on record shows that he had sufficient cause for non-production of evidence- the orders closing plaintiff's evidence and later on defendant's evidence; quashed- one more opportunity granted to the plaintiff to lead evidence and defendant also permitted to lead evidence thereafter.

Title: Ravi Dutt Vs. Joga Singh Page-1648

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree of permanent prohibitory injunction was passed by the Court in favour of plaintiff- an Execution Petition was filed pleading that judgment debtors had disobeyed the decree and had occupied the suit land- it was specifically stated by decree holder that judgment debtors were interfering with the possession in the month of June, 2006- this was corroborated by other witnesses- Judgment debtors also asserted that they were in possession which was contrary to the findings given by the Court holding the plaintiff to be in possession- decree passed against the judgment debtors can be executed against the legal heirs.

Title: Rupa alias Rup Singh Vs. Kashmir Singh and others Page-1133

Code of Civil Procedure, 1908- Order 21 Rule 97- A judgment and decree was passed in favour of the respondent no. 1-he filed an execution petition–the appellant filed objection petition which was dismissed– appellant contended that the judgment debtor was missing and report to this effect was lodged with the police- the possession of legal heirs could not be disturbed - the grounds taken in the application were taken earlier and were adjudicated - an appeal preferred against the order was dismissed by the High Court- held that the appellant cannot be permitted to raise same issue time and again to defeat judgment and decree - framing of issues is not always necessary for the executing Court- Appeal dismissed.

Title: Manohar Lal Vs. Kusum Lata Malhotra and another Page-1028

Code of Civil Procedure, 1908- Order 23 Rule 1- Plaintiffs filed a suit for seeking declaration- defendants pleaded that they had become the owners after the conferment of the proprietary rights and that original owners had filed a suit which was dismissed- plaintiffs filed an application for seeking liberty to file a fresh suit on the same cause of action which was allowed- application for withdrawal was filed after seven years and six months of the filing of the suit- it was necessary for the plaintiffs to prove that there was a formal defect in the suit necessitating the withdrawal of the same- plaintiffs could have filed an application for amendment and cannot be permitted to start a fresh round of litigation- suit cannot be allowed to be withdrawn on the ground of defect of substance- petition allowed and the application filed by the plaintiff dismissed.

Title: Rajesh Kumar and others Vs. Roshan Lal and others Page-1055

Code of Civil Procedure, 1908- Order 26 Rule 9 and Section 26– Plaintiff filed a civil suit for mandatory injunction directing the defendant to ascertain the boundaries of his land by lawful demarcation-held that such suit is not maintainable-appointment of local commissioner in such a case by the court amounts to gathering the evidence for the party moving the application-the plaintiff must prima-facie show the right before availing the remedy.

Title: Pawan Kumar Vs. Pradeep Kumar Page-1309

Code of Civil Procedure, 1908- Order 39 Rule 7- Suit for possession decreed by trial court—appeal by defendant-application under Order 39 Rule 7 for appointment of L.C by the defendant in first appeal rejected – held, that application was not maintainable in the absence of main application under order 39 C.P.C - suits and appeals are governed by different provisions of C.P.C - application dismissed and liberty reserved to the applicant to file an application under Order 41 Rule 27 C.P.C.

Title: Shambhu Nath Vs. Gurpiara Singh Page-1173

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a application for injunction with a suit against the defendant- claiming temporary injunction restraining the defendant from causing interference in the suit land, destroying its boundary and raising construction- defendant came up with the case that there was a passage (pucca path) used by the public passing through suit land and he intended to lay water supply line through the same without causing any interference in the suit land- defendant placed on record sufficient material to show that he was deprived of water from the main scheme and have to approach even before Consumer Redressal Forum- defendant alleged that suit and application were filed to create hindrance in obtaining the water supply connection- plaintiff not produced any material to deny existence of path through the suit land- pucca path constructed by the panchayat- plaintiff was not to suffer irreparable loss and injury in case, defendant permitted to lay pipe line through pucca path- both Courts rightly came to the conclusion that water is necessity of life and Courts rightly declined temporary injunction- petition also dismissed.

Title: Mehar Chand alias Mehar Singh Vs. Kalyan Singh Page-1646

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Route permit was granted to the petitioner against the bus bearing registration No. HP-68-2281- petitioner had sold the bus to the respondent- trial Court concluded that since the permit was issued against the particular bus, therefore, permit stood transferred along with bus- held, that in view of Section 82 of Motor Vehicles Act, Route Permit can be transferred only with the written permission of the Transporting Authority and without such permission the same cannot be used- transfer of the ownership of the vehicle is different from the transfer of the permit- sale of vehicle does not mean, the transfer of the permit automatically- petition allowed and the order passed by the Courts holding that the route permit stood automatically transferred set aside.

Title: Rajiv Kumar Sharma Vs. Renu Sharma Page-1072

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellate Court has power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other substantial cause- true test is whether Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

Title: Om Devi and others Vs. Krishan Kumar and another Page-1062

Code of Civil Procedure, 1908- Order 47 Rule 1- Review petition was filed on the ground that as per clause 11 for grant of Nautor Scheme, 1975 a restriction of 15 years in respect of alienation has been provided whereas the Court had taken the period to be 20 years- Deputy Commissioner had only clarified his own order and the Court had wrongly concluded that he had reviewed it- Reply filed by official respondent admitted the time restriction for transfer to be 20 years and not 15 years - official respondents were the best authorities who could have

stated about the time restriction – the question regarding review/clarification of the order by Deputy Commissioner had already been adjudicated- the question sought to be raised in the review petition cannot be gone into because power of review cannot be exercised on the ground that decision is incorrect or erroneous on merit - the parties are not entitled to rehearing under the guise of review and the Court while exercising the power of review cannot sit in appeal over its own order- petition dismissed.

Title: Sh. Rajinder & others. Vs. Sh. Gokal Chand and others. (D.B.) Page-1373

Code of Criminal Procedure, 1973- Section 127- Maintenance of Rs. 400/- per month was awarded in favour of the respondent No. 1 and Rs. 250/- per month in favour of respondent No. 2- they preferred a petition for enhancement of maintenance amount which was allowed and the maintenance was enhanced to Rs. 1,400/- per month in favour of respondent No. 1 and Rs. 1,100/- per month in favour of respondent No. 2- petitioner contended that respondent No. 1 was working as a tailor- she was having two buffaloes and was earning Rs. 6,000/- to 7,000/- per month- however, petitioner had failed to prove this fact – he had also leveled serious allegations against his wife that she was leading life of adultery and he had doubted the paternity of respondent No. 2- Income of the petitioner has increased and the respondent no. 2 is undertaking higher education- held, that order was rightly passed by the Court – however, the order modified and maintenance was enhanced from the date of the filing of the petition and not from the date of the order.

Title: Dhani Ram Bhatia Vs. Kalawati and another Page-1008

Code of Criminal Procedure, 1973- Section 319- Injured filed an application for arraying respondents No. 2 and 3 as co-accused on the basis of statement of the witnesses recorded during trial- application was dismissed on the ground that there was no material on record to prima facie establish the complicity or the involvement of respondents No. 2 and 3 in the crime- held, that persons not named in the FIR or named in the FIR but not charge-sheeted can be summoned under Section 319 Cr.P.C provided that it appears from the evidence that such person can be tried with the accused already facing trial- Court must have reasonable satisfaction from the evidence already collected- respondent No. 3 was at a distant place and could not have given any instruction to open fire- application was filed after much delay - in these circumstances, order of dismissal of the application cannot be faulted.

Title: Ashok Kumar Vs. State of Himachal Pradesh & ors. Page-1330

Code of Criminal Procedure, 1973- Section 378(3)- Accused were acquitted of the commission of offences punishable under Sections 323, 341 and 506 read with Section 34 IPC by the trial court- appeal against acquittal was also dismissed- State filed an appeal against the acquittal- held, that there is no provision of regular second criminal appeal and such appeal is not maintainable before the High Court- appeal can only be preferred against the original acquittal order and not against the acquittal order affirmed by the Appellate Court.

Title: State of H.P. Vs. Shyam Lal S/o Mansa Ram and another Page-1389

Code of Criminal Procedure, 1973- Section 397- Deceased was driving the vehicle with excessive speed- he lost control over the vehicle due to which vehicle hit the wall and crushed one 'N'- 'N' suffered fatal wounds- a huge mob gathered at the site of the accident- they gave beatings to the driver- driver died due to the injuries sustained by him- postmortem report shows that death had taken place due to the blows of the stick- complainant had not stated that accused had wielded the sticks but had only stated that

accused had given kicks and fist blows- bail application filed by the accused was allowed and the revision was preferred against this order- held that prima facie accused are not involved in the commission of offence punishable under Section 302 read with Sections 147 and 149 of IPC and bail was rightly granted to them - petition dismissed.

Title: State of H.P. Vs. Rakesh Kumar alias Raku Page-1137

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offence punishable under section 406 I.P.C- record reveals family dispute between the parties- Rule is in favour of bail and not jail- nothing on the record that the interest of state and General Public shall be prejudiced in case applicant is released on bail -application allowed.

Title: Usha Massand wife of Shri Anand Prakash Massand Vs. State of H.P.

Page-1463

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offence punishable under section 406 I.P.C- record reveals the existence of family dispute between the parties- Rule is in favour of bail and not jail- nothing on the record to show that the interest of state and General Public shall be prejudiced in case applicant is released on bail- application allowed.

Title: Anand Prakash Massand son of late Shri Ochi Ram Massand Vs. State of H.P.

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Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302, 452, 323, 504, 506 and 34 of IPC- it is not permissible for the Court granting the bail to appreciate the testimony of witnesses when the prosecution evidence is being led – petitioner cannot claim to be released on bail on the ground that another female accused has been released on bail as the female accused is covered by a special provision - while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- petitioner is facing heinous and grave criminal charges of murder- evidence is being recorded and in case of release on bail, trial would be adversely effected- petition dismissed.

Title: Vijay Kumar Son of Sh Balak Ram Vs. State of H.P. Page-1176

Code of Criminal Procedure, 1973- Section 482- An order rejecting an application for summoning the accused filed under Section 319 of Cr.P.C cannot be said to be an interlocutory order as the order decides certain rights of the parties and would be assailable only by revision and not by filing a petition under Section 482 of Cr.P.C.

Title: Ashok Kumar Vs. State of Himachal Pradesh & ors. Page-1330

Companies Act, 1956- Section 483- Respondent No. 1 filed a petition for winding up of respondent No. 2 which is pending adjudication- an application for appointment of official liquidator was filed on which company court appointed an official liquidator as provisional liquidator- appeal was filed against the order- held, that object of appointing a provisional liquidator is to ensure fair distribution of the assets of the company- such application is not to be ordinarily allowed except on a petition of the creditor who has been unable to obtain

payment of his money or unless the company asks for or agrees to the appointment- a strong prima facie case is to be made out for appointment of liquidator and the Court is required to satisfy itself that it would be just, equitable and proper to appoint a provisional liquidator in the interest of the company- appeal allowed and the matter remitted back for decision afresh.

Title: Umak Investment Company Pvt. Ltd. Vs. M/s Business Associates (Delhi) Pvt. Ltd. and others (D.B.) Page-1396

Constitution of India, 1950- Article 12- Co-operative Society is not a State within the meaning of Article 12 of the Constitution of India and no writ lies against it- hence, writ petition dismissed as not maintainable.

Title: Anil Kumar Vs. The State of HP and others (D.B.) Page-1640

Constitution of India, 1950- Article 226- 16 years old son of the petitioner had died- held, that it is the duty of the Court to make such interim order which are required in the facts and circumstances of the case- interim compensation can be awarded in the writ petition- hence, interim compensation of Rs.1 lac awarded in favour of the petitioner.

Title: Mangal Chand Vs. State of H.P. & others (D.B.) Page-1204

Constitution of India, 1950- Article 226- A partition application was filed, which was allowed- final partition was to be carried out in accordance with the approved mode of partition- Divisional Commissioner observed that Assistant Collector 1st Grade had prepared three khatas and had created a new path in violation of sanctioned mode of partition- it was necessary for the Assistant Collector 1st Grade to seek necessary approval of the Competent Authority to review mode of partition - he made a recommendation to Financial Commissioner (Appeals) for passing a fresh order- this recommendation was rejected by Financial Commissioner (Appeals) and the revision preferred by the appellant was allowed- Financial Commissioner (Appeals) directed to consider the recommendation of the Divisional Commissioner as well as the grounds taken in the Revision Petition and hear the parties afresh and to pass an appropriate order.

Title: Karan Singh Vs. Shakuntala Devi & others (D.B.) Page-1154

Constitution of India, 1950- Article 226- Allegations of misappropriation were made against the petitioner as she was working as a Pradhan- a show cause notice was served upon her-she submitted her reply- another inquiry was got conducted by B.D.O. for non signing of a cheque for an amount of Rs. 50,000/- the petitioner pleaded that this notice was never served upon her and therefore, no reply was filed by her- the petitioner was placed under suspension – respondents specifically stated in their reply that show cause notice was duly served upon the petitioner- the petitioner has not filed rejoinder to the reply which means that the allegations made in the reply have gone unrebutted- the petitioner has an alternative efficacious remedy available to her under Section 148 of H.P. Panchayati Raj Act- held, that when alternative efficacious remedy is available to the petitioner, the writ petition is not maintainable at her instance- Petition dismissed.

Title: Champa Devi Vs. State of H.P. & another. (D.B.) Page-1407

Constitution of India, 1950- Article 226- Appellant was an employee of the respondent board - he filed an application for seeking direction to consider his case for promotion, to fix his seniority and to release the selection grade in his favour- the application was dismissed-

the petition was filed after 19 years- held, that the petition of a person who does not seek relief within time has to be dismissed on the ground of delay and latches - the petitioner had not given any reason for the delay and his application was rightly dismissed.
Title: Inder Singh Vs. HP State Electricity Board (D.B.) Page-1419

Constitution of India, 1950- Article 226- Directions were issued by the High Court on which a Committee was convened and it was decided that auction will be the only viable method to fulfill the directions issued by the High Court- Divisional Forest Officers were directed to conduct the auction and to monitor the exercise- State prayed that it should be permitted to carry out the auction – State directed to conduct videography of the apple trees, other fruit bearing trees and the crops standing on the encroached land and also of the auction proceedings- State directed to proceed with FIR registered against the encroacher.
Title: Court on its own motion Ref:- Krishan Chand Vs. The State of H.P. & others (D.B.)
Page-1191

Constitution of India, 1950- Article 226- Government issued a notification providing that admission shall be made on the basis of National Common Entrance Test- petitioner prayed that it may be permitted to admit students on the basis of merit obtained in a written test to be conducted by it - State Government had issued an Essentiality Certificate in which it was provided that institution will have to abide by the guidelines/terms issued by Medical Council of India and State Government and the admission, fee structure and related issues shall be governed as per H.P. Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006- therefore, petitioner/University cannot rely upon the statute to claim a right of admission against the Essentiality Certificate- it is governed by Medical Council of India and is bound to follow the instructions issued by it- petition dismissed.
Title: Maharishi Markendeshwar University Vs. State of Himachal Pradesh and others (D.B.)
Page-1610

Constitution of India, 1950- Article 226- Liquor vend licence was granted to the petitioner for the year 2014-2015- State Government decided to renew the old licences to the same vendors provided they were ready to pay 15% hike in the licence fee- petitioner pleaded that respondents had unilaterally clubbed the units and were wrongly putting the clubbed units to auction by lottery system- respondents pleaded that units were regrouped for the purpose of revenue- held, that there is no fundamental right to do trade or business in intoxicants- however, State cannot act arbitrarily - it must comply with the quality while granting right or privilege of manufacturing or selling liquor- Court should not interfere with the policy decision, unless the policy suffers from malafide, unreasonableness, arbitrariness or unfairness- State is within its right to club the units and to allot them- a person does not acquire any right to get the allotment on deposit of money required from the allotment- a public notice was issued to every person and the petitioner had right to file fresh application for clubbing the units- petition dismissed.
Title: Satish Singh Vs. The State of H.P. and others (D.B.) Page-1165

Constitution of India, 1950- Article 226- Petitioner, an employee of co-operative society, filed a Writ Petition against the society claiming that he be allowed to continue with his services till he attains the age of 58 years- held, that co-operative society does not fall within the definition of State- no Writ Petition lies against it- petition dismissed.
Title: Mohar Singh Thakur Vs. State of H.P. and others (D.B.) Page-1651

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition for directing the State and Wakf Authority to evict unauthorized person and to remove encroachment made in the mosques at Shimla- Wakf authorities had arrived at a settlement with the occupants of the hall which shows that their possession was permissive- the authorities directed to take action in the matter and to decide the matter as early as possible preferably in four weeks.

Title: Imran Khan Vs. State of H.P. & others (D.B.) Page-1194

Constitution of India, 1950- Article 226- Petitioner filed an application before the Tribunal seeking a direction to the respondents to treat the petitioner eligible for promotion for the post of Principal, to consider his case for the said post and to release all the consequential benefits- petition was allowed and the respondents were directed to consider the case of the petitioner for promotion to the post of Principal from the due date and it was not determined by the writ Court - whether the writ petitioner was eligible and whether relaxation granted at the entry level can be granted at the time of promotion- appeal allowed and the order remitted to Administrative Tribunal for a fresh decision.

Title: State of Himachal Pradesh and another Vs. Inder Mohan Sharma (D.B.)
Page-1311

Constitution of India, 1950- Article 226- Petitioner pleaded that he was not being paid grant-in-aid- he pleaded that three teachers were appointed subsequent to his appointment and they are being paid grant-in-aid- held, that case of the petitioner should have been treated on parity with three teachers and he should not have been discriminated- respondents are directed to release the grant-in-aid to the petitioner on parity with three teachers.

Title: Hem Raj Sharma Vs. State of H.P. and others (D.B.) Page-1247

Constitution of India, 1950- Article 226- Petitioner prayed for quashing of water supply order and also prayed for free water supply to his farm at State expenses- perusal of order reveals that it was passed in public interest- private interest of the petitioner cannot override the public interest- moreover writ is not maintainable when there is a factual dispute- authorities directed to provide water facility to the petitioner as per statute -Writ petition dismissed.

Title: Capt. H.C. Chandel S/o Late Anant Ram. Vs. State of H.P. & others Page-1404

Constitution of India, 1950- Article 226- Petitioner sought a direction to the respondent to process his case for allotment of the Retail Outlet as per advertisement- petitioner had filed an affidavit that in case of her selection, she will provide assistance to the extent of Rs. 21,54,822/- she filed a letter issued by Block Education Officer that amount lying in the GPF account of the mother of the petitioner can be released at any point of time- respondent informed that amount lying in the GPF account was not taken into consideration as per dealership selection guidelines and the petitioner did not have the document to show that she was in possession of Rs. 25 lacs- held, that it was nowhere provided in the Brochure that amount lying in the GPF of the person or his family members is to be excluded- respondent relied upon the communication addressed by AG Office but this communication was subsequent to the date of rejection- amount lying in the GPF is the property of the employee and the respondent had wrongly excluded amount from consideration.

Title: Akhil Kumar Vs. Indian Oil Corporation Limited(D.B.) Page-1578

Constitution of India, 1950- Article 226- Petitioner was appointed as an Anganwari worker pursuant to the decision made by Deputy Commissioner- this decision was affirmed by Divisional Commissioner- appointment of the petitioner was challenged by respondent No. 3 which was accepted- petitioner filed an appeal before Divisional Commissioner which was dismissed- clause 2 of the Scheme provided that an appeal can be preferred within 15 days before Deputy Commissioner and thereafter within 15 days before the Divisional Commissioner from the date of declaration of the result- result was declared on 9.8.2007 and the appeal was filed on 11.4.2008- held that appeal preferred by respondent No. 3 was barred by limitation and appeal could not have been preferred from the date of the appointment of the petitioner in view of express clause of the Scheme.

Title: Asha Devi Vs. State of H.P & others Page-1139

Constitution of India, 1950- Article 226- Petitioner was appointed as Water Carrier on daily wages and thereafter as part time contingent paid Sweeper- he filed a writ petition seeking the benefit of the services rendered by him on daily wages- petitioner was engaged purely on temporary basis as a stop gap arrangement out of the College amalgamated funds against leave vacancy with the condition that services will be terminated on joining of the regular employee- held, that petition was rightly dismissed by the writ Court.

Title: Sita Ram Vs. State of Himachal Pradesh and another (D.B.) Page-1310

Constitution of India, 1950- Article 226- Petitioner was declared elected in an election to Panchayat- respondent No. 5 instituted an Election Petition challenging the eligibility of the petitioner to contest the election- Election Petition was dismissed, however, decision was reversed in the appeal- respondent No. 3 had contended that petitioner was an encroacher on the government land – petitioner stated that she had abandoned the government land more than six years prior to the date of the election- petitioner had sworn an affidavit stating that she was not holding any government land as encroacher- held, that it was for the petitioner to lead the satisfactory evidence to show that she had abandoned/left the government land six years prior to the date of the election and in absence of it, her plea cannot be accepted- appeal dismissed.

Title: Sahani Devi Vs. State of H.P. & Others Page-1076

Constitution of India, 1950- Article 226- Petitioner was deputed to drive a departmental vehicle from Shimla to Kalka- he reported that when he was returning from Kalka, he got down from the vehicle - he was overpowered by some unknown persons and was drugged by them- He regained consciousness and found himself at his residence- he was brought to his residence by some unknown person - the vehicle had met with an accident on the evening of the same day causing loss of Rs. 59,190/-departmental proceedings were initiated against the petitioner and Inquiry Officer rejected the version of the petitioner- he concluded that the petitioner had driven the vehicle in a negligent manner- he was ordered to be removed from service- held that the version of the petitioner that he was drugged due to which he became unconscious and was taken to his residence is inherently improbable- the name of the person who brought the petitioner to his residence was not revealed- it was also not revealed as to how the witness could have come to know about the residence of the petitioner- speaking order was passed by the authorities– it is not permissible to interfere with the decision of Administrative Authorities unless it is shocking to the conscience of the Court- the order was rightly passed – petition dismissed.

Title: Gulshan Kumar Vs. State of H.P. & anr. Page-1125

Constitution of India, 1950- Article 226- Petitioner was posted on secondment basis with respondent No. 3- services of the writ petitioner stood repatriated to the parent department- he was posted in the Office of Deputy Commissioner, Mandi on secondment basis- held, that writ petitioner is an employee of the State and the State has discretion to send him on deputation and to repatriate his services- petition dismissed.

Title: Pinjar Singh Vs. State of Himachal Pradesh and others (D.B.) Page-1350

Constitution of India, 1950- Article 226- Petitioner was selected for the post of Anganwari Worker but her appointment was cancelled on the application filed by respondent No. 4 by Deputy Commissioner- appeal preferred by the petitioner was dismissed- record showed that appointment letter was issued to the petitioner on 4.8.2007 and the appeal was filed by respondent No. 4 on 21.8.2007- respondent No. 4 pleaded that she came to know about the declaration of the result only on 8.8.2007- held, that in absence of any material, it cannot be said as to when result was declared and when it was notified or published- appeal preferred within 15 days of the knowledge cannot be said to be barred by limitation- there was no recommendation of Block Development Officer nor any order was passed by Sub Divisional Officer (C) for separation of the family of the petitioner- hence, plea of the petitioner that his family had separated on or before 1.1.2014 is not acceptable- order was rightly passed by Deputy Commissioner- petition dismissed.

Title: Krishna Devi Vs. State of H.P. & ors. Page-1250

Constitution of India, 1950- Article 226- Petitioner was senior to respondents No. 3 to 8- however, she was not confirmed and was placed below respondents No. 3 to 8 in the seniority list- she filed a writ Petition which was ordered to be treated as representation- representation was rejected on the ground that instructions to delink the seniority from confirmation came into force after finalization of her seniority- held, that practice of linking seniority with confirmation was deprecated by Supreme Court and the seniority could not have been linked with the confirmation- instructions cannot postpone the law laid down by Supreme Court to some later date.

Title: State of H.P. and another Vs. Chander Kanta and others (D.B.) Page- 1466

Constitution of India, 1950- Article 226- Respondents No.2 to 4 issued an advertisement for eliciting applications from the candidates falling in the handicapped quota for participation in an auction regarding the shop/stall – petitioner along with one 'D' participated in an auction – petitioner was the highest bidder, however, his bid was cancelled on the ground that only two persons had participated in the bid- held, that no material was placed on record to show that bid was cancelled on the ground that highest bid offered by the petitioner was lesser than the one offered by the allottees regarding the similar properties- writ petition allowed.

Title: Yogesh Mehta Vs. State of H.P. and others Page-1638

Constitution of India, 1950- Article 226- Respondents were directed to consider the case of the petitioner for claiming extraordinary pension- held, that pension is the right of employee and cannot be denied on the ground of delay and latches- appeal dismissed.

Title: Himachal Pradesh State Electricity Board & another Vs. Joginder Singh Attal Page-1650

Constitution of India, 1950- Article 226- Selection process for filling up the post of water carrier for Government Primary School was initiated in which both the appellant and respondent no. 4 participated- name of appellant was recommended by the Selection Committee- the selection was challenged on the ground that selection was against the policy/ instructions/ guidelines and notification of the government- the appointment of appellant was quashed on the ground that the Revenue record did not reflect that gift was made by appellant but shows that the gift made by "N" - the procedure prescribed under H.P. Panchayati Raj Rules was not followed while entering the name of the appellant in the family register of "N"- held that "N" was alive at the time of the selection – the will would come into operation after his death and therefore, the revenue record would only reflect the gift made by "N" and not by the appellant –no reasons are required to be recorded for executing a Will - it was not specified in the order as to how the procedure prescribed under the Rules was not followed-appeal allowed and the order passed by Writ Court set aside.
Title: Dabey Ram Vs. State of H.P. & others.(D.B.) Page-1365

Constitution of India, 1950- Article 226- State filed a Writ Petition against the award passed by the Labour Court on the grounds of delay in approaching the authorities and delay in reference by the appropriate government to the Labour Court- grounds are not available- held, that the remedy available was to challenge the order making the reference and not to challenge the award passed by the Labour Court- petition dismissed.
Title: State of H.P. and another Vs. Raj Kumar Page-1660

Constitution of India, 1950- Article 226- State Government issued a notification declaring the areas of Tahliwal as Nagar Panchayat of Tahliwal- petitioner contended that the declaration was contrary to the Constitution of India, H.P. Panchayati Raj Act and Himachal Pradesh Municipal Act, 1994 – respondents contended that notification was issued in the larger public interest and the Gram Panchayat could not authorize the petitioner for institution of the writ petition- held, that right to file the writ petition cannot be curtailed by the rules framed by the Government- State Government is empowered to issue notification to constitute the municipalities and specify the class to which a municipality shall belong – no violation of mandatory provision of H.P. Municipal Act could be established- Government is not required to consult Panchayat Samiti, the area of which is included in the municipality – the panchayat area had acquired the urban character after the establishment of the industrial units- objections were called and heard - the Government had complied with the requirements of principles of natural justice- petition dismissed.
Title: Gram Panchayat, Nangal Kalan Vs. State of H.P. & ors. (D.B.) Page-1582

Constitution of India, 1950- Article 226- Two writ petitions had been filed challenging one notification- writ petitions were allowed and the notification was quashed- appeal was allowed in one writ petition- no appeal was preferred in second writ petition- held, that second judgment quashing the notification had attained finality and the appeal in the second case challenging the quashing of notification will not be maintainable.
Title: Ranjit Singh and others Vs. State of H.P. and others (D.B.) Page-1641

Constitution of India, 1950- Article 226- Writ Court had quashed the order and had granted the liberty to the appellants to conduct a fresh inquiry- appellants apprehended that writ petitioner had retired and that fact may not come in their way while conducting fresh inquiry- held, that inquiry initiated prior to the retirement of the employee can be continued even after his retirement.
Title: State of HP and others Vs. Ramji Dass (D.B.) Page- 1175

Constitution of India, 1950- Article 227- **Himachal Pradesh Co-operative Societies Rules, 1971-** Section 94- Chief Secretary to the Government held that general body meeting was not held in terms of mandate of the provision and the entire exercise of bye-laws suffers from procedural defects- writ petitions were filed challenging this order – land of villagers of Gram Panchayats Mangal and Beral were acquired for the construction of cement project and a society was constituted to provide transport business for the landless losers, houseless and affected persons of Gram Panchayats Mangal and Beral – bye-laws were amended in a meeting dated 19.07.2009- this gave rise to dispute between the parties - Registrar directed to deregister the amendments carried out in the general house- an appeal was preferred which was allowed and the case was remanded to the Registrar – Chief Secretary held in revision that amendments were valid- held, that Chief Secretary and the Registrar were to keep in mind that procedure is meant to further the ends of the justice and not to frustrate the same- They were within their power to pass any order which they thought proper in the facts and circumstances of the case and it was their duty to set the controversy at rest by passing an appropriate order- however, order had left the parties in a lurch- case remanded to Registrar Co-operative Societies to pass a fresh order in accordance with law.

Title: Thakur Dass Bhardwaj and others Vs. State of Himachal Pradesh and others (D.B.)
Page-1221

Contempt of Courts Act, 1971- Section 12- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A and 406 of IPC- one of the accused was arrested and was granted bail by the Court- another accused was granted pre-arrest bail by the High Court- it was contended that parties were litigating before the Civil Court and the police had violated the directions of the Apex Court- held, that the police had not made any haste in arresting the accused-the accused moved an application seeking pre-arrest bail which was granted hence it cannot be said that the police had violated the judgment of the Apex Court or that the police had committed contempt.

Title: Arjanbir Singh Likhari Vs. D.W. Negi, and others. Page-1121

'E'

Employees Compensation Act, 1923- Section 22- Deceased was a driver of the vehicle which met with an accident – he was aged 21 years- his salary was Rs. 4,500/- per month and he was being paid Rs. 120/- as daily diet money- held that diet money paid to the driver falls within the definition of income and has to be taken into consideration while assessing the compensation- the Insurance Policy did not exclude the provisions of interest, therefore, the Insurance Company is liable to pay the interest on the compensation from the date of the accident.

Title: Shriram General Insurance Company Limited Vs. Leela Vati and others
Page-1046

'H'

Hindu Marriage Act, 1955- Section 13- Husband filing a divorce petition against the wife on the ground of cruelty alleging that wife along with her relatives compelled him to leave the job- further, alleging that wife use to threaten to consume poison and implicate him in false case- further, alleging that the child born to the wife was not conceived from the lions of appellant and lateron false entries recorded in the Hospital qua pregnancy and delivery of child- appellant opted voluntarily for DNA test- as per report appellant was biological father of child- result of genuine DNA test is said to scientifically accurate- appellant thus failed to

simply because there was delay in filing the application- the Court had rightly allowed the application- petition dismissed.

Title: Ashwani Sood Vs. Mohini Devi Sood and another Page-1355

Indian Evidence Act, 1872- Section 45- Defendant moved an application for allowing handwriting expert to take photographs of the disputed agreement to sell for expert opinion and to produce the same in the Court- application was allowed by the Court- defendant No.1 had denied the execution of the agreement and stated that plaintiff used to take her signatures on blank papers- execution of the agreement to sell is under dispute- held that application for comparison of signatures can be filed at any stage and it cannot be rejected simply because there was delay in filing the application- the Court had rightly allowed the application- petition dismissed.

Title: Ashwani Sood Vs. Mohini Devi Sood and another Page-1360

Indian Evidence Act, 1872- Section 112- Parties cannot be compelled to subject themselves to undergo blood test in maintenance proceedings- there is a presumption that a child born during the substance of marriage is legitimate child and no adverse inference can be drawn against wife for refusing to subject herself to blood test.

Title: Dhani Ram Bhatia Vs. Kalawati and another Page-1008

Indian Evidence Act, 1872- Section 112- Plaintiff filed a suit seeking declaration that defendant No. 6 is neither legitimate nor illegitimate son and his name recorded as father of the defendant No. 6 in the birth certificate of M.C. Mandi and Gram Panchayat be declared wrong- application was filed by him during the pendency of the suit for conducting DNA test which was allowed by the trial Court- held, that the mother of defendant no. 6 had herself admitted that she was not married to the plaintiff and defendant No. 6 was born out of sexual relation between her and the plaintiff - it was necessary to conduct the DNA test to ascertain the truth regarding the allegations made by the mother and to save defendant No. 5 from possible stigma of being called a bastard in the society- petition dismissed.

Title: Narinder Kumar Vs. Tej Ram alias Taru Ram and others Page-1496

Indian Evidence Act, 1872- Section 146- Petitioners are accused of the commission of offence punishable under Section 354-A IPC read with Section 34- they filed an application for summoning the case file from various courts to prove long standing civil and criminal litigation initiated by petitioner no. 1 against the prosecutrix – the application was dismissed on the ground that prosecutrix can be confronted with certified copies of the record, which is per se admissible under Section 76 of Indian Evidence Act – further, the petitioner will have an opportunity to lead the defence - no previous statement of the prosecutrix was to be proved with which the prosecutrix was to be confronted – held, that cross-examination is an effective mean for extracting the truth- a person is required to put his case in cross-examination otherwise the version of the witness has to be taken as accepted- the prosecutrix could not have been confronted in the defence and in case her testimony was not confronted with the documents, her testimony would go unchallenged- an opportunity has to be given to the party to confront a witness and merely because the record speaks for itself can be no ground for denying the cross-examination of a witness - Petition allowed and the order passed by Magistrate set-aside.

Title: Sh. Kamal Parkash and another Vs. State of Himachal Pradesh Page-1347

Indian Penal Code, 1860- Sections 191 and 192- An application was filed for initiation of Court complaint before appropriate Court against the plaintiff, defendant no.1 and defendant no. 5 for furnishing fabricated documents, making false statements etc.- it was contended on behalf of the respondents that application under C.P.C. is not maintainable and the application was to be filed under Cr.P.C. – the document was not forged when it was custodia legis- held that mere wrong provisions or non mentioning of provisions of law will not vitiate the exercise of powers when the power can be traced to a source available in law - when the document was not forged after its production in the Court, there is no embargo on the power of Court to take cognizance on the basis of the complaint and the Court would not act as a complainant– no allegations was made that the documents was forged when it was in the custody of the Court hence, application dismissed with liberty to the petitioner to avail other remedy as may be available in law.
Title: Mrs. Seema Sahai Vs. Sh. Daljit Singh Sahi and others Page-1351

Indian Penal Code, 1860- Section 306- Deceased was treated with cruelty due to which she committed suicide by jumping into a rivulet – held, that there should be a direct nexus between abetment and suicide- prosecution witnesses had not deposed that accused had abetted the deceased to commit suicide- therefore, accused cannot be held liable for the commission of offence punishable under Section 306 of IPC.
Title: State of Himachal Pradesh Vs. Jatinder Kumar son of Shri Purshotam Chand and others Page-1377

Indian Penal Code, 1860- Section 376- Prosecutrix had gone to urinate but she had not returned- she was found by her mother to be coming out from the house of the accused- prosecutrix told her mother that accused used to give her biscuits and to take her to his residence- prosecutrix also told her that accused had committed sexual intercourse with her and had told her not to disclose this fact to any person- prosecutrix was aged 13 years and was mentally weak – the version of the prosecutrix was supported by her parents- DNA profile obtained from the shirt and vaginal slides of prosecutrix matched with the DNA profile obtained from the blood sample of the accused- this report also corroborates the version of the prosecution- held, that in these circumstances, accused was rightly convicted.
Title: Vipan Kumar Vs. State of H.P. (D.B.) Page-1240

Indian Penal Code, 1860- Section 498-A- Marriage of the deceased was solemnized with 'J' in 2003- accused ill-treated the deceased in her matrimonial home at Ludhiana- accused did not allow the deceased to meet or telephone her parents- deceased left her home and was not traceable- her dead body was found in a rivulet- it was duly proved by the testimonies of the prosecution witnesses that accused had treated the deceased with cruelty- this version was corroborated by the compromise effected between the parties- held, that husband is guilty of the commission of offence punishable under Section 498-A of IPC.
Title: State of Himachal Pradesh Vs. Jatinder Kumar son of Shri Purshotam Chand and others Page-1377

Indian Penal Code, 1860- Sections 147, 148, 307, 323, 326 and **Indian Arms Act, 1959-** Section 25- Complainant was coming from Ghanahatti bazaar- when he had covered some distance, a Maruti Car came from back side- accused "G" came out from the car and fired at the complainant- gun shot hit right eye of the complainant - complainant grappled with the accused and snatched country made pistol- In the meantime, another occupant sitting on the driver seat came out of the vehicle and fired at the complainant, however the gun shot missed the complainant - complainant rushed towards the jungle and asked PW-2 to inform

the jail authorities- the version of the complainant was supported by other witnesses – the medical officers had noticed an entry wound which could have been caused by a bullet – the complainant knew the accused prior to the incident and therefore it was not necessary to conduct test identification parade– held, that the prosecution had succeeded in proving its case and the accused were rightly convicted.
Title: Amrish Rana Vs. State of Himachal Pradesh Page-1292

Indian Penal Code, 1860- Sections 302, 102 and 34- Deceased consumed alcohol – he went to sleep and asked his wife not to wake him up- husband did not wake on calling- he was found dead with blue mark on the left side of the neck- a complaint was made against the wife that she had killed her husband and had manipulated a false story- post mortem examination revealed that deceased had died due to asphyxia caused by strangulation- witnesses to disclosure statement did not support the prosecution version- recovery was doubtful- prosecution witnesses had not narrated the incident to any person- medical evidence pointed towards hanging and not strangulation- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- accused acquitted.
Title: Sukhdev alias Sonu alias Deepa alias Sukha Vs. State of H.P. (D.B.)
Page-1668

Indian Penal Code, 1860- Sections 302, 307, 325 and 323 IPC and **Indian Arms Act, 1959-**Section 27- PW-5 was sitting in his courtyard when the accused fired at him- he fell down and was taken inside- accused also fired at 'J' and 'R'- injured were taken to hospital- 'R' died on the way to IGMC, Shimla- Medical Officer opined that injury sustained by the injured and deceased could have been caused by gunshot- deceased had died from firearm injury leading to rupture of vital organs along with hemorrhage- merely because, witnesses are closely related to the deceased is not sufficient to discard their testimonies- the reason for firing at deceased and the injured is the litigation going on between the parties- more particularly, accused had lost his case before S.D.M., accused had knowledge that shooting from a firearm from the close range may result in the death of the person- held, that accused was rightly convicted by the trial Court.
Title: Raj Kumar Vs. State of Himachal Pradesh (D.B.) Page-1209

Indian Penal Code, 1860- Sections 302, 323, 147 read with Section 149- Complainant had come to the college as usual- he called 'A' to come with the vehicle- 4-5 boys and girls boarded the vehicle - when they were at some distance, accused came from behind on a bike and stopped his bike in front of the vehicle- he started misbehaving with a girl sitting in the vehicle- accused threatened the occupants of the vehicle- accused formed an unlawful assembly and started beating the members of the complainant party- 'R' became unconscious and was taken to hospital, where he was declared brought dead- eye-witnesses supported the prosecution version- their testimonies corroborated each other- medical evidence showed that deceased had died due to haemorrhagic shock as a result of haemothorax due to laceration of lung and sub-arachnoid haemorrhage (brain)- there were no contradictions in the testimonies of the prosecution witnesses- defence version that injuries were sustained in an accident was not believable as no damage was noticed to the motorcycle- accused had knowledge that banging the head of the deceased against the concrete would cause fatal injury on the head and therefore, they are liable for the commission of offence punishable under Section 304 Part-II of the IPC besides for offences punishable under Sections 147, 323 read with Section 149 IPC.
Title: Sandeep Kumar and another Vs. State of Himachal Pradesh (D.B.)
Page-1511

Indian Penal Code, 1860- Sections 320 and 498-A- Deceased was taken to the Hospital as a burn case- she made a statement that accused had poured the kerosene on her and had ignited with match stick- subsequently, she succumbed to her injuries- trial Court had discarded the dying declaration- PW-18 had moved an application before the Medical Officer seeking his opinion regarding the feasibility of recording the statement- Medical Officer made an endorsement that she was fit to make the statement- she made a subsequent statement that she had put herself on fire- however, subsequent statement was not endorsed by the Doctor- trial Court had erred in discarding the statement- it was duly proved by the statements of witnesses that accused had sprinkled kerosene on deceased and had put her on fire- second statement is doubtful and could not have been relied upon- accused No. 2 to 10 were aware of the commission of offence by accused No. 1 and despite this they had obtained second dying declaration to screen the accused No. 1 from legal punishment - accused had failed to prove alibi taken by accused- accused No. 1 convicted of the commission of offence punishable under Section 302 of IPC and accused No. 2 to 10 were convicted of the commission of offence punishable under Section 201 read with Section 34 of IPC.

Title: State of H.P. Vs. Kishori Lal & ors. Page-1079

Indian Penal Code, 1860- Sections 363, 366, 376 and 342- Prosecutrix was found missing from her home- complainant received a call from the accused threatening her that she would not be spared in case of any harm to the prosecutrix- call was traced and the accused was arrested- prosecutrix earlier refused to undergo medical examination but subsequently, she was medically examined- prosecutrix was proved to be 15 years 2 months of age- Medical Officer proved that she was subjected to coitus which corroborates the version of the prosecutrix- Since prosecutrix was minor, she was not capable of giving consent- however, there was evidence on record to show that prosecutrix had voluntarily accompanied the accused- therefore, conviction upheld but the sentence reduced.

Title: Baldev Singh Vs. State of Himachal Pradesh Page-1546

Indian Penal Code, 1860- Sections 366, 376, 376(g), 342, 506 read with Section 34 and Section 120B- Prosecutrix was kidnapped by accused 'M' and was taken to a village where she was raped – accused 'I' brought some papers which she was forced to sign as Mehruffa Begum- she was taken to Ner Chowk where she was again subjected to rape- she was taken to village Bagayan and thereafter to village Gazipur- she was raped by accused 'L' and when she made a complaint to accused 'N', she was subjected to indecent act- matter was reported to police- held that testimony of the prosecutrix can be relied upon but where there are reasons not to accept her version on its face value, the court may look for corroboration – Medical Officer had not found any injury on the body of the prosecutrix- prosecutrix is aged more than 18 years- she had reported the matter to police after 11 months- no satisfactory explanation was given for the same- prosecutrix admitted that she resided in open place to which she had free access – she had not narrated the incident to any person- she travelled alone from Ner Chowk to Ropar in a bus but had not made any complaint - in these circumstances, version of the prosecution that accused had raped the prosecutrix cannot be accepted and the trial Court had rightly acquitted the accused.

Title: State of Himachal Pradesh Vs. Mohammad Yaqub and others (D.B.)

Page-1528

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was raped in a Nalla- she claimed that she was sent by the wife of a priest to bring blanket but the wife of the priest denied this fact- she even denied the presence of the prosecutrix – prosecutrix further

deposed that 15-20 boys came and damaged the motorcycle of the accused- however, motorcycle was not found to be damaged- prosecutrix had apprised 'K' about the incident , however, 'K' was not examined- other witnesses had not supported the prosecutrix regarding the circumstances surrounding the incident- there was delay in lodging of FIR- held, that in these circumstances, accused was rightly acquitted.

Title: State of Himachal Pradesh Vs. Dumnu Ram (D.B.) Page-1520

Indian Penal Code, 1860- Sections 376, 342 and 506- Accused subjected the prosecutrix to forcible sexual intercourse- the prosecutrix resisted the act of the accused and the accused sustained injuries on his nose and ear- the matter was narrated by her to her husband, who confronted the accused- the matter was subsequently reported to the police on which FIR was registered- Police had not got the DNA profiling done despite the medical advise- the genesis of the incident was doubtful because it was admitted that entry of ladies was not permitted in the guest house- there was no reason for the husband of the prosecutrix to send her to the guest house- there was no evidence that the prosecutrix used to visit the guest house earlier - she did not shout for help at the time of incident- there were no injuries on her person- her clothes were not torn- there were contradictions and improvements in her testimony – held that in these circumstances the accused was rightly acquitted by the Trial Court.

Title: State of Himachal Pradesh Vs. Lekh Ram (D.B.) Page-1467

Indian Penal Code, 1860- Section 377- Accused committed sodomy with the victim- Medical Officer found injuries on the person of the victim- victim was minor at the time of accident- he had narrated the incident to his father – testimony of the victim was duly corroborated by the testimony of his father- delay in lodging the FIR was satisfactory explained- minor contradictions in the testimony are not sufficient to discard the testimony of the prosecution witnesses- held, that in these circumstances, prosecution version was duly proved and the accused was rightly convicted by the Trial Court.

Title: State of Himachal Pradesh Vs. Harbans Lal son of Shri Mukesh Kumar and another (D.B.) Page-1717

Indian Stamp Act, 1899- Section 30- At the time of argument, defendant filed application under section 151 C.P.C for placing on record a copy of receipt for payment of money - application was dismissed on the ground that document is not properly stamped-held that document is inadmissible for want of stamp- document impounded as per Stamp Act and permitted to be taken on record subject to payment of cost- Revision allowed.

Title: Dharam Pal, S/o late Sh. Chand Vs. Mandir Bhagwati Devi Page-1417

Indian Succession Act, 1925- Section 276- Petitioners applied for the probate of the Will, which was contested- the probate was ultimately granted in favour of the petitioners- there was no evidence to show that beneficiary had played a dominant role at the time of execution of the Will- mere fact that natural heirs have been excluded, will not make the Will suspicious - beneficiary was looking after the deceased being the grandson – deceased was in sound disposing state of mind and had died more than two years after the execution of the Will- held, that probate was rightly granted by the trial Court.

Title: Subhash Chand & another Vs. Surender Singh & ors. Page-1503

Indian Succession Act, 1925- Section 63- Defendant pleaded that deceased had executed a Will in his favour due to the services rendered by him- Will was scribed by DW-3 and was attested by 'A' and 'J'- however, neither 'A' nor 'J' was examined to prove the validity of the Will- DW-2 is residing in Delhi and could not have looked after the deceased who was residing in the Village- scribe had not identified the thumb impression of the executant or signatures of the witnesses- testator was suffering from cancer which was at the last stage- held, that the trial Court had rightly ignored the Will.

Title: Fithu Ram alias Pritam Chand Vs. Jit Singh and another Page-1142

Industrial Disputes Act, 1947 - Section 17(B)- An award was passed by Trial Court ordering the reinstatement in the services- respondents did not comply with the award till 29.7.2015- there was no proof that workman was employed anywhere- hence, respondents are liable to pay compensation to the workman till the date of reinstatement.

Title: The State of H.P. and another Vs. Rakesh Kumar Page-1535

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged as a beldar- he was retrenched - he raised an industrial dispute and the matter was referred to the Labour Court – however, the reference was rejected by the Labour Court- petitioner had completed more than 240 days in the year 1997 to 2005- he had worked for 171 days in the year 2006- Government had framed a policy of regularization of the daily waged/ contingent paid workers who had completed 8 years continuous of service with a minimum of 240 days – held, that respondents should have regularized the services of the petitioner instead of retrenching him- retrenchment of the petitioner amounted to unfair labour practices- petition allowed and the services of the petitioner directed to be regularized.

Title: Krishan Chand Vs. State of H.P. & anr. Page-1128

'L'

Land Acquisition Act, 1894- Section 11(A)- Land was acquired for the construction of Bamta-Ali Khad-Kothi Kandrour road in village Bhandwar Tehsil Sadar District Bilaspur- notification under Section 4 was issued on 10.6.1998 and notification under Sections 6 and 7 was issued on 7.6.1999- award was passed by Land Acquisition Collector on 25.2.2004- it was held by Learned District Judge, Bilsapur that award passed by Land Acquisition Collector was passed beyond the period of two years- he ordered the issuance of fresh notification to seek recovery of amount paid in accordance with law- appeal was preferred before the High Court- held, that award was passed beyond a period of two years- Section 11(A) provides that award is to be passed within a period of two years and uses the word 'shall' which shows that period of two years is mandatory- mere fact that the party participated in the hearing will not constitute an estoppel as their can be no estoppel against the law- Court was duty bound to look into the question of limitation, even if such question was not raised by any party- appeal dismissed.

Title: The Land Acquisition Collector HP PWD Mandi, District Mandi and another Vs. Ishwar Prashad son of Jakhu and others Page-1392

Land Acquisition Act, 1894- Section 18- Property of the claimant was acquired and a compensation of Rs.3,32,68,516/- was awarded as market value of the houses/structures- a reference petition was filed pleading that structures were located adjacent to bazaar, offices of HPPWD, HPSEB, Rest House, Central School etc. and compensation was wrongly assessed- RW-1 had admitted before the Court that cost of the material was increased from 1999 to 2005 by 27.4%- however, this increase was not provided to the claimant- held, that

Motor Vehicles Act, 1988- Section 149- Driver had a fake licence- insured had not pleaded that he had exercised due care and caution while employing the driver or he had perused the driving licence- held, that Tribunal had rightly held that owner had failed to discharge his duty and had committed willful breach and tribunal had rightly granted the right of recovery to the insurer.

Title: M/s. Jogindra Transport Co. Vs. Deepak Kumar and others Page-1252

Motor Vehicles Act, 1988- Section 149- Driver was driving Mahindra Maxi Cab (Jeep) which falls within the definition of light motor vehicle- driver had a valid driving licence to drive light motor vehicle- held, that Tribunal had erred in holding that driver did not possess a valid driving licence at the time of accident.

Title: Sukhvinder Singh and another Vs. The New India Assurance Ltd. and others Page-1701

Motor Vehicles Act, 1988- Section 149- Injured had specifically averred in the claim petition that he had hired the offending vehicle, which fact was not denied by driver-cum-insured in his reply- the insurance policy disclosed that the offending vehicle was a private vehicle – held, that the vehicle could not have been used as a commercial vehicle – owner-insured had committed willful breach of the terms and the conditions of the insurance policy- the award modified and right of recovery granted to the Insurance Company.

Title: The New India Assurance Company Vs. Sh. Vijay Goel and another Page-1290

Motor Vehicles Act, 1988- Section 149- **Insurance Act, 1938-** Section 64-VB- Cheque issued by the insured was dishonoured- however, no evidence was led to show that insured was informed about the dishonor of the cheque or about the cancellation of the insurance policy- held, that Insurance Company cannot be absolved of its liability.

Title: National Insurance Co. Ltd. Vs. Madan Lal and others Page-1554

Motor Vehicles Act, 1988- Section 149- Insurance Company pleaded that the driver was under the influence of liquor at the time of the accident, however, the policy absolves the Insurance Company of liability, when the vehicle was being driven under the influence of liquor with the knowledge and consent of the insured -no such evidence was led by the insurer- held, that the Tribunal had fallen an error in holding that the insured had committed willful breach of terms and conditions of the policy.

Title: Managing Director, HPMC Nigam Vihar Vs. Naresh Kumar and others. Page-1435

Motor Vehicles Act, 1988- Section 149- Insurer contended that claimant was a gratuitous passenger and owner had committed willful breach- claimant had specifically pleaded that he was travelling in the vehicle as owner of the goods- this fact was also admitted by the owner and driver- no evidence was led by the insurer- held, that plea of the insurer that claimant was a gratuitous passenger cannot be accepted.

Title: Oriental Insurance Co. Ltd. Vs. Sandeep Kumar and others Page-1696

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving license and a route permit- insurer had not led any evidence to prove the plea taken

by it- evidence led by the claimant and the owner had gone un-rebutted- held, that Tribunal had rightly decided the issue regarding the driving license and the route permit against the insurer.

Title: Oriental Insurance Company Vs. Raj Rani & others Page-1694

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving license- license was proved on record and it was renewed from time to time- owner had examined driving license before engaging the driver- therefore, it cannot be said that owner had committed any willful breach.

Title: United India Insurance Company Ltd. Vs. Tripta Rana and others

Page-1704

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence and the insurer had committed willful breach of the terms and conditions of the policy- offending vehicle was a Mahindra Pick Up whose gross weight was 2820 kilograms which falls within the definition of light motor vehicle- driver having a driving licence authorizing him to drive light motor vehicle does not require an endorsement of PSV vehicle- held, that findings recorded by Tribunal that driver had a valid driving licence cannot be faulted.

Title: The New India Assurance Company Vs. Bihari Lal and others Page-1686

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence, amount of compensation awarded by the Tribunal is excessive, claimants had filed a petition under Workmen's Compensation Act which was dismissed in default and the claimants are precluded from invoking the jurisdiction under the Motor Vehicles Act- driver possessed a driving licence authorized him to drive heavy goods vehicle, therefore, he was competent to drive heavy transport vehicle- Tribunal had assessed monthly income of the deceased as Rs. 3,000/- per month- after making deduction, loss of dependency was taken to be Rs. 2,000/- per month- after applying multiplier of '14' Tribunal had awarded compensation of Rs. 3,36,000/-- thus, amount awarded by Tribunal was not excessive but was meager – order of dismissal in default is not a decree and cannot operate as a bar for filing fresh suit/claim petition- appeal dismissed.

Title: National Insurance Company Ltd. Vs. Raj Kumari and others

Page-1685

Motor Vehicles Act, 1988- Section 149- Insurer Contended that the deceased was a gratuitous passenger and his risk was not covered– the claimant pleaded the deceased was travelling with the shuttering material which was loaded in the trolley of the tractor-the owner and driver had admitted in the reply the deceased was travelling in the vehicle with shuttering material- held, that the deceased was not a gratuitous passenger and his risk was covered.

Title: United India Insurance Company Ltd. Co. Vs. Savita Devi and others

Page-1285

Motor Vehicles Act, 1988- Section 149- Insurer contended that the Tribunal had fallen in error in awarding compensation in favour of the claimants who are legal representative of the owner of the offending vehicle and the risk of the owner was not covered in the

Insurance policy- held, that insurance policy was a package policy and it is the duty of the insurer to satisfy the award.

Title: National Insurance Company Limited Vs. Smt. Shyam Kali & another

Page-1263

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that accident was an outcome of contributory negligence- however, no evidence was led by the insurer to prove this fact- it was duly proved that accident was caused by 'A' while driving the offending vehicle- driver had not challenged this finding- held, that plea of Insurance Company was not acceptable.

Title: The New India Assurance Co. Vs. Pawan Kumar and another Page-1560

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that claimant was a friend of owner and the vehicle was registered as a private vehicle, therefore, insurer is not liable to pay compensation to the claimant- insurance policy covered the risk of 4 persons- held, that risk was covered in terms of policy- further, an additional amount of Rs.500/- was paid towards the risk of 3rd party- hence, Insurance Company was rightly held liable.

Title: The New India Assurance Co. Ltd. Vs. Rakesh Kumar Gautam and others

Page-1561

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that claimant was travelling in the vehicle as a gratuitous passenger- however, he had not led any evidence to this fact and had failed to discharge the onus- it was specifically asserted in the Claim Petition that claimant was employed by the owner and the driver- thus, plea of the insurer that claimant was a gratuitous passenger cannot be accepted.

Title: Oriental Insurance Co. Ltd. Vs. Mahender Singh and others Page-1264

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving licence – however, no evidence was led to prove the same- held, that insurer was rightly held liable by the Tribunal.

Title: National Insurance Company Ltd. Vs. Vinod Kumar & others Page-1558

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that he should be held liable to pay interest from the date when he was arrayed as party and not from the date of filing of the petition- held, that Motor Vehicle Act is a social legislation for the benefit of the claimants- claimants were not aware of the name of the insurer and the insurer was impleaded as party subsequently- moreover, purpose of insurance is to indemnify the insured for the loss sustained by him which would include the liability to pay interest – allowing the application for impleading a party is that the party is impleaded from the inception of the claim petition and not from the date of impeladment- thus, Insurance Company cannot claim to be absolved from the liability on the ground that it was impleaded subsequently.

Title: United India Insurance Company Ltd. Vs. Manohar Lal and others

Page-1287

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that insurance policy did not cover the third party risk at the time of accident and that the driver did not have a valid and effective driving licence at the time of accident- cover note showed that vehicle was insured

from 21.1.2003 till 20.1.2004- therefore, risk was covered on 24.10.2003, date of the accident- insurer had failed to prove that driver did not possess a valid driving licence at the time of accident- licence was valid from 15.6.1989 till 14.6.1992 – it was also valid till 14.6.2001 and from 5.5.2005 till 21.5.2008- Insurance Company had not brought on record a renewal order – it was not proved that licence was not effective w.e.f. 14.6.2001 till 5.5.2005- appeal dismissed.

Title: Iffco Tokio General Insurance Co. Vs. Ajay Thakur and others Page-1248

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that the driver was intoxicated - however no evidence was led by the insurer before the Tribunal to prove this fact- held that it is not permissible for the insurer to say in appeal that the driver of the vehicle was intoxicated at the time of the accident- further the plea of intoxication is not available to the insurer as the same is not covered by section 149 of Motor Vehicle Act- Appeal dismissed.

Title: Oriental Insurance Co. Ltd. Vs. Sangeyum & others Page-1265

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that the driver did not have a valid driving license and the driver was minor at the time of the accident- the date of birth of the driver is recorded in matriculation certificate is 7-7-1984 and the license was issued in his favour on 31-12-2001- the license was renewed on 30-01-2003- the accident had taken place on 4-9-2004- held, that the license was renewed on the date when the driver had attained the age of majority- the insurer had failed to prove that owner had committed willful breach of the terms and conditions of the policy or that owner had not exercised due care and caution while employing the driver - hence, the plea of the insurance company that it is not liable to pay compensation cannot be accepted.

Title: Oriental Insurance Company Ltd. Vs. Ujalu Devi and others Page-1449

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that Tribunal had wrongly saddled it with liability with the right to recovery – held that the insurer has to satisfy the claim of the 3rd party and the rights of the 3rd party cannot be defeated even if the insured had committed a willful breach.

Title: Oriental Insurance Company Ltd. Vs. Shamu Ram & others Page-1448

Motor Vehicles Act, 1988- Section 149- Other appeal arising out of the same accident was dismissed- held, that present appeal was the outcome of the same accident- insurer is caught by the law of res-judicata and estoppel and it cannot be said that insurer is not liable- appeal dismissed.

Title: Oriental Insurance Co. Ltd. Vs. Gulab Singh & another Page-1693

Motor Vehicles Act, 1988- Section 149- Owner had paid the premium towards the renewal of the policy through a cheque which was dishonoured- held that It was for the insurer to inform the insured about the dishonor of the cheque and the cancellation of the policy- since it was not done therefore the Insurance Company cannot absolve itself of the liability.

Title: Raj Kumar Vs. The New India Assurance Co. and others Page-1457

Motor Vehicles Act, 1988- Section 149- The offending vehicle was tractor and was insured for agricultural purposes- deceased and other persons were travelling in the tractor as to their home- it is not the case of the claimant that owner had engaged the deceased as

labourer or tractor was engaged for agricultural purposes at the time of accident- held, that insurer had committed breach of the terms and conditions of the policy.
Title: Saroj Kumari and others Vs. Manohar Lal and others Page-1571

Motor Vehicles Act, 1988- Section 149- Tribunal had held that driver did not have a valid driving licence to drive the vehicle at the time of accident- registration certificate shows that unladen weight of the vehicle was 1660 kg. – driver was competent to drive the light motor vehicle- vehicle fell within the definition of 'Light Motor Vehicle'- held, that Tribunal had wrongly held that driver did not possess a valid driving licence to drive the vehicle at the time of accident.
Title: Amar Nath Vs. Deli Devi and another Page-1242

Motor Vehicles Act, 1988- Section 157- Insurer contended that vehicle had been transferred and he is not liable to pay compensation- held, that mere transfer of vehicle is not enough to absolve the insurer from liability.
Title: United India Insurance Company Ltd. Vs. Tripta Rana and others
Page-1704

Motor Vehicles Act, 1988- Section 166- Appeal by Insurance Company challenging the award on the ground that deceased was a gratuitous passenger- specific pleadings and ample evidence on record to prove that the deceased was travelling with his goods in the offending vehicle-Insurance Company not pleading commission of the willful breach by the owner -Insurance company had miserably failed to prove that the deceased had not hired the vehicle to transport the vegetable- held that the company was rightly saddled with the liability- appeal dismissed.
Title: National Insurance Company Ltd. Vs. Khimi Devi & others Page-1445

Motor Vehicles Act, 1988- Section 166- Award challenged by the claimants on the ground of adequacy of compensation- age of the deceased was 30 years at the time of accident- multiplier of '16' was applicable, per settled law in **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104 and Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120-** Tribunal has fallen in an error and wrongly applied multiplier of '12'- Tribunal also fell in error while wrongly deducting 2/3rd amount towards personal expenses of the deceased- only 50% deduction was permissible in view of law laid down by Apex Court in **Sarla Verma's case and Reshma Kumari's case supra-** award modified accordingly - enhanced award amount to be deposited by the insurer within 6 weeks in the Registry.
Title: Inder Singh and another Vs. Sunita Nagraik and another Page-1679

Motor Vehicles Act, 1988- Section 166- Award challenged by Insurer on the grounds that driver of offending vehicle not possessing a valid and effective driving licence; rashness and negligence of the driver not established and award amount was excessive- evidence led on record establishes existence of valid driving licence and rashness and negligence on the part of driver- Tribunal had rightly passed the impugned award- however, Tribunal fell in an error while applying the multiplier of '15'- age of the deceased at the time of accident was 45 years- multiplier of '13' was applicable in view of law laid down by Apex Court in **Sarla Verma's case and Reshma Kumari's case-** award accordingly modified.
Title: National Insurance Company Ltd. Vs. Neelam Sharma and others
Page-1683

Motor Vehicles Act, 1988- Section 166- Car of the petitioner was damaged due to the negligence of the driver of the bus- it was proved on record that claimant had suffered because of rash and negligent driving of the driver of the offending vehicle- compensation of Rs.1 lac awarded in lump sum without any interest.

Title: Brig. Ranjit Singh Verma Vs. Himachal Road Transport Corporation & another Page-1676

Motor Vehicles Act, 1988- Section 166- Claim petition was dismissed on the ground that rashness or negligence of the driver was not proved- The FIR showed that accident was the outcome of rash and negligent driving of the bus- the tribunal had wrongly appreciated the evidence and had non-suited the claimant on a technical ground– the claimant had suffered injuries - he had produced the medical evidence and the receipt of taxi charges – a compensation of Rs. 1,00,000/- with interest @ 7.5 % p.a. from the date of filing of the claim petition awarded in favour of the petitioner.

Title: Reeta Chandel Vs. The General Manager and others. Page-1270

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in a motor vehicle accident and had suffered dislocation of the jaw- held, that loss of jaw, member/joint is permanent disability– this also amounts to disfigurement - inadequate compensation was awarded by the Tribunal - Compensation enhanced.

Title: Roop Ram Vs. HRTC and another Page-1273

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that he had suffered injury in the accident- MLC shows that injury was sustained by the claimant on left side of the body and not on the right side- claimant claimed that he had to undergo replacement of the right hip - held, that there was nothing on record show that claimant had sustained injury on the right side of the body- therefore, trial Court had rightly denied the compensation for the replacement of the right hip.

Title: Ramesh Chand Vs. The Truck Co-operative and Operator Goods Carrier Transport Society Limited & others Page-1269

Motor Vehicles Act, 1988- Section 166- Claimant was a government employee - he had suffered 10% permanent disability- his age was 54 years- injury would be a handicap for re-employment and for other jobs- claimant had lost future income due to the injury sustained by him which was assessed as Rs. 2,200/- per month- applying multiplier of '11'- claimant is entitled to compensation of Rs. 2200x12x11= Rs. 2,90,400/ with interest.

Title: Desh Raj Bhardwaj Vs. Veena Devi and others Page-1245

Motor Vehicles Act, 1988- Section 166- Claimant was riding a bicycle and had met with an accident with a scooter- the tribunal had awarded the interest @ 12% per month- held that the rate of interest should be awarded as per the prevailing rates – claim petition was dismissed on 29-07-2004 and was restored on 27-06-2008-thus the claimant/injured is not entitled to interest for the said period – the rate of interest reduced from 12% to 7.5% per month – interest awarded from the date of the claim petition till 29-07-2004 and from 27-06-2008 till realization.

Title: United India Insurance Company Ltd. Vs. Sh. Gian Chand and others Page-1279

Motor Vehicles Act, 1988 –Section 166- Claimant, a motorcyclist, was hit by an approaching vehicle and suffered injuries - claim petition dismissed by the Tribunal holding that the claimant himself was rash and negligent - findings not sustainable - FIR by the claimant against the driver of offending vehicle and presentation of final report by the police sufficient proof of rashness and negligence on the part of the driver of the offending vehicle – witnesses also deposing about the rashness and negligence on the part of driver of offending vehicle - Motor Vehicles Act is not to be seen as an adversial litigation – but its aims and objectives are to be kept in mind while granting compensation – Tribunal committed an error in refusing claim – Rs. 60,000/- awarded as compensation.

Title: Naresh Kumar Vs. M/s Associate Bulk Transport Co. and others Page-1552

Motor Vehicles Act, 1988- Section 166- Claimants were entitled to compensation in terms of Consumer Protection Act, however, keeping in view time period elapsed from the date of accident, matter settled at Rs.2.27 lacs in lump sum without any interest.

Title: Oriental Insurance Company Vs. Subhadra and others Page-1698

Motor Vehicles Act, 1988- Section 166- Collision between bus and motorcycle- injured claimant motorcyclist filed claim petition- in the meanwhile bus driver tried by the criminal court and acquitted of the charges- the Tribunal took this fact into consideration and concluded that petition u/s 166 M.V Act was not maintainable and proceeded to grant compensation under section163-A- held that the acquittal in criminal court has no effect on the proceedings before Tribunal and the tribunal is bound to assess the evidence led independently and come to the independent conclusion- appeal allowed and compensation of Rs.2,80,000/- awarded.

Title: Surinder Kumar Vs. Himachal Pradesh Road Transport Corporation & another Page-1275

Motor Vehicles Act, 1988- Section 166- Death caused in a vehicular accident- petition filed by the claimants was rejected by the Tribunal on the ground of rashness and negligence on the part of driver of offending vehicle not established- the Tribunal fell in error while expecting the petitioner to prove the rashness and negligence of the driver of the offending vehicle beyond the reasonable doubt- rashness and negligence to be established by preponderance of probabilities and prima facie proof is sufficient- driver/co-owner had himself admitted the accident and made an evasive denial of the allegations- FIR lodged against the driver, sufficient proof of rashness and negligence- other evidence also led by the petitioner not favourably met with by the respondent- appeal allowed and taking into account, the age of the deceased as 62 years- multiplier of '5' applied and award of Rs.1,80,000/- along with interest passed.

Title: Chaudhary Ram & another Vs. Mohinder Singh and another Page-1677

Motor Vehicles Act, 1988- Section 166- Deceased a bachelor was aged 23 years at the time of death-parents were dependent upon him- applying guess work, minimum income of deceased can be held to be Rs. 5,000/- 50% was to be deducted towards the personal expenses and 50% of income was to be deducted towards loss of dependency, and thus, the loss of dependency is held to be Rs.2500/- per month- applying multiplier of 15 deceased held entitled to, total Rs. 4,50,000/- (Rs. 2500x12x15) along with interest @ 7.5 per annum from the date of the claim petition.

Title: Pawna Devi Vs. Shri Raj Kumar and others Page-1454

Motor Vehicles Act, 1988- Section 166- Deceased was aged 17 years- multiplier of '14' would be applicable- by guess work, it can be said that deceased would have been earning not less than Rs.5,000/- on attaining the age of 18 years- deceased was unmarried and 50% amount is to be deducted towards his personal expenses- taking the loss of the dependency as Rs.2,500/- per month- claimants are entitled to compensation of Rs.2,500x12x14= Rs.4,20,000/- + Rs.10,000/- under the head 'loss of love and affection + Rs. 10,000/- under the head 'funeral charges' +Rs.10,000/- under the head 'loss of estate'.

Title: Tripta Devi and another Vs. Rajesh Kumar @ Billa and others Page-1702

Motor Vehicles Act, 1988- Section 166- Deceased was aged 41 years at the time of accident- tribunal applied multiplier of 12 –held, that the multiplier of 14 is applicable-since the claimants are more than four; personal and living expanses wrongly deducted to be 1/3rd whereas, it should have been 1/5th - appeal allowed and compensation of Rs.13,04,400/- awarded to the claimants.

Title: Raj Kiran and others Vs. Sh. Rattan Lal and others Page-1455

Motor Vehicles Act, 1988- Section 166- Deceased was aged 47 years at the time of accident- multiplier of '12' was applicable- 1/3rd of amount was to be deducted towards personal expenses- deceased was drawing salary of Rs.16,291/- per month- rounding it off to Rs.16,500/-- loss of dependency would be Rs.11,000/-- claimants are entitled to Rs. 11000x12x12= Rs.15,84,000/- as compensation.

Title: Kusum Lata and another Vs. Bhajan Singh and others Page-1550

Motor Vehicles Act, 1988- Section 166- Four appeals filed against an award- three appeals decided earlier and Insurance Company saddled with the liability with right of recovery from the owner - fourth appeal pertained to the same transaction - similar direction issued in the same.

Title: Satnam Singh Vs. Chattur Singh & others Page-1462

Motor Vehicles Act, 1988- Section 166- Injured was 34 years of age at the time of the accident – she was a housewife and had suffered 45% disability- the injuries had shattered her physical frame and now she is dependent upon her family- it can be safely said by guess work that she was contributing not less than 6,000/- per month and by applying multiplier of '14', the claimant is entitled to Rs. 6,000/- x 12 x 14 = Rs. 10,08,000/- under the head 'loss of income' Rs. 50,000/- under the head medical treatment already undergone - Rs. 50,000/- under the head future treatment Rs. 2,00,000/- under the head pain and suffering in future Rs. 1,00,000/- under the head loss of amenities to life, Rs. 20,000/- under the head attendant charges and Rs. 10,000/- under the head transportation charges- thus the total amount of Rs. 16,38,000/- with interest @ 7.5 p.m. awarded to the petitioner.

Title: Smt. Mani Devi Vs. Sh. Baldev and another Page- 1253

Motor Vehicles Act, 1988- Section 166- Injured was travelling in the vehicle which met with an accident-plea that the claimant along with his father was travelling in the vehicle with their goods not denied by the owner-plea of Insurance Company that claimant was a gratuitous passenger wrongly accepted by the Tribunal-Insurance Company, however rightly saddled with the liability by the Tribunal - appeal dismissed.

Title: Oriental Insurance Co. Ltd. Vs. Waryam Singh and others Page-1453

Motor Vehicles Act, 1988- Section 166- Petitioner having suffered injuries in an accident filed a Claim Petition before the Tribunal- same was dismissed on the ground that claimant has not proved his case beyond reasonable doubt- Tribunal certainly fell in error- strict proof is not required in claim petition and only prima facie proof sufficient- law has undergone see changes, even FIR can be treated as a Claim Petition- appeal allowed and award of Rs.1,02,803/- passed in favour of the petitioner alongwith interest @ 7.5% per annum.

Title: Subhash Chand Vs. Subhash Chand and others Page-1699

Motor Vehicles Act, 1988– Section 166– Tribunal awarded Rs.2 Lacs as compensation in favour of the complainants –insurance company contended in appeal that the driver was not in possession of a valid and effective license and compensation was excessive – the driver of the offending vehicle found to be possessing effective and valid driving license – record revealed that the compensation was on the lower side – appeal dismissed.

Title: National Insurance Company Ltd. Vs. Veena Devi and others Page-1557

Motor Vehicles Act, 1988- Section 166– Tribunal awarded Rs.6,97000/- as compensation – appellant challenged the award on the ground that it was excessive -age of the deceased was 31 years at the time of accident - the Tribunal had rightly applied the multiplier of 14- awarded amount not on the higher side – appeal dismissed.

Title: The Divisional Manager, HRTC Vs. Sheela Devi and others Page-1573

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded compensation under the head of 'No Fault Liability' and held that claimants had not proved the rash and negligent driving of the vehicle – FIR was lodged against the driver of the vehicle- driver was convicted by the trial Court but was acquitted by the Appellate Court after giving a benefit of doubt- this fact prima facie shows that driver of the vehicle had driven the vehicle in a rash and negligent manner causing the accident- order passed by the Tribunal set aside and the compensation of Rs.2,50,000/- awarded in addition to the already awarded amount.

Title: Udesh Kumar Vs. Dhan Prakash and another Page-1574

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted the allowances from the salary of the deceased- held, that Tribunal erred in deducting the allowances- taking the income of the deceased as Rs.17,540/- and after deducting 1/3rd amount towards personal expenses, loss of dependency comes to Rs.11,693/-- applying multiplier of '9'- claimants are entitled to Rs. 11693 x 12 x 9 = Rs.12,62,844/-.

Title: Rajinder Nath Nehru Vs. Amit Chadha and others Page-1569

Motor Vehicles Act, 1988- Section 169- Insurer contended the Tribunal had not returned any findings on issue no. 5- the insurer had led the evidence to prove the issue but no finding was recorded by Tribunal - hence the case remanded to the Tribunal with the directions to provide opportunity to the insurer, owner and driver to lead further evidence and to return findings within three months.

Title: United India Insurance Company Ltd. Vs. Smt. Neelam Kumari & others Page-1283

Motor Vehicles Act, 1988- Section 169- The matter is covered by the judgment of the full bench in *Jagdish Chand Sharma vs. Bachan Singh and others, 2010 ACJ 1229* and the Tribunal had rightly dismissed the claim petition- petitioner was permitted to withdraw the petition with liberty to seek the appropriate remedy.

Title: Bil Bahadur Vs. Narender Pal & others Page-1549

Motor Vehicles Act, 1988- Section 171- Tribunal had not awarded any interest on the compensation- interest @ 7.5 % per annum from the date of the filing of the claim petition till deposit awarded.

Title: Saroj Kumari and others Vs. Manohar Lal and others Page-1571

'N'

N.D.P.S. Act, 1985- Section 20- Accused found in possession of 1.3 kgs. charas at Mini Bus Stand, Kasauli- personal search of the accused was conducted after giving him option to be searched before the Magistrate or any Gazetted Officers or SHO- compliance of Section 50 of N.D.P.S Act not made - Section 50 of N.D.P.S. Act does not provide for third option to be given- compliance of Section 50 is not a bare formality- accused has to be apprised of his right as emanating from sub-section (1) of Section 50- held, that in these circumstances, conviction and sentence of the accused by the trial Court not sustainable- appeal allowed.

Title: Aman Kumar Vs. State of H.P. (D.B.) Page-1711

N.D.P.S. Act, 1985- Section 20- Accused found in possession of 1.970 kgs. charas by the police-trial court on appraisal of the evidence collected during trial found the accused guilty - held that police had complied with the mandatory provisions of the law – sample was sealed at the spot as per rules-the Trial court had rightly appreciated the evidence and had come to a proper conclusion-appeal dismissed.

Title: Mark Attila Hegedus Vs. State of Himachal Pradesh (D.B.) Page-1306

N.D.P.S. Act, 1985- Section 20- Accused had hatched a conspiracy and were found in possession of 5.500 Kgs. of charas- recovery was effected by chance when accused were trying to run away on seeing the policy- merely because description of the bag was not made in the report of the analysis is not sufficient to doubt the prosecution case- no independent witness was available and the prosecution case cannot be rejected due to non-association of independent witness - recovery was effected from secluded place and it was not possible to associate independent witnesses - minor contradictions in the testimonies of the prosecution witnesses, when they were deposing after a considerable period of time will not make their testimonies doubtful- held, that in these circumstances, prosecution version was duly proved and the accused were rightly convicted by the trial Court.

Title: Sumit Kumar son of Hari Bhadur Vs. State of H.P. (D.B.) Page-1627

N.D.P.S. Act, 1985- Section 20- Accused persons intercepted with 1500 gms Charas being carried in a reddish coloured bag in a Santro car by the police patrolling party-during recovery from the car personal search of the accused was also conducted- however, no memo was prepared-provision of section 50 also not complied with-mandatory requirement of law not followed-Malkhana register not properly maintained-doubt about the case property writ large on the record-conviction cannot be sustained-appeals allowed and the accused acquitted.

Title: Sunil Kumar Vs. State of Himachal Pradesh (D.B.) Page-1314

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.250 k.gs of charas- police party had gone on patrolling duty and were checking the traffic which shows that it was a busy road- however, no independent witness was associated by stopping the vehicles plying on the road- village was at a distance of 1 k.m- no independent person was associated from the village as well- no entry was made in the Malkhana register regarding taking out of the case property for production in the Court and re-deposit of the case property after its production in the Court, which casts doubt that case property produced in the Court is the same which was recovered from the accused- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt - accused acquitted.

Title: Nihal Singh Vs. State of H.P. (D.B.) Page-1563

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque for discharging his liability which was dishonoured- complainant admitted that words Doctor Lok Nath Sharma at the top and signature at the bottom are in one ink whereas the amount in figure and words and date are in different ink, which casts doubt about the issuance of cheque by accused- complainant had failed to prove that any advance money was taken by accused from him- no receipt was issued- there was discrepancy regarding the advancing of the loan- held, that accused was rightly acquitted by the trial Court.

Title: Lok Nath Sharma Vs. Surender Soni Page-1490

Negotiable Instruments Act, 1881- Section 138- Complainant contended that a blank cheque was issued as security – accused admitted that he had signed the cheque- there is a presumption regarding the cheque being issued for consideration- accused did not adduce any evidence to rebut this presumption- testimonies of witnesses were corroborating each other- accused had acknowledged antecedent liability- held, that accused was rightly convicted by the trial Court- appeal dismissed.

Title: Balbir Singh son of Sh. Mehar Singh Vs. Devinder Singh son of Dalip Singh and another Page-1399

Negotiable Instruments Act, 1881- Section 142- The trial Court had returned the complaint for presentation before the Court having jurisdiction over the places where cheque was dishonoured- held, that provisions of Section 142 of N.I. Act have been amended retrospectively and the proceedings can be initiated before the Court where cheque was presented for collection- since, cheque was presented within jurisdiction of the trial Court, therefore, the mere fact that it was sent for collection to Bilaspur will not take away the jurisdiction – order set aside.

Title: M/s Mahindra and Mahindra Vs. Vikram Singh Page-1492

'P'

Prevention of Corruption Act, 1988- Sections 7 and 13 (2)- Accused was caught red handed receiving an illegal gratification of Rs. 500/-- a complaint was lodged that accused had demanded gratification for release of last installment under Indira Vikas Yojna- however the complainant had deposed in the court that Pardhan had demanded Rs.1,000/- out of which Rs. 500/- were to be paid to the accused and remaining amount was to be kept with the Pardhan- Pardhan was not arrayed as an accused- construction of the house was not completed and the money was to be released only on the completion of the house- shadow witness did not say anything regarding the demand- there were contradictions in the testimonies of the prosecution witnesses- mere recovery without demand is not sufficient to

implicate accused- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- appeal allowed.

Title: Prithvi Raj Vs. State of Himachal Pradesh Page-1653

Prevention of Food Adulteration Act, 1954 – Section 20(A) - Sauce was found to be adulterated on analysis- shopkeeper filed an application for impleading the manufacturer which was allowed- held, that impleading the manufacturer without issuing notice to him is violation of the principles of natural justice- it was mentioned in the annexure that bottles were manufactured by some other manufacturer- hence, impleading the petitioner was bad- order set aside.

Title: M/s Cremica Food Industries Ltd. Vs. State of H.P & anr. Page-1131

'S'

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession by way of demolition of the construction pleading that defendant had encroached upon 2 marlas of the land without his consent –a Local Commissioner was appointed who submitted his report- however, copy of Musabi was not proved to be genuine – further, this copy was not legible- it was also proved that original document was torn and could not be read, hence, report of Local Commissioner was not acceptable - no encroachment was detected in the demarcation conducted after the preparation of new Musabi- held, that plaintiff had failed to prove his case.

Title: Braham Dass & anr. Vs.Bhoomi Chand Page-1338

Specific Relief Act, 1963- Section 20- Plaintiffs pleaded that an agreement was entered into between the parties on 20.9.1996 for sale of the suit land for consideration of Rs.1,35,000/-- defendants delivered the possession of the suit land to the plaintiffs after receiving a sum of Rs. 20,000/- as earnest money- it was agreed that suit land was under attachment and the sale deed would be executed after releasing the suit land- land was released on 3.11.1997- defendants did not perform their part of the agreement- hence, suit was filed for seeking the relief of specific performance- plaintiffs had duly proved the execution of the agreement and that they were put into possession- order of attachment was only a formal entry which could not have remained after the pronouncement of the judgment- held, that in these circumstances, suit was rightly decreed by the Appellate Court.

Title: Om Devi and others Vs. Krishan Kumar and another Page-1062

Specific Relief Act, 1963- Section 34- 'M' and 'B' non-occupancy tenants conferred proprietary rights qua the suit land to the extent of ½ share each – on his death 'B' succeeded by L.Rs Bhagat Ram, Surji, Thopali and Mahajanu and 'M' succeeded by Sh. Atma Ram- Shri Bhagat Ram, Smt. Thopali and L.R of M sold their share to other defendants excess to their entitlement- plaintiffs Surji etc. who had ¼ share each felt aggrieved- suit for declaration of their share and injunction filed- plaintiffs claiming that they have never sold their share nor created any tenancy qua the same- GPA of Sh. Bhagat Ram, in favour of defendant No.2, was challenged on the ground that Sh. Bhagat Ram was deaf and dumb- trial Court on appreciation of evidence found that GPA is null and void document- sale on the basis of GPA not valid, and secondly, land exceeding the share could not be sold- defendants taking up the plea of adverse possession but failed for want of evidence- suit rightly decreed- sale deed in favour of defendant No.8 declared as void- since, defendant No.8 was bonafide purchaser, therefore, defendant No.1 rightly directed to

compensate her for the loss suffered by her- both Courts rightly appreciated the facts and law- hence, appeal without merits and dismissed.
Title: Atma Ram Vs. Surji & ors. Page-1642

Specific Relief Act, 1963- Sections 34 and 28- Plaintiff pleaded that deceased had executed a Will in his favour – defendant No. 3 got himself recorded to be the owner in possession, on the basis of gift deed- defendants pleaded that Will set up by the plaintiff was a forged Will- the validity of the Will was upheld by the trial Court but this judgment was reversed in the appeal- it was duly proved that Will was revoked by execution of a validly executed and registered revocation deed- appeal dismissed.
Title: Ram Dittu (Now deceased) through LRs. Vs. Ram Dass (Now deceased) through LRs. Page-1620

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit seeking to restrain the defendants from raising construction or changing its nature till it is legally partitioned- it was pleaded that suit land is valuable and is located adjacent to PWD road- partition proceedings are pending and defendants have no right to raise construction or change its nature- defendants pleaded that suit land was in possession of 'H' who inducted father of the defendants as occupancy tenant- he became owner on the commencement of Punjab Occupancy Tenant Vesting of Proprietary Right Act, 1952 – record showed that proceedings for partition are pending before Learned A.C. Ist Grade- merely because co-owner is in exclusive possession will not give him right to use the land in a manner inconsistent with the rights of other co-owners- they cannot raise construction inconsistent with the rights of other co-owners- appeal dismissed.
Title: Painchu Ram & Ors. Vs. Hoshiar Singh & Anr. Page-1615

Specific Relief Act, 1963- Section 38- Plaintiffs prayed that suit land was allotted to them by State of Himachal Pradesh- they had improved the land by spending huge amount - defendants are interfering with their possession- it was prayed that defendants be restrained from interfering with their possession- defendants pleaded that plaintiffs never remained in possession of suit land- plaintiffs were in possession of adjacent land, this fact came into notice during the demarcation- - defendant No. 2 had taken plea of adverse possession which was subsequently withdrawn- the Courts below had found plaintiffs to be in possession- however, Courts had ignored the document which showed the possession of predecessor of defendants No.1 and 2 over old khasra numbers- plaintiffs further stated in cross-examination that they had acquired the knowledge regarding the possession of the suit land during settlement, which means that they were not earlier aware about the possession- held, that in these circumstances, plaintiffs had failed to prove their possession.
Title: Kundan Singh & Others Vs. Dheru & Others Page-1057

'W'

Workmen Compensation Act, 1923- Section 5- Award passed by the Commissioner Workmen Compensation challenged by the Insurance Company on the ground that Commissioner has wrongly applied the provisions of amended Act retrospectively- accident took place on 29.4.2000, whereas Commissioner applied Law amended after this date- Commissioner erred in applying the law not in force at the time of accident- there is nothing in insurance policy to exclude Insurance Company from not paying the interest- no pleading by the appellant to show that any clause to the agreement excluded its liability to pay the interest- plea that interest was not payable by the Insurance Company was not tenable- Driver not possessing valid driving licence- Learned Tribunal rightly held that Insurance

Company was liable to pay compensation with liberty to recover the amount from the owner- appeal partly allowed.

Title: National Insurance Company Ltd. Vs. Tripta Devi & ors. Page-1369

Workmen Compensation Act, 1923- Section 5- Deceased used to drive a tanker- he had gone to Ambala- he suffered heart attack and died on the spot in the vehicle- Workmen Compensation Commissioner held that the death had no causal relations with the duty- the deceased had reached Ambala at 8:00 a.m. - he was taking the tanker inside the depot at 9:30 a.m.- the principal cause of death was due to heart attack – there was a causal between the duties discharged by the deceased and the death of the workman- the death was caused by stress and strain as the accused used to drive the vehicle even at odd hours – appeal allowed and compensation awarded.

Title: Savitri Devi Vs. M/S Bharti Filling Station & anr. Page-1032

Workmen Compensation Act, 1923- Section 5- Deceased was employed as a conductor and died when he was travelling in the vehicle– insurance company contended that deceased was not a workmen and there was no relationship of employer and employee- it was duly proved on the record that the deceased was employed by respondent no. 4- he was getting wages of Rs. 2,200/- per month and Rs. 60-70 as daily allowances – the owner of the vehicle also admitted that he used to pay Rs. 2,200/- per month and Rs. 60/- as daily allowances to the deceased- it was not provided in the contract of insurance that Insurance Company will not be liable to pay the interest-held, that in these circumstances the insurer was rightly held liable to pay the compensation and interest.

Title: Oriental Insurance Co. Ltd. Vs. Nisha Devi and ors. Page-1157

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V.L.Tresa vrs. State of Kerala, (2001) 3 SCC 549
Vidhya Devi and another vrs. State of Haryana, (2004) 9 SCC 476
Vidhyadhar vs. Mankikrao, AIR 1999 Apex Court 1441
Vikas Sharma Vs. State of H.P. 2015 (1) SLC 295
Vikram Chauhan versus The Managing Director and ors., Latest HLJ 2013 (HP) 742 (FB)
Village Panchayat, Calangute vrs. Additional Director of Panchayat-II and others, (2012) 7 SCC 550
Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282
Vipan Kumar versus Naushad Ahmed and another, I L R 2014 (VI) HP 607
Virbhan Singh and another vs. State of U.P., AIR 1983 SC 1002
Virendra Singh Bhandari and others vs. Nandlal Bhandari and sons P. Ltd.1979 (49) Com. Cases 532 (MP)
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal, (2012) 7 SCC 288
Visveswaran vrs. State Rep. by S.D.M., AIR 2003 SC 2471

'Y'

Yashodabai Ganesh Naik Gaunekar vs. Gopi Mukund Naik, AIR 2003 Bombay 77

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

Dhani Ram Bhatia ....Petitioner.

Vs.

Kalawati and another. .....Respondents.

Cr. MMO No. 216 of 2015
Date of Decision: 27.07.2015

Code of Criminal Procedure, 1973- Section 127- Maintenance of Rs. 400/- per month was awarded in favour of the respondent No. 1 and Rs. 250/- per month in favour of respondent No. 2- they preferred a petition for enhancement of maintenance amount which was allowed and the maintenance was enhanced to Rs. 1,400/- per month in favour of respondent No. 1 and Rs. 1,100/- per month in favour of respondent No. 2- petitioner contended that respondent No. 1 was working as a tailor- she was having two buffaloes and was earning Rs. 6,000/- to 7,000/- per month- however, petitioner had failed to prove this fact – he had also leveled serious allegations against his wife that she was leading life of adultery and he had doubted the paternity of respondent No. 2- Income of the petitioner has increased and the respondent no. 2 is undertaking higher education- held, that order was rightly passed by the Court – however, the order modified and maintenance was enhanced from the date of the filing of the petition and not from the date of the order. (Para-13 to 25)

Indian Evidence Act, 1872- Section 112- Parties cannot be compelled to subject themselves to undergo blood test in maintenance proceedings- there is a presumption that a child born during the substance of marriage is legitimate child and no adverse inference can be drawn against wife for refusing to subject herself to blood test. (Para-27 to 33)

Cases referred:

Subbayal Vs. Muthuswamy 1986 Cri. L.J. 692
Sau Suman Narayan Niphade and another Vs. Narayan Sitaram Niphade and another 1995 Supp. (4) Supreme Court Cases 243
Prafulla Kumar Panda Vs. Smt. Amari Kumari Panda, 1996 Cri. L.J. 553
Dhan Raj Vs. Kishni and another 1998 Cri. L.J. 1312
Manik Chandra Ankure Vs. State of West Bengal & Anr. 2004(1) Crimes 547
S. Brahmanandam Vs. S. Rama Devi and another 2007 Cri. L.J.811
Badshah Vs. Urmila Badshah Godse and another (2014) 1 Supreme Court Cases 188
Shail Kumari Devi and another Vs. Krishan Bhagwan Pathak (2008) 9 SCC 632
Sujit Kumar Pandey Vs. Anjali Devi 2015 (2) HLR 625 (Jhark.)
Bhuwan Mohan Singh Vs. Meena and others (2015) 6 Supreme Court Cases 353
Goutam Kundu Vs. State of West Bengal and another, AIR 1993 Supreme Court 2295
Eswaran Vs. Pichayee and others 1998 Cri. L.J. 3976
Devesh Pratap Singh Vs. Srimati Sunita Singh AIR 1999 Madhya Pradesh 174
Ningamma and another Vs. Chikkaiah AIR 2000 Karnataka 50
Kamti Devi and another Vs. Posshi Ram AIR 2001 Supreme Court 2226
Teeku Dutta Vs. State and another AIR 2004 Delhi 205
Heera Singh Vs. State of U.P. and others, 2005 Cri. L.J. 3222
Sunil Eknath Trambake Vs. Leelavati Sunil Trambake AIR 2006 Bombay 140

For the petitioner: Mr. Ashwani Kaundal, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This petition is instituted against the order, dated 16.04.2015, rendered by the learned Sessions Judge, Bilaspur, H.P. in Criminal Revision No. 8/10 of 2013.

2. Key facts necessary for the adjudication of this petition are that the respondents have moved an application under Section 125 Cr. P.C. before the learned Judicial Magistrate, 1st Class, Ghumarwin, District Bilaspur, H.P. for the grant of maintenance. The same was allowed on 16.06.2001. The respondent No. 1 was awarded a sum of Rs. 400/- per month towards maintenance and the respondent No. 2 was granted a sum of Rs. 250/- per month from the date of order, i.e., 16.06.2001. The respondents have filed a Cr. M.A. No. 78/4 of 2005/04 under Section 127 Cr. P.C. for enhancement of maintenance amount.

3. The application was contested by the petitioner. The learned Judicial Magistrate, 1st Class, Ghumarwin, District Bilaspur, H.P. allowed the application on 31.01.2013 and enhanced the amount of maintenance in the sum of Rs. 1400/- per month to be paid to respondent No. 1 and Rs. 1100/- per month to be paid to respondent No. 2. The petitioner filed a Criminal Revision No. 8/10 of 2013 against the order, dated 31.1.2013 before the learned Sessions Judge, Bilaspur, H.P. He dismissed the same on 16.04.2015. Hence this petition.

4. Mr. Ashwani Kaundal, learned counsel for the petitioner has vehemently argued that the Courts below have misconstrued and misread the statements of the witnesses. According to him, the respondent No. 1 was earning handsome amount of Rs. 6000-7000/- per month from selling milk and stitching clothes and the respondent No. 2 was also earning a sum of Rs. 6000/- per month. He also contended that the application preferred by his client for conducting DNA test of paternity of respondent No. 2 was wrongly dismissed by the learned Sessions Judge, Bilaspur, H.P.

5. I have heard the learned counsel for the parties and gone through the judgments carefully.

6. The respondents No. 1 and 2 were only awarded a sum of Rs. 400/ and Rs. 250/- per month, respectively towards maintenance vide order, dated 16.06.2001. AW-1 Smt. Kalawati has testified that in the year, 2001, the respondents were awarded a sum of Rs. 650/- per month towards maintenance. The respondent No. 2 was pursuing her studies in Master of Arts. A sum of Rs. 4000/- to Rs. 5000/- was required for her expenses. She was studying at Shimla. The prices have increased since 2001. The income of petitioner has also increased. He was working as First Grade, Motor Mechanic. He was in Government job. He was earning Rs. 20,000/- per month. According to her, she had no source of income. She denied that she had two buffaloes. She denied that she was earning by selling milk. She also denied that she was earning Rs. 5000/- to Rs. 6000/- per month by doing tailoring work. She also denied that the petitioner was working as labourer in the factory.

7. AW-2 Sh. Kamal Nain deposed that respondent No. 2 was studying at Shimla. They have no source of income. AW-3 W. Ravi Shankar has deposed that the salary of the petitioner in the month of March, 2009 was Rs. 32,347/-. He was working as Senior Mechanic in the Company. He retired on 31.01.2011. He was getting pension to the tune of Rs. 6,475/- per month. He has proved Ex. RW3/A to Ex. RW3/D.

8. The petitioner has appeared as RW-1. According to him, the respondent No. 1 was living in adultery. Respondent No. 2 was not his daughter. The respondent No. 2 was serving in Computer Centre and her salary was Rs. 6,000/- and the respondent No. 1 used to earn Rs. 100/- per day by selling the milk. He was suffering from prostate cancer and was undergoing treatment from CMC, Banglure, for which he had to incur Rs. 6000/- per month. He has constructed a residential house, for which he has spent a sum of Rs. 4 - Rs. 5 lac.

9. RW-2 Sh. Ganga Ram was not aware that Smt. Kalawati has buffaloes. He was told by petitioner that he was suffering from cancer. He has borrowed a sum of Rs.50,000/- from him. In his cross-examination, he has admitted that the petitioner was his relative.

10. RW-3 Sh. Shamsher Singh deposed that he was engaged as Contractor for raising the construction of residential house by the petitioner. He had to pay him Rs. 1,20,000/-. He told him that he was suffering from cancer. He is also relative of petitioner.

11. RW-4 Sh. Rattan Singh deposed that respondent No. 1 had two three buffaloes. She used to sell 5-6 litters of milk. Her income was Rs. 100/- per day. She was working as a tailor.

12. RW-5 Sh. Sunka Ram desposed that petitioner and respondent No. 1 were husband and wife. The respondent No.1 was working as tailor. She was also having two buffaloes. She was earning a sum of Rs. 6000/- - Rs. 7000/- per month. He has admitted that the respondent No. 2 was unmarried. She was pursuing her studies in Master of Arts. She required money to pursue her studies. The petitioner has failed to prove that the respondent No. 1 was having buffaloes and was working as tailor. Petitioner was working as First Grade Motor Mechanic. He was in Government job. His salary for the month of March, 2009 was Rs. 32,347/-. His pension is Rs. 6,475/-. His salary and pension have been duly proved by AW-3 W. Ravi Shankar.

13. Petitioner has made reckless allegations against the respondents. He has made serious allegations against respondent No. 1 that she was leading life of adultery. He has also doubted the paternity of respondent No. 2. He has moved an application for proving the paternity of respondent No. 2, which has rightly been rejected by the Court. He cannot be permitted to rake up these issues in an application filed under Section 127 Cr. P.C. RW-2 Sh. Ganga Ram is not aware that respondent No. 1 has kept buffaloes. Hoshiar Singh to whom, according to RW-5 the respondent No. 1 had been selling milk, has not been produced. RW-5 has not disclosed the names of the women, who were getting the clothes stiched from the respondent No.1. RW-2 Sh. Ganga Ram and RW-3 Sh. Shamsher Singh are relatives of petitioner. Case of the petitioner was that he was suffering from prostate cancer. However, he has not placed any medical evidence on record to establish this fact. RW-3 Sh. Shamsher Singh, though stated that a sum of Rs. 1,20,000/- was to be paid to him by the petitioner, but there is nothing in writing to this effect. Similarly, taking of loan by the petitioner from RW-2 Sh. Ganga Ram has not been substantiated. RW-2 Sh. Ganga Ram has not mentioned the date, month and year when the amount was advanced by him to the petitioner. Petitioner has not led any evidence when the house was constructed by him. The respondents were awarded only a sum of Rs. 650/- vide order, dated 16.06.2001. There is manifold increase in the prices of goods. Petitioner has not led any evidence to prove that respondent No. 1 was working in Shimla. The respondent No. 1 was forced by the petitioner to live in her parental house. The family could not survive with a meagre amount of Rs. 650/-. The Courts below have correctly appreciated the evidence. The application preferred by the petitioner for conducting DNA test has rightly been rejected by the Court below.

14. It would be apposite to state that the Judicial Magistrate, 1st Class, Court No. 1, Ghumarwin, District Bilaspur, H.P. has made the order applicable from the date of passing of the order, i.e., 31.01.2013. The Court is of the considered view that enhanced compensation was to be paid from the date of filing of Cr.M.A. No. 78/4 of 2004/04, i.e., 17.12.2003. Moreover, the respondents have remained in destitue for 10 years. Respondent No.2 is legitimate child since she was born during the lawful wedlock.

15. The learned Single Judge of Madras High Court in **Subbayal** Vs. **Muthuswamy** 1986 Cri. L.J. 692 has held that it is the duty of the Court to see that the amount of maintenance is not only the same in nominal terms but remains the same in real terms. In the case of salaried people, the restoration of the salary to the real terms is achieved by way of grant of dearness allowance. Enhancement of maintenance on account of rise of cost of living index would serve the same purpose and does not bring about any modification of the real amount and does not require any special change in the circumstances of the people. The learned Single Judge has held as under:

> *"4. The amount was fixed at Rs. 50/- per month taking into consideration the fact that the husband was in addition to his salary as cooly, having an approximate annual income of Rs. 5000/- as his share from the lands. At that time the cost of living index was 286. (January 1976). Now the cost of living index is 558 (January 1984). Obviously the salary as well as the land income of the husband have increased nominally. As far as wife is concerned, though the amount of maintenance is nominally the same, it does not provide the same purchasing power. Therefore, what she seeks is in reality not alteration of her maintenance in real terms, but only alteration of the maintenance in nominal terms so as to restore the real amount of maintenance earlier granted. Therefore, the change of circumstances pleaded is only that the nominal amount filed by the Court does not serve the purpose for which it was fixed, since she is not able to get with the same amount of Rs. 50/- the same quantity of goods as in the year 1976. This is a real change in the circumstances which the Court has necessarily to take into account. It is the duty of the Court to see that the amount of maintenance is not only the same in nominal terms but remains the same in real terms. In the case of salaried people, the restoration of the salary to the real terms is achieved by way of grant of dearness allowance. Enhancement of maintenance on account of rise of cost of living index would serve the same purpose and does not bring about any modification of the real amount and does not require any special change in the circumstances of the person. As pointed out, the simple fact that the nominal amount does not represent the same real amount as granted, is a sufficient change in the circumstances."*

16. Their Lordships of the Hon'ble Supreme Court in **Sau Suman Narayan Niphade and another** Vs. **Narayan Sitaram Niphade and another** 1995 Supp. (4) Supreme Court Cases 243 have held that whether enhanced maintenance is to be allowed from the date of the application or from the date of order is within the discretion of the Court and merely because the husband has incurred liability to pay instalments by obtaining loans is no ground for denying maintenance to the wife and minor child. Their Lordships have held as under:

> *"1. This is a wife's appeal questioning the order of the learned Single Judge of the High court directing that the maintenance*

should be paid from the date of the order and not the date of the application as allowed by the courts below. The only reason why the High court interfered in revision was that the husband's salary was Rs 1285.55p. and his carry-home pay packet was Rs 506. 00 and therefore it thought it would be unjust to compel him to pay maintenance of rs 400 per month. It is a matter of discretion of the court whether to allow enhanced maintenance from the date of the application or from the date of the order. It appears that the initial maintenance was fixed at Rs. 50. 00 for the wife and Rs. 100. 00 per month for the son, which was increased to Rs. 175. 00 and Rs. 225. 00 respectively, presumably because of the increase in the cost of living as well as the fact that the son was old enough to go to school and the wife would have to incur additional expenses on his education. It appears that the husband had incurred liability to pay instalments by obtaining loans, but that is no reason why the wife and the minor child should be denied maintenance which is just sufficient for keeping body and soul together. We think that this was not a fit case in which the High court should have interfered in revision. Therefore,quite apart from the question whether or not a second revision could lie to the High court we do not see how we can allow this order to stand because there was no justification for interfering with the discretion exercised by the two courts below for good reason."

17. The learned Single Judge of Orissa High Court in **Prafulla Kumar Panda** Vs. **Smt. Amari Kumari Panda**, 1996 Cri. L.J. 553 has held that expression "change in circumstances" would include rise in cost of living and also amounts to change in existing circumstances. The learned Single Judge has held as under:

"7. Is there no change in the existence of circumstances of a party with the passage of time when the cost of living goes up ? This question directly came up for consideration before the Bombay High Court in State v. Janakibai, AIR 1956 Bombay 432. A learned Single Judge has held that one of the circumstances which governs award of maintenance obviously is the cost of living and if the cost of living has gone up then there is a change in the circumstances of the wife, which enables her to ask for enhancement of the maintenance. The same view was taken by the Madras High Court in Subbayal v. Muthuswamy, 1986 Crl.L.J. 692. In that case, the wife has granted maintenance in the year 1976 at the rate of Rs. 50/- per month payable by her husband. In 1981, she filed a petition for enhancement of the maintenance to Ra. 200/- per month on the ground of rise in the cost of living index. The Magistrate rejected the petition of the wife by accepting the plea of the husband that there was no change in the circumstances of the parties. A learned Single Judge set aside the order of the Magistrate and accepted the plea of the wife that she was entitled to enhancement of maintenance on account of rise of cost of living index.

8. Now the facts of the case reveal that as per the orders passed by the learned Magistrate in 1989, the Opposite Party was entitled to monthly allowance of Rs. 125/-. The purchasing power which was in 1989 has not remained static. With the time progressing, it has eroded and affected the living standard of opposite party resulting in change in the existence of her circumstances. Accordingly, the grievance of the Opposite Party that the monthly allowance of Rs. 125/- .which

was granted to her in the year 1989 is insufficient for her maintenance in 1992 was rightly entertained and accepted by the learned Magistrate."

18. The learned Single Judge of Rajasthan High Court in **Dhan Raj** Vs. **Kishni and another** 1998 Cri. L.J. 1312 has held that fact of inflation, resulting in fall in purchasing power of money and consequent rising cost of commodities can be taken for enhancing maintenance. The learned Single Judge has held as under:

"7. I have carefully considered the arguments of both the parties. Inflation is an universal phenomena adversely effecting the purchasing power of the currency and thereby raising the prices of commodities. It is well established that the entire human society is a creation of mankind. Values, acts and omissions of the human beings which are responsible for creating preservation or adversely effecting the human society or any part thereof, or any system thereof are manifestations of the lives and personal as well as collectively. Therefore, so long life and personal liberty continues to be protected by Article 21 of the Constitution and so long the Courts are obliged to act as custodians of the life and personal liberty of the human beings under Article 21 of the Constitution, the judicial notice of all those acts and omissions which are themselves a consequence of life and personal liberty and which are concerned with preservation, control, regularisation and deprivation of life and personal liberty must be taken judicial notice by the Courts. Section 114 of the Evidence Act gives ample authority to the Courts to take judicial notice of the facts, regard being had to common course of nature events, human conduct and public and private business in their relation to the facts of the particular case. The power to take judicial notice of facts in accordance with Section 114 of the Evidence Act can be curtailed only by expressed provision of law and not otherwise. Section 56 of the Evidence Act provides that facts judicially noticeable need not be proved. Section 57 of the Evidence Act makes it obligatory on the part of the Court to take judicial notice of the facts mentioned in Clause (1) to clause (13) of Section 57. There is nothing in Section 57 to indicate that a Court cannot take judicial notice of facts, which are not covered by Clause (1) to Clause (13) of Section 57. Therefore, so far as the power of the Court to lake judicial notice of the facts of the case is concerned, Section 57 and Section 114 of the Evidence Act confer two different kinds of powers. The distinction between Section 57 and Section 114 of the Evidence Act is this that if under Section 57 of the Evidence Act, relevant fact is covered by one or more of the thirteen clauses of Section 57, then the Court is under a legal obligation to take judicial notice of the fact subject to the conditions laid down in Section 57 itself. On the other hand Section 114 of the Evidence Act does not make it obligatory on the part of the Court to take judicial notice of any fact, but empowers the Court to take judicial notice of all those facts, which the Court may presume to have happened regarding being had to the common course of natural events, human conduct and public and private business in relation to the fact of the particular case. Inflation, resulting in rise of prices gradually, fall in the purchasing of the currency and consequent deprivations of various kind to persons whose income is limited are

facts, of which judicial notice can be taken under Section 114 of the Evidence Act. I, therefore, do not find any force in the submission that the judicial notice of inflation and rising cost of commodities cannot be taken by the Courts unless evidence is produced before it to prove the same.

19. The learned Single Judge of Calcutta High Court in **Manik Chandra Ankure** Vs. **State of West Bengal & Anr.** 2004(1) Crimes 547 has held that the object of Section 125 Cr. P.C. was to provide maintenance in order to prevent starvation and vagrancy. The learned Single Judge has further held that in a petition under Section 125 Cr. P.C., Magistrate would not be justified in directing DNA test for determination of paternity of child. The learned Single Judge has held as under:

"6. I have heard the learned Advocates of the respective parties. I have also gone through the impugned order passed by the learned Additional Sessions Judge as also the order passed by the learned Magistrate. In my considered view, the impugned order passed by the learned Additional Sessions Judge does not suffer from any illegality. As I have already pointed out earlier Section 125, Cr.P.C. provides a swift remedy against any person who despite means neglects or refuses to maintain his wife and other dependents. The primary object of the section is to prevent starvation and vagrancy. Section 125, Cr.P.C. provides a summary procedure. The findings are also not final and the parties can agitate their rights in the Civil Court. In a proceeding under Section 125,Cr.P.C., the Court would not be justified in suspecting the chastity of the wife merely because the husband casts aspersion on her chastity. If the husband wants to challenge the paternity of the child he can always file a civil suit in appropriate Civil Court for such declaration. In a proceeding under Section 125, Cr.P.C. the learned Magistrate was not justified in directing D.N.A. test of the child. The learned Additional Sessions Judge was very much justified in setting aside such order of the learned Magistrate. In my considered view, the order passed by the Additional learned Sessions Judge does not suffer from any illegality and I do not find any reason to interfere with the same."

20. Mr. Ashwani Kaundal, learned counsel for the petitioner has vehemently argued that the learned Judicial Magistrate, 1st Class, Ghumarwin, District Bilaspur, H.P. has granted more maintenance than claimed for. There is no merit in his contention. It is open to the Court to grant more maintenance than claimed for due to changed circumstances.

21. The learned Single Judge of Andhra Pradesh High Court in **S. Brahmanandam** Vs. **S. Rama Devi and another** 2007 Cri. L.J.811 has held that the Court can enhance or reduce the maintenance amount on the proof of change of circumstances. Hence, it cannot be said that the Court has got no power to grant maintenance more than the amount claimed in the petition for the period subsequent to the amendment of Section 125 Cr. P.C. in 2001 because Section 127 Cr. P.C. empowers the Court to enhance the maintenance granted under Section 125 Cr. P.C. on proof of a change in the circumstances. Section 127 Cr. P.C. does not mandate that an application is required to be filed to enhance the maintenance amount, after the amendment of 2001 in Section 125 Cr. P.C. The learned Single Judge has held as under:

"20. Firstly *it has to be seen whether the learned Sessions Judge has got power to award more than the amount claimed in*

the application towards maintenance. The Apex Court very recently in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. held that in an application filed under Section 125 Cr.P.C. at the time when maximum limit of maintenance was prescribed, the request for enhancement over and above the maximum amount fixed under Section 125 Cr.P.C. prior to the amendment, can be considered and that the plea that original application has not been amended is too technical to be raised in view of the fact that Section 127 Cr.P.C. permits increase in the quantum. A similar contention as raised in this case was raised before the Apex Court. In the cited case, the application under Section 125 CriP.C. was filed on 1-9-1995. The Magistrate granted maintenance @ Rs. 350/- per month by his order, dated 31-7-1999. The High Court enhanced the quantum awarded to the child from Rs. 350/- to Rs. 500/- with effect from the order passed by the Magistrate. The said amount of maintenance was enhanced by the Apex Court. Considering the peculiar facts of the case, the Apex Court rejected the contention of the learned Counsel therein that as there was no amendment made to the claim petition for the enhancement the Court cannot grant more than the amount claimed, observing that such a plea is too technical. Therefore, in view of the cited decision of the Apex Court, it cannot be said that the Sessions Judge has got no power to grant maintenance more than the amount claimed in the petition for the period subsequent to the amendment of Section 125 Cr.P.C. as Section 127 Cr.P.C. empowers the Court to enhance the maintenance granted under Section 125 Cr.P.C. on proof of a change in the circumstances. Section 127 Cr.P.C. does not mandate that an application is required to be filed to enhance the maintenance amount. The only requirement is on proof of change of circumstances. The Court can enhance or reduce the maintenance amount as the proof of change of circumstances. Here in the instant case, at the time of giving evidence the respondent-wife categorically stated about the income of her husband-petitioner herein and also the requirement of at least Rs. l,000/- per month for her maintenance. The learned Sessions Judge considered the evidence adduced and also admissions made by the petitioner-husband and enhanced the maintenance to Rs. l,000/-. It will be useful to extract the relevant portion of the order of the learned Sessions Judge, which reads as follows:

> *In the evidence, the respondent has clearly admitted that he is getting gross salary of Rs. 18,485/- and he is having three storeyed building in Kothi, Hyderabad and 1000 sq.yards of site on which mulgies are constructed. He also admitted that he is having LIG quarter and he is also getting rents from the mulgies constructed in 1000 sq. yards at Ramachandrapuram. It is, therefore, clear from his evidence that the respondent is having substantial properties and getting rents and also drawing his gross salary of Rs. 18.485/-. The revision petitioner claimed maintenance of Rs. 1000/- per month only. Considering the 'standard of life of the respondent, present cost of living and*

other circumstances, I feel the claim of the revision petitioner for Rs. 1000/- per month towards her maintenance is just and reasonable. The revision petitioner is therefore, entitled to maintenance of Rs. 1,000/- per month with effect from 24-9-2001 'as prayed for.

From the above said order, it is clear that the respondent himself admitted about his getting gross salary of Rs. 18,485/- per month, having three storeyed building in Kothi, Hyderabad besides 1000 sq. yards of site in which mulgles were constructed and getting rents from the mulgies besides having one LIG quarter at Ramachandrapuram. The learned Judge gave categorical finding that the husband is having substantial properties and getting rents besides getting gross salary of Rs. 18,485/-. Under these peculiar circumstances of the case and also considering the standard of life of the husband and the cost of living and other circumstances, the learned Sessions Judge enhanced the amount from Rs. 400/- to Rs. l,000/- per month giving effect from 24-9-2001 the date on which the maximum prescribed is deleted from Section 125 Cr.P.C. I do not find any perversity in appreciation of evidence by the learned Sessions Judge warranting interference by this Court by way of revision. However as the learned Counsel contended that the petitioner is now retired and the respondent is gainfully employed and is capable to maintain herself. I consider it necessary to give liberty to the petitioner herein to approach the learned Magistrate and file an application for alteration or cancellation of the amount granted and to prove that the respondent-wife is capable to maintain herself and there is no need to order maintenance under Section 125 Cr.P.C. The learned Sessions Judge enhanced the costs from Rs. 500/- to Rs. 5,000/-. As the petitioner approached the several Courts, I do not find that the Sessions Judge is not justified in granting Rs. 5,000/- towards costs. Therefore, in my considered view, there is no need to interfere with any portion of the impugned order. Thus, this point is held accordingly."

22. The Apex Court in **Badshah** Vs. **Urmila Badshah Godse and another** (2014) 1 Supreme Court Cases 188 has held that the Court must give effect to that construction which will be responsible for smooth functioning of the system for which the statute has been enacted. The provision as to maintenance is a social justice legislation and distinct approach to be adopted while dealing with cases under the said provision. The Apex Court has held as under:

"13. On this basis, it was pleaded before us that this matter be also tagged along with the aforesaid case. However, in the facts of the present case, we do not deem it proper to do so as we find that the view taken by the courts below is perfectly justified. We are dealing with a situation where the marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent by suppressing the factum of alleged first marriage. On these facts, in our opinion, he cannot be permitted to

deny the benefit of maintenance to the respondent, taking advantage of his own wrong. Our reasons for this course of action are stated hereinafter.

13.1 Firstly, in Chanmuniya case, the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two because of the said reason, thus, giving rise to claim of maintenance under Section 125,Cr.P.C. by interpreting the term "wife" widely. The Court has impressed that if man and woman have been living together for a long time even without a valid marriage, as in that case, term of valid marriage entitling such a woman to maintenance should be drawn and a woman in such a case should be entitled to maintain application under Section 125,Cr.P.C. On the other hand, in the present case, respondent No.1 has been able to prove, by cogent and strong evidence, that the petitioner and respondent No.1 had been married each other.

13.2 Secondly, as already discussed above, when the marriage between respondent No.1 and petitioner was solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A false representation was given to respondent No.1 that he was single and was competent to enter into martial tie with respondent No.1. In such circumstances, can the petitioner be allowed to take advantage of his own wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125,Cr.P.C. as respondent No.1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section 125 Cr.P.C., respondent No.1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above. For this reason, we are of the opinion that the judgments of this Court in Adhav and Savitaben cases would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marriages second time by keeping that lady in dark about the first surviving marriage. That is the only way two sets of judgments can be reconciled and harmonized.

13.3 Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125,Cr.P.C. While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the

cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society.

18. The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision "libre recherch sceintifique" i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Cr.P.C., to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from Shah Bano, 1985 AIR(SC) 945 to Shabana Bano, 2010 AIR(SC) 305 guaranteeing maintenance rights to Muslim women is a classical example.

20. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon Case, 1854 3 CoRep.7a,7b which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction ut res magis valeat guam pereat, in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife."

23. Their Lordships of the Hon'ble Supreme Court in **Shail Kumari Devi and another** Vs. **Krishan Bhagwan Pathak** (2008) 9 Supreme Court Cases 632 have held that even after the amendment of 2001, an order for payment of maintenance can be made by a Court either from the date of the order or where an express order is made to pay maintenance from the date of application, then the amount of maintenance can be paid from that date, i.e., from the date of application. Their Lordships have held as under:

"17. Bare reading of sub-section (1) of Section 125 leaves no room for doubt that if any person having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself or his legitimate (or illegitimate) child (children) unable to maintain itself (themselves), or his father, or mother, unable to maintain himself or herself, a Court, upon proof of negligence or refusal, order such person to pay maintenance to his wife or child (children) or parents, as the

case may be. It is also clear that maximum amount which could be ordered to be paid was Rs.500/- p.m. which was clear from the expression "not exceeding Rs.500/- in the whole".

21. Again, there is no substantial change so far as the date of payment is concerned. Under sub-section (2) as originally enacted, it was provided that such maintenance could be made payable from the date of the order or if so ordered, from the date of application. Even after the amendment of 2001, an order for payment of maintenance can be made by a Court either from the date of the order or where an express order is made to pay maintenance from the date of application, then the amount of maintenance can be paid from that date, i.e. from the date of application."

24. In **Sujit Kumar Pandey** Vs. **Anjali Devi** 2015 (2) HLR 625 (Jhark.), the Division Bench has held that while granting maintenance under Section 125, no arithmetic formula can be adopted regarding the amount the wife was entitled for permanent alimony but the fact like status, their respective social needs and the financial capacity of the husband are to be considered by taking note of the fact that the maximum amount fixed for the wife should be such which will be enough for her to lead a reasonable and comfortable life considering her status and the standard of living she would have enjoyed had the parties led the conjugal life in normal circumstances. The Division Bench has held as under:

"13. Before adjudicating on the said issue it would be necessary to refer to Section 25 of the Hindu Marriage Act, 1955 which reads as follows:-

"25. Permanent alimony and maintenance.--- (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge immovable property of the respondent.

(2) If the Court is satisfied that there is, a charge in the circumstances of either party at any time after it has made an order sub-Section(1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this Section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

14 It is true that no arithmetic formula can be adopted regarding the amount the wife, of the appellant, is entitled for

permanent alimony but the fact like status, their respective social needs and the financial capacity of the husband are to be considered by taking note of the fact that the maximum amount fixed for the wife should be such which will be enough for her to lead a reasonable and comfortable life considering her status and the standard of living she would have enjoyed had the parties led the conjugal life in normal circumstances.

15. It is apparent from the salary slip filed by the appellant that the gross salary of the appellant is Rs.61,989/-. In this context, learned counsel for the appellant has argued that appellant has to pay for the loans he has taken and in fact his take home salary is 1/3rd of the gross salary; that he has other liabilities as pointed out above and he has no other source of income; that the agricultural property is a joint property from which he gets Rs.3,000/- to 4,000/- per annum; that the respondent has no liability whereas the appellant is saddled with the liabilities of looking after his aged parents, his mentally ill brother and has also to pay for the medicine of his aged parents and the education fees for the two daughters of his ill brother.

16. On the other hand it has been canvassed by the learned counsel for the respondent that she is residing with her old and aged father and she does not have any fixed source of income.

17. The plea that loan has been taken by the appellant and he has to pay the instalments to liquidated the loan and therefore, the same may be considered, is not acceptable to us. No paper or document has been filed to show that for what purpose the loan was taken. On the contrary it suggests that the appellant is solvent enough to pay the loans which he might have taken for getting benefit of tax concession and for creating future assets. The appellant is employed as an Inspector in the Railway Protection Force and he has ten years of service left and the prospects of the increments in the salary and promotion to a higher rank in future is natural consequence of service. His gross salary is Rs.61,989/- p. m. and after deduction under the compulsory heads, his net pay is around Rs.53,000/- p .m. The respondent-wife has to maintain the standard of living which she would have been entitled to had the appellant maintained the conjugal relationship."

25. Their Lordships of the Hon'ble Supreme Court in **Bhuwan Mohan Singh** Vs. **Meena and others** (2015) 6 Supreme Court Cases 353 have given the circumstances when maintenance is payable from the date of application. Their Lordships have held that the order of the High Court was justified in granting maintenance from the date of application. Their Lordships have further held that "sustenance" does not mean animal existence, but signifies leading life in similar manner as she would have lived in house of her husband. Husband has bounden duty to enable wife to live life with dignity according to their social status and strata. Their Lordships have held as under:

"16. In the present case, as we find, there was enormous delay in disposal of the proceeding under Section 125 of the Code

and most of the time the husband had taken adjournments and some times the court dealt with the matter showing total laxity. The wife sustained herself as far as she could in that state for a period of nine years. The circumstances, in our considered opinion, required grant of maintenance from the date of application and by so granting the High Court has not committed any legal infirmity. Hence, we concur with the order of the High Court. However, we direct, as prayed by the learned counsel for the respondent, that he may be allowed to pay the arrears along with the maintenance awarded at present in a phased manner. Learned counsel for the appellant did not object to such an arrangement being made. In view of the aforesaid, we direct that while paying the maintenance as fixed by the learned Family Court Judge per month by 5th of each succeeding month, the arrears shall be paid in a proportionate manner within a period of three years from today.

26. Their Lordships of the Hon'ble Supreme Court in **Goutam Kundu** Vs. **State of West Bengal and another**, AIR 1993 Supreme Court 2295 have held that it is a rebuttable presumption of law under Section 112 that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities. Their Lordships have laid down the following principles for the permissibility of blood test to prove paternity:

"22. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

26. From the above discussion it emerges:-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis"

27. The learned Single Judge of Madras High Court in **Eswaran** Vs. **Pichayee and others** 1998 Cri. L.J. 3976 have held that the parties cannot be compelled for subjecting themselves for blood test in maintenance proceedings. Their Lordships have held as under:

"30. No doubt, it is true that on 11-6-1990 Crl. M.P.No. 167 of 1989 filed by the petitioner was allowed. In pursuance of the said order, it is to be noted that the petitioner and the respondents were sent for the blood test. But, due to want of chemicals, the test was not conducted then. Subsequently, on receipt of a letter from the Forensic

Science Department, again the petition was posted for enquiry. On 29-5-1991, on the date of the enquiry, as seen from the records, the petitioner was not present, when the matter was called in the forenoon. It was passed over and again in the afternoon the Magistrate called the matter. However, the petitioner was absent even in the afternoon. Therefore, the learned Judicial Magistrate had dismissed the application by giving reasons. The lower Court's order is as follows:-[Vernacular matter omitted]

31. Admittedly, the above order dated 29-5-1991 had not been challenged. The examination of the witnesses commenced from 6-2-1996 onwards and ended on 23-4-1996. During this period also the petitioner never took steps for blood group test. Therefore, it cannot be contended, in the light of the above fact situation, that the opportunity had been denied.

32. Moreover, as laid down by the Apex Court, the parties cannot be compelled for subjecting themselves for blood test in the proceedings under Section 125, Cr.P.C. It is held in Goutam Kundu v. State of West Bengal as follows :-

From the above discussion it emerges:-

(1) that Courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.(5) No one can be compelled to give sample of blood for analysis.

In view of what is stated above, the first ground urged by the learned counsel for the petitioner fails."

28. The learned Single Judge of Madhya Pradesh High Court in **Devesh Pratap Singh** Vs. **Srimati Sunita Singh** AIR 1999 Madhya Pradesh 174 has held that the rule of evidence contained in Section 112 raises a mandatory presumption that a child born during wedlock, no matter when the child could be begotten, is the legitimate issue of the husband of the mother and no adverse inference can be drawn against the wife in refusing to submit herself to blood test. The learned Single Judge has held as under:

"8. The Petitioner/husband seeks annulment of marriage on the ground of pregnancy per alium i.e. concealed pregnancy. It is not the case of the husband that the wife was already pregnant at the time of marriage because that would be a ground for voiding the marriage by a decree of nullity under Section 12(1)(d) of the Act. A decree of divorce under Section 13(1)(i) of the Act can be obtained only on the ground that other party to the marriage, after solemnization of the marriage, had voluntary sexual intercourse with any person other t ban his or her spouse. In the instant case, the main emphasis for

seeking a decree of divorce by the husband is on the admission contained in the statement of wife in her cross-examination that after marriage when the husband visited her parents' place between 8-1-86 to 12-1-86 the wife was in menstrual period and could not have conceived. Relying on the above part of the statement of the wife, the argument sought to be built up is that the wife became pregnant due to illegitimate sexual connection with a person outside the wed-lock sometime after 12-1-86 when the menstrual period might have been over. The rule of evidence contained in Section 112 of the Evidence Act raises mandatory presumption that a child born during wedlock, no matter when the child could be begotten, is the legitimate issue of the husband of the mother. The presumption can be dislodged by proof of non-access during the time of conception. The husband has admitted a consummation of marriage after it took place on 29-11-85 and also admitted access to each other between 29-11-85 to 12-1-1986. The child born on 31-10-1986 could have been conceived as the husband and wife had access to each other between the above period. As held by the Supreme Court in Dukhtar Jahan v. Mohammad Farouq, AIR 1987 SC 1049, the sole ground that the child had been born in seven months 'time after the marriage leads to no conclusion that the child was conceived even before the marriage. Giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event.

9. The husband cannot derive much help from the admission made by the wife in her cross-examination that when the husband visited her while she was living in her parents' house between 8-1-1986 and 12-1-1986, she was in menstrual period. Merely because the wife states that she was in menstrual period at the time of visit of the husband, it cannot be conclusively held that she could not have conceived earlier to the above period as a result of her access to the husband before the aforesaid period.

12. In view of the above medical opinion, the contention of the husband based on the alleged admission of the wife in her cross-examination about her menstrual period does not lead to a rebuttable presumption that the wife had conceived as a result of any illicit sexual intercourse with any person outside the wedlock. The presumption in Section 112 of the Evidence Act thus does not stand rebutted, in view of the admitted access between the husband and the wife during which she could have conceived and delivered a normal child.

14. It is no doubt true that in the matrimonial Court below the husband had filed an application seeking directions of the Court to the wife to submit herself and her child to blood test, but the wife refused on the ground that there is no one in her family to take her for the test to New Delhi. On the basis of evidence discussed above, and the medical opinion, this Court does not find that any adverse inference can be drawn against the wife in refusing to submit herself to blood test."

29. The learned Single Judge of Karnataka High Court in **Smt. Ningamma and another** Vs. **Chikkaiah** AIR 2000 Karnataka 50 has held that to compel a person to undergo

or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty. The learned Single Judge has held as under:

> *"21. Article 21 of the Constitution confers fundamental right of life and personal liberty. Life full of dignity and honour. In India chastity of the woman and paternity of the child have got their importance and pride places. No person in India will ever tolerate nor cherish or like to be called bastard nor a woman will tolerate to be called unchaste. Legitimacy of the paternity of a child or person and chastity of a woman are parts of the dignity and honour for each man and woman according to law. Article 21 confers right to life and provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life is not merely animal life. Right to life means life full of dignity and honour and right to live with honour and dignity. Right to personal liberty is also very important. To compel a person to undergo or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty particularly even when there is no provision either in the Code of Civil Procedure or theEvidence Act or any other law which may be said to authorise the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man's paternity. It will amount to nothing but interference with the right of personal liberty. Here as mentioned earlier, Section 112read with Section 4, Evidence Act really has the effect of completely closing and debaring the party from leading any evidence with respect to the fact which the law says that to be the conclusive of proof of legitimacy and paternity of child covered by Section 112 of Evidence Act, except by showing that during the relevant period of time as referred to in Section 112 the parties to the marriage had no access to each other, the allowing of medical test to test the blood group to determine paternity would run counter to the mandate of Article 21 of the Constitution as well and inherent powers are not meant to be exercised to interfere with the fundamental right of life and liberty of the person nor to nullify or stultify any statutory provision.*
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> *22. In the case of Revamma v Shanthappa, this Court had an opportunity to consider this question of medical examination as to whether the Court can compel a person to undergo medical examination. His Lordship Hon'ble H.B. Datar, J., as he then was had been pleased to observe at paras 4 and 5 are as under:*
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> *"4. In a case where a party alleges that a person is impotent or suffering from other such incurable disease, it is for the person making such an allegation to prove the same. A party cannot be compelled to undergo medical examination. As stated by the High Court of Gujarat, "There is no provision under the Hindu Marriage Act or the Rules framed thereunder, or in the Code of Civil Procedure, or by the Indian Evidence Act, or any other law which would show any power in the Court to compel any party to undergo medical examination".*

A medical examination for ascertaining whether a person is insane or impotent are all cases in which unless by the law of the land a person can be compelled to undergo medical examination, an order directing a person to medical examination would be clearly illegal and without jurisdiction. In P. Sreeramamurthy v P. Lakshmikantham, when an order was passed directing medical examination, it was held that there must be some statutory provision under which it would be open to the Court to compel medical examination of a party, thus restricting the enjoyment of personal liberty of the person. It was also held that in a case like this, it was not right to rely upon the general or inherent powers of the Court under Section 151 of the Civil Procedure Code. It may be rejected and that even medical examination is specifically provided as under the terms of the Indian Lunacy Act. In the absence of any provision, it is not competent to any party to compel the other party to undergo medical examination.

5. In the case of Ranganathan Chettiar, supra, it has been held that it is not open to the Court under Section 151 of the Code of Civil Procedure, to order a medical examination of a party against the consent of such party. To pass such an order is tantamout to treating a human being as a material object, which no Court should do under its inherent power. It is, thus, clear that it is not open to the Court to invoke Section 151 of the Code of Civil Procedure to order a medical examination against his consent. In that view the order directing the medical examination of the petitioner is one which has been passed by the learned Judge in excess of the jurisdiction and the same is liable to be set aside".

23. Thus considered in my view the Court below committed an error of jurisdiction and acted in excess of jurisdiction in directing the revision petitioners to subject themselves to medical examination for the blood test.

24. I am further to observe that the Court below has observed that if the parties or any of them fails to appear before the District Surgeon for medical test on 4-12-1996, adverse inference shall be or may be drawn as per law. Here again the Court below acted illegally in making this observation, because Section 4 provides and mandates that when one fact is said to be conclusively proved on establishment of another relevant fact, then it completely shuts down and rules out every sort of evidence to disprove that fact. Adverse presumption under Section 114 may furnish a circumstantial evidence to dislodge the conclusive proof, then that will be running counter to the provisions of Section 112 read with Section 4 of the Evidence Act. The Court below observed illegally that failure or refusal to surrender to medical test will result in raising adverse presumption against the party when in view of Section 112 read with Section 4 of the Evidence Act, every sort of evidence, other than referred in Section 112 is barred and closed including presumptive circumstantial evidence under Section 114 and then the presumption cannot be raised under Section 114 from the failure to surrender. What evidence can be lead so that conclusive presumption or doctrine of conclusive

proof under Section 112 may not arise is of the fact that the parties to marriage had no access to each other or occasion to have access during the relevant period i.e., period when the child or person concerned whose paternity or legitimacy in question was conceived as per the latter part of Section 112 of the Evidence Act. Further threat to raise such adverse presumption in such case will amount to interference with fundamental right under Article 21 of personal liberty by implicitly forcing an unwilling person to undergo the medical test i.e., blood group test against his wish and against his or her free will and liberty."

30. Their Lordships of the Hon'ble Supreme Court in **Smt. Kamti Devi and another** Vs. **Posshi Ram** AIR 2001 Supreme Court 2226 have held that Section 112 which raises a conclusive presumption about the paternity of the child born during the subsistence of a valid marriage, itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. Their Lordships have held as under:

"4. The marriage between appellant Kamti Devi and respondent Poshi Ram was solemnised in the year 1975. For almost fifteen years thereafter Kamti Devi remained childless and on 4-9-1989 she gave birth to a male child (his name is Roshan Lal). The long period in between was marked by internecine legal battles in which the spouses engaged as against each other. Soon after the birth of the child it was sought to be recorded in the Register under the Births, Deaths and Marriages Registration Act. Then the husband filed a civil suit for a decree declaring that he is not the father of the child, as he had no access to the appellant-Kamti Devi during the period when the child would have been begotten.

11. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

31. The learned Single Judge of Delhi High Court in **Mrs. Teeku Dutta** Vs. **State and another** AIR 2004 Delhi 205 has held that no party to legal proceedings can be

subjected to any such test against his or her will. It infringes upon his or her right to privacy. The learned Single Judge has held as under:

> *"6. Additionally, it may be recalled that an inbuilt constitutional safeguard exists in the shape of Article 20(3) of the Constitution against a person accused of any offense being compelled to be a witness against himself. Right of privacy as enshrined in Article 21 of the Constitution also comes into play as and when any party to the proceedings is called upon to undergo any scientific test for the purpose of collecting evidence. It is a fairly settled position that no party to a legal proceedings can be subjected to any scientific test against his or her will as it has the effect of infringing upon his or her right to privacy."*

32. The learned Single Judge of Allahabad High Court in **Heera Singh** Vs. **State of U.P. and others**, 2005 Cri. L.J. 3222 has held that merely because of advancement in science and technology, provisions of Evidence Act, enacted more than 100 years back, does not lose significance. Before DNA test is conducted, consent of person concerned is necessary. The learned Single Judge has referred to maxim "Pater est quem nuptiae demonstrant" (father is one whom marriage indicates). The learned Single Judge has held as under:

> *"10. In view of the settled legal position, respondent No. 2 being guardian of respondent No. 3 having refused P.M.A. test, cannot be compelled for the same at the instance of the petitioner. The courts in the capacity of ad litum guardian of minor can also not direct such a test in the absence of direct and positive evidence of non-access as required by Section 112 of the Evidence Act The courts exercise protective jurisdiction on behalf of an infant and it would be unjust and unfair to direct to such a test to assist a litigant to establish and prove his or her claim at the cost of an infant. The infant cannot be allowed to suffer because of his incapacity. The Apex Court in the case of Smt. Dukhtar Jahan v. Mohammed Farooq, reported in AIR 1987 SC 1049 has observed as under:*
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> *"12..... This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice, to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman. "*

33. The learned Single Judge of Bombay High Court in **Sunil Eknath Trambake** Vs. **Leelavati Sunil Trambake** AIR 2006 Bombay 140 has held that DNA test to prove paternity of child can be ordered only in exceptional and deserving cases and if it is in the interest of child, it cannot be directed as a matter of routine.The learned Single Judge has further held that order directing DNA test of child to prove his paternity is not necessary and the factum of paternity can be proved by other evidence also. The learned Single Judge has held as under:

> "6. *Merely because either of the parties have disputed a factum of paternity does not mean that the Court should direct DNA test or*

such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference or adverse inference on the basis of such evidence on record or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the Court can direct such test. DNA test, in any case, cannot be directed as a matter of routine. The Courts should record reasons as to how and why such test in the case is necessary to resolve the controversy and is indispensable. That is necessary since a result of such test, in matrimonial and succession cases, being negative will have an effect of branding a child as a bastard and the mother as an unchaste women as noted in Goutam Kundu v. State of West Bengal and Anr. (1993) 3 SCC 418. That may also adversely affect the child psychologically. The Courts, however, should not hesitate to direct DNA test if it is in the best interest of a child.

7. In the present case, the respondent-wife is seeking DNA test not in the interest of the child but in her own interest to establish that the petitioner-husband lives in adultery and is, therefore, not entitled for divorce. The learned Judge has not recorded the reasons as to why DNA is indispensable and that the other evidence produce on record is not sufficient to draw an inference or adverse inference in favour or against either of the parties. In the present case the documentary evidence in the form of birth certificate and school record is already produced on record which, according to the respondent, reflects that the petitioner and Meena are parents of child - Rupesh. The learned Judge has not recorded its opinion in respect of that evidence. I do not wish to express any opinion on merits of the case. However, in my opinion, in the absence of sufficient reasons for holding the DNA test necessary, to resolve the controversy involved in the matter the impugned order is liable to be set aside."

34. Accordingly, there is no merit in this petition and the same is dismissed. The order, dated 31.01.2013, is modified only to the extent that enhanced maintenance payment shall be made from the date of filing of Cr.M.A. No. 78/4 of 2005/04, i.e., w.e.f. 17.12.2003. The arrears shall be deposited by the petitioner before the learned Trial Court within a period of eight weeks form today. No costs.

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

Manohar Lal ...Appellant

Versus

Kusum Lata Malhotra and another. ...Respondents.

RFA No. 266 of 2015
Decided on: 27.7.2015

Code of Civil Procedure, 1908- Order 21 Rule 97- A judgment and decree was passed in favour of the respondent no. 1-he filed an execution petition–the appellant filed objection petition which was dismissed– appellant contended that the judgment debtor was missing and report to this effect was lodged with the police- the possession of legal heirs could not be disturbed - the grounds taken in the application were taken earlier and were adjudicated - an appeal preferred against the order was dismissed by the High Court- held that the appellant cannot be permitted to raise same issue time and again to defeat judgment and decree - framing of issues is not always necessary for the executing Court- Appeal dismissed. (Para-7 to 9)

Cases referred:

Silverline Forum Pvt. Ltd. v. Rajiv Trust and another, AIR 1998 SC 1754

Parkash vs. Santosh Rani and another, AIR 1997 Punjab and Haryana 130

For the Appellant : Mr. R.K. Bawa, Sr. Advocate with Mr. Jeevesh Sharma, Advocate.

For the Respondents : Nemo.

The following judgment of the Court was delivered:

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

This appeal is directed against the order dated 1.7.2015 rendered by the Additional District Judge (II), Shimla in Execution Petition No.35-S/10 of 14/2009.

2. "Key facts" necessary for the adjudication of this appeal are that the judgment and decree dated 21.1.2009 was passed in Civil Suit No.4-S/1 of 2008 in favour of respondent No.1 and against the defendant. The decree holder filed Execution Petition bearing No. 35-S/10 of 14/2009 before the Additional District Judge, Shimla for the execution of judgment and decree dated 21.1.2009. The appellant also filed an application under order 21 rule 97 read with section 151 of the Code of Civil Procedure. The decree holder also filed an application under sections 94 and 151 of the Code of Civil Procedure to provide police assistance for taking over the possession. The Executing Court has dismissed the application preferred by the appellant under order 21 rule 97 read with section 151 of the Code of Civil Procedure on 1.7.2015 and allowed the application preferred by the decree holder under sections 94 and 151.

3. The appellant has precisely contended in his application preferred under order 21 rule 97 of the Code of Civil Procedure that judgment debtor was missing since first week of November, 2007. Report to this effect was lodged with the Police Station (West), Shimla on 16.12.2007. His whereabouts were not known. Sale deed dated 11.2.2015 was also in nullity. Devi Saran was an agriculturist and had no source of income except the ancestral/coparcenary property. The possession of Devi Saran and other legal heirs could not be disturbed.

4. The application was contested by the decree holder. According to her, objector had also taken similar plea in the previous objections. These were dismissed on 21.5.2014. Defendant preferred CMPMO No. 125 of 2015 before this Court. The Court has upheld the order dated 21.5.2014. Devi Saran and his sons never constituted a Hindu undivided family. Filing of the objections after objections was gross misuse of process of law. Objections raised on the similar grounds were rejected on 21.5.2014. This Court has made the following observations while upholding the order dated 21.5.2014 on 20.4.2015:

> **"11. In the instant case, it was incumbent upon the petitioner to establish by tangible evidence that the whereabouts of judgment debtor were not known and he was not heard for the last seven years, at the**

time of filing of the suit. Appropriate inquiry is also required to be held to prove that the person is not heard for the last seven years. It has come in the statement of daughter-in-law of the judgment debtor that infact, judgment debtor was living in Delhi for the last 2-3 years. This statement was made by the daughter-in-law of the judgment debtor in the year 2009. Merely filing the complaint before the Police Station, Boileauganj, would not establish that the judgment debtor is not alive."

5. The judgment and decree is dated 21.1.2009 and till date the same has not been executed.

6. Mr. R.K. Bawa, learned Senior Advocate has also argued that detailed inquiry was to be made after framing issues in an application preferred under order 21 rule 97 of the Code of Civil Procedure.

7. The grounds taken in the application preferred under order 21 rule 97 of the Code of Civil Procedure have already been adjudicated by the Executing Court on 21.5.2014, which is upheld by this Court on 20.4.2015. The appellant cannot be permitted to raise the same issues time and again to defeat the judgment and decree dated 21.1.2009.

8. Their Lordships of the Hon'ble Supreme Court in ***Silverline Forum Pvt. Ltd***. v. ***Rajiv Trust and another***, AIR 1998 SC 1754 have held that the words "all questions arising between the parties to a proceeding in an application under rule 97" would envelop only such questions as would legally arise for determination between those parties. The Court is not obliged to determine a question merely because the resistor raised it. These questions must be relevant for consideration and determination between the parties and those questions should have legal arisen between the parties. Their Lordships have further held that the adjudication need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Their Lordships have held as under:

"10. It is true that R. 99 of O. 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the executing Court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding that point the execution Court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution Court to adjudicate upon it. But while making adjudication, the Court is obliged to determine only such question as may be arising between the

parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the Court is not obliged to determine a question merely because the resistor raised it. The questions which executing Court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21, Rule 97(2) of the Code, execution Court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

12-13. It is clear that executing Court can decide whether the resistor or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."

9. Learned Single Judge of Punjab and Haryana High Court in ***Som Parkash*** vs. ***Santosh Rani and another***, AIR 1997 Punjab and Haryana 130 has held that the term "adjudication" as used in order 21 rules 97 and 98 does not start and end with the framing of the issues but it requires appreciation of the case of the objector and the documents in support of such objections. Adjudication does not mean that framing of issues is always necessary for the executing court. Learned Single Judge has held as under:

"[11] Summing up the above discussion, I hold that the term 'adjudication' as used under Order 21, Rules 97 and 98, C. P. C. , does not start and end with the framing of the issues but it requires appreciation of the case of the objector and the documents in support of such objections. In the present case the executing Court did apply its mind to the objections as well as the various orders which were passed intra parties and then came to the conclusion that the objections of the objector had no force and he was bound to deliver the possession in

pursuance of the ejectment order being a person inducted by the original tenant Sunil Kumar."

10. Thus, there is no merit in the contention of Mr. R.K. Bawa, learned Senior Advocate that issues were to be framed and detailed inquiry was to be gone into. The executing court has correctly decided the application on the basis of facts placed before it. There is neither any illegality nor any perversity in the order dated 1.7.2015 whereby the application preferred by the appellant under order 21 rule 97 of the Code of Civil Procedure has been dismissed. The order is upheld to the extent whereby the police assistance has been permitted by the Executing Court for the purpose of taking over the possession.

11. Accordingly, there is no merit in the appeal 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 RAJIV SHARMA, J.

Savitri Devi .....Appellant.
Versus
M/S Bharti Filling Station & anr. .....Respondents.

FAO No. 213 of 2015.
Reserved on: 15.7.2015.
Decided on: 28.7.2015.

Workmen Compensation Act, 1923- Section 5- Deceased used to drive a tanker- he had gone to Ambala- he suffered heart attack and died on the spot in the vehicle- Workmen Compensation Commissioner held that the death had no causal relations with the duty- the deceased had reached Ambala at 8:00 a.m. - he was taking the tanker inside the depot at 9:30 a.m.- the principal cause of death was due to heart attack – there was a causal between the duties discharged by the deceased and the death of the workman- the death was caused by stress and strain as the accused used to drive the vehicle even at odd hours – appeal allowed and compensation awarded. (Para-11 to 25)

Cases referred:
Broach Municipality vrs. Raiben Chimanlal and others, 1989 Lab.I.C. 73,
United India Insurance Co. Ltd. vrs. C.S.Gopalakrishnan and another, 1989 Lab. I.C. 1906
General Superintendent Talcher Thermal Station vrs. Smt. Bijuli Naik, 1994 Lab. I.C. 1379
Mines Manager vrs. Waheedul Haque Abbasi, 1994 ACJ 334
Param Pal Singh through father vrs. National Insurance Company and another (2013) 3 SCC 409
Rani Kour and others vrs. Jagtar Singh and another, 2012 ACJ 2072 (Vol.3)
Oriental insurance Co. Ltd. vrs. Sumanbai and others, 2014 ACJ 2354 (Vol.4)
Managing Director, Karnataka State Road Trans. Corpn. and another vrs. Jayalakshmi and others, 2014 ACJ 2490 (Vol.4)
Kalyan Roller Flour Mills Pvt. Ltd. vrs. U. Neelamma and others, 2014 ACJ 1661 (Vol.3)
Divisional Manager, Oriental Insurance Co. Ltd. vrs. M/S Giriwal Transport Corporation and others, 1994 Lab. I.C. 2655
New India Assurance Company Limited vrs. Smt. Sughra & ors., IV (2006) ACC 642

Basantabai and another vrs. Shamim Bee and another, 2012 ACJ 1858 (Vol.3)

For the appellant: Mr. Sanjeev Bhushan, Advocate.
For the respondents: Mr. Rahul Mahajan, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J (oral).

This appeal is instituted against the order dated 23/9/2014, rendered by the learned Commissioner, Employees' Compensation, Solan, H.P. in WCA Petition No. 26/2 of 2011.

2. Key facts, necessary for the adjudication of this appeal are that the appellant has filed petition to claim compensation under Workmen Compensation Act 1923 (hereinafter referred to as the Act) against respondent No. 1-owner of the tanker and respondent No. 2, being Insurance Company. The petitioner's son, namely, Sanjeev Kumar was working as driver with respondent No.1. He used to drive tanker in the year 2001. On 10.8.2001, he had gone to Ambala at Indian Oil Corporation Ltd.. He suffered heart attack due to heavy exertion. He died on the spot in the vehicle itself. The petitioner was fully dependant on the deceased. The monthly wages of the deceased were Rs. 3000/- per month. He was also paid Rs. 80/- per day as daily allowance. Thus, his monthly total wages were Rs. 5400/-. His age was 27 years.

3. The claim petition was resisted by respondent No. 1. Respondent No. 1 denied that the deceased was working with him as driver. The Insurance Company also contested the petition. According to the reply filed by the Insurance company- respondent No. 2, there was no casual connection between the death and work of the deceased.

4. The learned Commissioner framed the issues on 26.9.2007. The learned Commissioner dismissed the petition on 23.9.2014. Hence, this appeal.

5. The appeal was admitted on 24.6.2015, however, inadvertently, there is no reference to the substantial questions of law framed at page 6 of the paper book. In view of this, the appeal would be deemed to have been admitted on substantial questions of law framed at page 6 of the paper book.

6. Mr. Sanjeev Bhushan, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that there was connection between the work and death of the deceased. He then contended that the learned Commissioner has not appreciated the oral as well as documentary evidence in right perspective. On the other hand, Mr. Rahul Mahajan, Advocate, for respondent No. 1 has supported the order of the Commissioner dated 23.9.2014.

7. I have heard learned counsel for the parties at length and gone through the records and order very carefully.

8. The petitioner has appeared as PW-1. She has led her evidence by filing affidavit Ext. PW-1/A. She has placed on record identity card vide Ext. PW-1/B and driving licence Ext. PW-1/C. PW-2 Vishal Gupta, deposed that he was working as Deputy Manager in Indian Oil Corporation. He has brought certain records pertaining to the tanker. The deceased was found unconscious in the oil tanker. The dead body was taken to hospital and post mortem was also conducted. The form No. 25-35 was filled up by the concerned I.O vide Ext. PW-5/A. The I.O has also recorded the statements of some witnesses vide Ext.

PW-5/B and PW-5/C. The I.O has proved post mortem report vide Ext. PW-5/E. PW-3 Ram Chand has also deposed that the deceased was working as driver with respondent No. 1.

9. The petitioner has duly proved that the deceased was working as driver with respondent No.1 and he had gone to Ambala. The learned Commissioner has given findings that the doctor who has conducted the post mortem has not been examined and it was for the petitioner to prove by leading cogent evidence that the deceased died of heart attack induced by heavy stress and strain of work.

10. It has come in Ext. PW-5/A that deceased died of heart attack. In post mortem report Ext. PW-5/E, though doctor who has conducted the post mortem has not been examined, but in one of the columns, the cause of death has been shown to be heart attack, as information furnished by the police. In mark P-4, Sh. Naveen Kumar has deposed that they reached the Depot at 8:00 AM. He was working as cleaner with the deceased. When they were taking tanker inside the Depot at 9:30 AM, the deceased told him that he had pain in the chest and thereafter, he became unconscious. In para 3 of the claim petition, it is specifically averred that the deceased died due to heavy exertion and heavy duty/work, while he was discharging duties of respondent No. 1.

11. The deceased was employed as a driver by respondent No. 1. He used to go to Indian Oil Corporation Depot at Ambala. He reached Ambala at 8:00 AM in the morning. Thus, he had driven the vehicle during night time. He was taking the tanker at 9:30 AM inside the Depot. He complained of chest pain and thereafter he became unconscious. The principal cause of the death of the deceased was due to heart attack. There is casual link between the duties discharged by the deceased and the death. The death has been caused by stress and strain since the petitioner used to drive the tanker even at odd hours.

12. In the case of ***Broach Municipality vrs. Raiben Chimanlal and others***, reported in ***1989 Lab.I.C. 73,*** the learned Single Judge has held that where the workman was working as driver in the appellant-Municipality and was driving the tractor attached with a trailer in which dirt and filth was being collected from different parts of the town and was being dumped in a particular place in the town from morning 7 AM up to about 3:00 PM every day and it was proved in the case that on the date of incident, the workman was on duty from 7:00 AM onwards, in these circumstances, the Court has observed that it can be inferred that strain of work would contribute and aggravate the heart disease. It has been held as follows:

> "3. In this appeal it is contended on behalf of the appellant-Municipality that the nature of the duty to be performed by the deceased workman was not such that it can be the cause or contributing factor for aggravation of the disease. Therefore, it cannot be said that the workman died due to accident which arose out of and during the course of employment. The contention cannot be accepted for the simple reason that as found by the learned Commissioner for Workmens Compensation, the workman was working as Driver and was driving the tractor attached with a trailor in which dirt and filth was being collected from different parts of the town and was being dumped in a particular place in the town. The deceased workman was required to do this work from morning 7 a.m. up to about 3 p.m. every day. It is proved in the case that on the date of incident, the workman was on duty from 7 a.m. onwards. Simply because the work did not require continuous driving for all the duty hours, it cannot be said that the driving of a tractor would not be a contributory or aggravating cause for the cardiac failure or for myocardial infraction. Academically it may be said that heart-

attack may also be sudden one. But ordinarily, it has got to be inferred that strain of work would contribute and/or aggravate the heart disease. In this connection reference may be made to the decision of this High Court in the case of Amubibi v. Nagri Mills Co. Ltd. (18 G.L.R. 681) rendered by D.A. Desai, J. (as he then was). In that case also the workman had died due to heart failure. He was working in a textile mill. Therein it is observed as follows:

> "Leaving aside any technical consideration, common course of human conduct or common sense knowledge tells us that coronary insufficiency is generally the consequence of strain, extra work, fatigue. In the case of workman working on a loom in an artificial atmosphere of humidity (formerly called sweated labour) he is shown to have died on account of coronary insufficiency. Heart failure would be preceded by some sort of heart ailment, may be heart attack. In any event, if strain of work causes insufficiency that strain itself would be cause of death and it would be personal injury suffered by an employee in course of his employment."

The aforesaid observations would squarely apply to the facts and circumstances or the present case also. The deceased workman was performing his duty as a driver; from 7 o'clock in the morning. He worked up to 2 o'clock. By no stretch of reasoning it can be said that his work did not involve stress and strain. He was required to drive the tractor with trailer and had to move from place to place in the town for collecting the dirt and refuse. Then he was required to unload the same in a particular place in the town. Such type of work would certainly aggravate the disease. If the performance of duty during the course of employment aggravates the disease, then the death can certainly be attributed to the employment injury which he receives on account of strains of the work performed by him. Furthermore, the seat of the driver of a tractor remains incessantly trembling and there will be vibrations in the body of the driver which would also definitely aggravate the heart-disease. In this view of the matter, the learned Commissioner for Workmen's Compensation has correctly applied the Principle laid down by this High Court in the aforesaid decision."

13. In the case of ***United India Insurance Co. Ltd. vrs. C.S.Gopalakrishnan and another,*** reported in ***1989 Lab. I.C. 1906,*** the Division Bench of the Kerala High Court has held that though it is necessary that there should be a casual connection between the employment and the death in the unexpected way in order to bring the accident within S. 3, it is not necessary that it should be established that the workman died as a result of an exceptional strain or some exceptional work that he did on the day in question. If the nature of the work and the hours of work caused great strain to the employee and that strain caused the unexpected death, it can be said that the workman died as a result of an accident. It has been held as follows:

> "10. Though it is necessary that there should be a casual connection between the employment and the death in the unexpected way in order to bring the accident within Section 3, it is not necessary that it should be established that the workman died as a result of exceptional strain or some exceptional work that he did on the day in question. If the nature of the work and the hours of work caused great strain to the employee and that strain caused the unexpected death, it can be said that the workman died as a result of an accident which has arisen in the course of his employment.

18. Of course, in this case, there may have been no clear evidence as to the fact whether the death occurred directly due to the strain and stress of the work the deceased was doing on the day previous to the fatal incident. But, considering the circumstances proved in the case, it is only natural and probable to infer that the workman was put to great strain and stress in discharging his duties. From the evidence discussed by the Commissioner, it is clear that the workman was asked to do work for more hours than what he was statutorily bound to do.

23. Taking the evidence adduced in the case and the circumstances involved in the case, we feel that it has been established in the case that there was a casual connection between the death of the deceased and the work done in the course of his employment. We are of the opinion that from the evidence it is possible to infer that the strain of the work contributed to the fatal accident. Though the workman died due to heart failure, we are certain that it is not necessary that the workman was actually working at the time of his death and that the death must occur while he was working or had just ceased to work. Further, we find that the evidence shows a great probability which satisfies in a reasonable manner that the strenuous work contributed to the fatal accident. This finding of the Commissioner is not unreasonable which requires interference by this Court."

14. In the case of ***General Superintendent Talcher Thermal Station vrs. Smt. Bijuli Naik,*** reported in ***1994 Lab. I.C. 1379,*** the learned Single Judge of the Orissa High Court has held that the deceased suffering coronary thrombosis and dying of the same had close connection with his strenuous work in the factory and employer was liable to pay compensation. It has been held as follows:

"7. In the other Supreme Court case, : 1963 II LLJ 615 also the question of notional extension of employer's premises was under consideration. In that case, the employee after finishing his work for the day at 7.45 p.m. at Jogeshwari Bus Depot boarded another bus in order to go to his residence at Santa Cruz and the said bus collided with a stationary lorry parked at an awkward angle as a result of which he was thrown out on the road and was injured and died at the hospital. The Supreme Court held in that case that the accident occurred during the course of his employment and, therefore, his wife was entitled to compensation. In the said case, the Apex Court observed that the question when does an employment begin and when does it cease depends upon the facts of each case. But the Courts have agreed that the employment does not necessarily end when the "down tool" signal is given or when the workman leaves the actual workshop where he is working. There is a notional extension at both the entry and exit by time and space. The scope of such extension must necessarily depend on the circumstances of a given case. An employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and egress to and from the place of employment. This being the ratio and the employee in the instant case having died at the factory gate while coming to join his duty for the general shift at 8.00 a.m. a couple of minutes before 8.00 a.m. the theory of notional extension must apply. But the crucial question that arises for consideration is whether the nature of work which the deceased was doing can be said to have any connection with the coronary thrombosis which the deceased suffered and on account of which he ultimately succumbed. The doctor in his evidence has stated that

strenuous physical work may cause coronary thrombosis and even for 3 or 4 months prior to the death, the deceased had been coming to him complaining of chest pain and the doctor had treated him five days prior to the occurrence for chest pain. The claimant, the widow of the deceased, in her evidence had stated that on Saturday evening the deceased came back from office and complained of chest pain and the Commissioner on consideration of other evidence has held that the deceased was doing strenuous physical work in the factory. In this state of affairs, the ultimate conclusion that the deceased suffered from coronary thrombosis and ultimately died of the same has a close connection with his strenuous work in the factory, cannot be said to be erroneous in any manner and in the facts and circumstances of the case, the Commissioner rightly came to the conclusion that the injury suffered by the deceased has a direct connection with the employment in question. In this view of the matter, I find hardly any justification for interference by this Court with the impugned order of the Commissioner. This appeal accordingly fails and is dismissed but in the circumstances, without any order as to costs."

15. In the case of ***Mines Manager vrs. Waheedul Haque Abbasi,*** reported in ***1994 ACJ 334,*** the learned Single Judge of the Madhya Pradesh High Court has held that the death of workman due to heart failure while on duty is an accident, certain manifestations of heart condition from the effect of strain or over exertion of work constitute an accidental injury within the Act. It has been held as follows:

"11. Death of workman due to heart failure while on duty is an accident within the meaning of Section 3 of the Act. Certain manifestations of heart condition from the effect of strain or overexertion of work constitute an accidental injury within the Act. In the cases of heart failure during the course of employment the claimant dependant cannot be expected to give evidence of strain or overexertion experienced by the deceased while at work in the course of employment leading to the heart attack and death. In the nature of things and in fairness it could only he expected of the employer to give evidence about the previous history of the deceased's health and his health condition in the course of his employment prior to the occurrence of death. There is, however, no evidence led by the employer which could throw light on the question whether the death by heart attack occurred as a result of employment or otherwise. To my mind, if the matter is allowed to be shrouded in mystery because of the paucity of evidence, the employer cannot be given the advantage of it. In the case of Amubibi v. Nagri Mills Co. Ltd., (1977-II-LLJ-510) (Guj), where a workman going to work at 3.30 p.m., was found dead on the floor at 5.30 p.m., by coronary insufficiency, it is permissible to infer that the death was due to strain out of work and fatigue in doing the work and that the strain led to the coronary condition. Relying on this decision, I hold that the death of the deceased employee occurred on account of personal injury in an accident arising out of and in the course of his employment In this view of the matter agreeing with the finding of the learned Commissioner, I uphold the award. This appeal, filed by the employer, is, therefore, dismissed with no order as to costs."

16. In the case of ***Param Pal Singh through father vrs. national Insurance Company and another*** reported in ***(2013) 3 SCC 409,*** their lordships of the Hon'ble Supreme Court have held that the deceased being professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such

constant driving of heavy vehicle, being dependent solely upon his physical and mental resources and endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his lifespan. It has been held as follows:

> "21. On behalf of the first respondent its Divisional Manager filed his proof affidavit while on behalf of the second respondent one Anil Sharma was examined. As far as the employment of the deceased was concerned, the Commissioner has noted that the FIR which was marked as Exhibit AW1/1 disclose that the second driver Bhure Singh himself admitted therein that the deceased was the senior driver who was driving the vehicle at the time of his death. As regards the said piece of evidence contained in AW1/1 nothing was brought out in his evidence either by way of trip sheet or attendance register or payment of wages register or any other document to show that the deceased was not in the employment of the second respondent at any point of time or on the fateful day. The Commissioner also noted that there was no cross-examination of WW1/A Santokh Singh on that issue. On the other hand RW.1 Anil Sharma in his cross-examination admitted that a sum of Rs.10,000/- was given to the family of the deceased for cremation purposes. Therefore, the issue relating to the employment of the deceased by the second respondent as found to have been established before the Commissioner cannot be assailed.
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> 29. Applying the various principles laid down in the above decisions to the facts of this case, we can validly conclude that there was CAUSAL CONNECTION to the death of the deceased with that of his employment as a truck driver. We cannot lose sight of the fact that a 45 years old driver meets with his unexpected death, may be due to heart failure while driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1152 kms. away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependant solely upon his physical and mental resources & endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span. Such an 'untoward mishap' can therefore be reasonably described as an 'accident' as having been caused solely attributable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business."

17. In the case of ***Rani Kour and others vrs. Jagtar Singh and another,*** reported in ***2012 ACJ 2072 (Vol.3),*** the learned Single Judge of the Madhya Pradesh High Court, Indore Bench, has held that Commissioner was justified in holding that heart attack to the driver was due to service strain. It has been held as follows:

> "[7] Here in the present case, there was pleading in this behalf in para 1 of the claim petition. The deceased Manoharsingh was working as a driver in a truck which was going to Borali Badnawar village from Borowa to unload molasses. From the evidence it has come on record that on 12.4.2006 the deceased came from Punjab and he stayed for five minutes at his home and thereafter due to pressure of work he again left for Borali for unloading of

molasses of Oasis Distillery. Rani Kour, AW 1, wife of the deceased, and Ramesh, cleaner of the vehicle, in their statement have very categorically stated that deceased had gone to Punjab. As per autopsy report, the death was due to heart attack. The Commissioner after appreciating the evidence of Rani Kour, appellant No. 1, and Ramesh, cleaner, arrived at a finding that heart attack was due to service strain and held that deceased had suffered massive heart attack. The record shows that heart attack was caused while doing his job. The learned Commissioner gave a finding that appellants by cogent evidence have proved that deceased had died while he was working in the vehicle and cardiac arrest has occurred because of stress and strain.

[9] On perusal of the material available on record this court is of the view that the learned Commissioner has not committed any legal error in awarding compensation to the appellants. The finding recorded by the Commissioner is based on application of evidence on record which required no interference. No substantial question of law is involved in the cross-objection filed by the respondent No. 2. Cross-objection has no merit and is accordingly dismissed."

18. In the case of ***Oriental insurance Co. Ltd. vrs. Sumanbai and others,*** reported in ***2014 ACJ 2354 (Vol.4),*** the learned Single Judge of the Madhya Pradesh High Court, Indore Bench, has held that driver while driving the truck developed chest pain and he was taken to hospital where he was declared dead. The Commissioner found that death occurred during the course of employment and directed the employer and insurance company to pay compensation. The learned Single Judge has held that the Commissioner was justified in awarding compensation against the employer and Insurance Company since the death arose out of and in the course of employment. It has been held as follows:

"[11] In a recent and latest decision reported in Param Pal Singh v. National Insurance Co. Ltd., 2013 ACJ 526(SC), their Lordships analysed the entire case-law relating to the expression "injury caused by an accident arising in and out of employment" in the context of section 3 of the Workmen's Compensation Act. It is also a case of professional truck driver who suffered heart attack while in employment, i.e., when driving the truck, like the case in hand, and was immediately taken to hospital but in vain. After reviewing the two judgmentsand various English authorities it was held as under:

"Applying the various principles laid down in the above decisions to the facts of this case, we can validly conclude that there was causal connection of the death of the deceased with that of his employment as a truck driver. We cannot lose sight of the fact that a 45-year-old driver meets with his unexpected death, maybe due to heart failure while driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1,152 km away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependent solely upon his physical and mental resources and endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his lifespan. Such an 'untoward mishap' can therefore be reasonably described as

> an 'accident' as having been caused solely attributable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business."
>
> [12] Having regard to the evidence placed on record there stands established and proved that the deceased was actually driving the truck and that in the course of such driving activity he had a heart attack. In such circumstances, we are convinced that the conclusion of the Commissioner for Workmen's Compensation that death of the deceased was in an accident arising out of and in the course of his employment with the respondent No. 7 was perfectly justified and this appeal deserves to be dismissed and is hereby dismissed with costs throughout. Counsel's fee Rs. 5,000 if certified."

19. In the case of ***Managing Director, Karnataka State Road Trans. Corpn. and another vrs. Jayalakshmi and others, ,*** reported in ***2014 ACJ 2490 (Vol.4),*** the learned Single Judge of the Karnataka High Court, has held that driver who was forced to attend duty for 36 to 40 hours with a short gap of 6-7 hours aggravated his pre-existing heart condition and the stress and strain of work led to sudden heart failure. It has been held as follows:

> "[13] In the matter on hand, admittedly the workman was driver working in Karnataka State Road Transport Corporation. The Conductor of the bus PW-2, who had slept alongwith the deceased workman at the time of incident in the bus, has specifically deposed before the Commissioner that the deceased informed the officials of the appellant Corporation in the morning of 6.10.2006 at the time of reporting for duty itself that he is having chest pain and that he is not able to drive the bus; despite the same, the officials of the appellant Corporation insisted the driver that he should drive the vehicle on that day because of lack of drivers strength on that particular day. The officials of the appellant Corporation insisted that the deceased shall complete the trip. Because of such pressure by the officials, the deceased went on duty during the relevant day. The very fact, that the deceased was made to drive the bus from morning till evening of 6.10.2006 on Route No.99 and that he was again instructed to drive the bus from the evening of 6.10.2006 till next day as aforementioned on the route Arasikere-Shimoga-Mysore- Arasikere, clearly reveals that the death has occurred while he was on duty. It is not open for the driver to leave the bus at Shimoga bus station and come back to his home at Arasikere which is about more than 150 kilometers from Shimoga. Since the deceased was entrusted with the bus and as he was directed by the higher officials to drive back the bus from Shimoga to Mysore at 4 a.m. on the next day i.e., 7.10.2006, the argument of the learned counsel for appellants that the death was not while the deceased was on duty, cannot be accepted. The work was entrusted to the deceased at 8 a.m. on 6.10.2006 and it was to continue till the next day evening (i.e., approximately for about 36- 40 hours) though there was a short gap of about 6 to 7 hours at Shimoga. As is clear from the evidence of PW-2, the deceased was suffering from headache, chest pain when he reached Shimoga from Mysore on the night of 6.10.2006. Immediately he went to medical shop and purchased some pills and consumed the same for relief from headache. Unfortunately, the deceased suffered massive heart attack while asleep in the bus during the night intervening between 6.10.2006 and 7.10.2006. Hence the Commissioner for Workmen's Compensation is justified in concluding that the death was direct result of continuous and heavy work

entrusted to the deceased and that the deceased died during the course of duty. It is the specific evidence of PW-2 that in the morning of 6.10.2006 itself the deceased had complained that he is suffering from chest pain. Despite the same, the officials of the Corporation forced the deceased to drive the bus because of dearth of drivers' strength on that day. Such evidence of PW-2 Conductor is not even controverted in the crossexamination. On the other hand in the cross-examination PW-2 has denied the suggestion of the appellant Corporation that the work undertaken by the deceased was not strenuous. From the aforementioned uncontroverted evidence of PW-2, it is clear that the deceased was suffering from stress & strain because of heavy pressure of work on that day.

[14] In the matter on hand, the stress and strain suffered by the deceased did mainly contribute to or accelerate the injury. If the deceased were to take rest on 6.10.2006 without attending the work, probably he would have saved his life. But he was forced to work since morning of 6.10.2006. When he reached Shimoga during night of 6.10.2006, he was completely exhausted and immediately he took some pills. Unfortunately, he lost his life while in sleep. Thus the case on hand is the finest example relating to direct connection between injury and employment and loss of life due to strain of ordinary work. The stress & strain did contribute to and accelerate the injury {see the judgment in the case of JYOTHI ADEMMA .vs. PLANT ENGINEER, NELLORE, 2006 5 SCC 513.

[15] In the cross-examination, it is also brought out that since two weeks prior to his death, the deceased was suffering from chest pain. The post-mortem report amply makes it clear that the death was due to cardiac failure as a result of coronary insufficiency consequent to chronic coronary artery disease. Therefore the circumstances as brought out by the claimants clearly reveal that the death was caused as a result of failure of the heart which is because of strain and stress of the work. Stress and strain has resulted in sudden heart failure and the death has occurred during the course of employment. The preexisting heart condition of the deceased was aggravated by the strain of work of the deceased and the same has resulted in his death.

[16] Sri D'Sa sought to contend that the deceased driver died naturally i.e., due to heart attack. But the material on record amply reveals that the workman was forcibly engaged to work on particular day which accelerated his death. From the evidence available on record, it is clear that the workman had died of heart attack; there being a pre-existing heart condition which was aggravated by the strain of the work of the deceased and the same has resulted in his death. The death of the workman was not due to the disease from which he was suffering, but on account of factors coupled with employment. Aforementioned facts have led the Commissioner to conclude that the death occurred as consequence of and in the course of employment. Hence the Commissioner for Workmen's Compensation is justified in awarding compensation. Accordingly, no interference is called for.

The question of law is answered accordingly. Appeal fails and the same stands dismissed. The amount in deposit shall be disbursed in favour of the respondents."

20. In the case of ***Kalyan Roller Flour Mills Pvt. Ltd. vrs. U. Neelamma and others,*** reported in ***2014 ACJ 1661 (Vol.3),*** the learned Single Judge of the Andhra Pradesh High Court has held that the contention that deceased never complained of any

chest pain and discomfort while working as driver and he suffered heart attack after reaching home, therefore, there is no nexus between the accident and the employment, held that the incident of the deceased suffering from chest pain due to strenuous work is closely connected with the nature of employment and there is close nexus between death of the deceased and his employment. It has been held as follows:

> "[10] Learned counsel placed strong reliance upon a decision of this Court in DEPOT MANAGER, APSRTC v. GURRAPU ANJAMMA, 1999 6 ALD 101 wherein the conductor of a RTC bus while on duty suffered chest pain and died due to cardiac infraction. In the said case also, this Court considered various decisions and came to the conclusion that the death had occurred out of and during the course of employment. This court also considered various other decisions where strenuous driving of the vehicle was one of the causes, which lead to death and the case of conductor, on hand, was considered in the light of the ratio of various decisions and it was held that the death has occurred during and in the course of employment.
>
> [11] Learned counsel for the respondents also relied upon a latest decision of the Supreme Court in PARAM PAL SINGH v. NATIONAL INSURANCE CO., 2013 2 ALD(SC) 61 where various principles laid down under different judgments were reviewed and considered by the Supreme court and it was held that there was close connection to the death of the deceased with that of his employment as truck driver. On facts, it was found that the heavy vehicle driver had driven the vehicle for about 1200 KMs and while he had stopped the vehicle on road side of a nearby hotel, he, thereafter, immediately fainted and was taken to the hospital where he was found brought dead.
>
> Thus, the occupation as a heavy vehicle driver was said to be a contributory factor resulting in accelerated death and as such, the death was attributable to and in the course of employment. A Division Bench judgment of the Madras High Court in P. KALYANI v. DIVISIONAL MANAGER, SOUTHERN RIALWAY (PERSONAL BRANCH), DIVISIONAL OFFICE, MADRAS, 2004 1 LLJ 49 is relied upon, which was a case relating to an employee, who was called to attend night duty, was found dead on the platform of the station, which is just before he joined duty. The employer disputed the liability on the ground that the deceased was not on duty and was found lying unconscious on railway platform. The Division Bench considered that the strain caused accelerated or hastened death and it cannot be said that the death was not on account of or in the course of employment.
>
> [12] In the light of these rival contentions and the legal position placed on record by the learned counsel on either side, I have examined the evidence, on record, afresh to find that the deceased being driver of the lorry transporting factory products, all of which are in the powder form, is one of the contributory factors, as, admittedly, the driver and cleaner have to be present when the lorry is being loaded or unloaded, which is bound to produce powdered dust. Moreover, the nature of the job required the deceased to be away from home, on duty, driving the lorry for days together, as stated by P.W.1 in her statement. On the fateful day also, immediately after the deceased had returned home from duty, around midnight he suffered chest pain to which he succumbed. As has been found in the latest judgment of the Supreme Court in PARAM PAL SINGH'S case (5 supra), the incident of the deceased suffering from a massive chest pain is closely connected with the nature of employment. The close nexus between the

death of the deceased and employment being evident, the learned Commissioner was right in holding that the death occurred during the course of employment or arising out of employment and as such, was justified in granting compensation to the claimants under the Act. That finding of the Commissioner, therefore, does not deserve any interference."

21. Mr. Rahul Mahajan, Advocate, for respondent No. 1-owner, has also argued that the daily allowance could not be added in the income. The learned Single Judge of the Orissa High Court in the case of ***Divisional Manager, Oriental Insurance Co. Ltd. vrs. M/S Giriwal Transport Corporation and others,*** reported in ***1994 Lab. I.C. 2655,*** has held that "bhatta" (daily allowance) towards food was considered to be part of wages.

22. In the case of ***New India Assurance Company Limited vrs. Smt. Sughra & ors.,*** reported in ***IV (2006) ACC 642,*** the Division Bench of the Allahabad High Court has held that daily allowance given for the purpose of food is privilege and benefit and the same can be estimated in terms of money. It has to be included in wages of workman while calculating compensation. It has been held as follows:

"15. In the case of Oriental Insurance Co. Ltd. v. Shyamsundar Rohldas and Ors. II (2000) ACC 599 : 2000 Vol. 3 TAC 290 (Orissa), similar question arose with respect to daily allowance paid towards diet. The learned Single Judge of the High Court, after taking into consideration, the definition of wages given in the Act and also following the judgment of the Supreme Court in the case ofDivisional Manager, Oriental Insurance Company Ltd. v. Girlwal Transport Corporation and Ors. 1994 LAB I.C. 2655, held that daily allowance of Rs. 25 towards food was to be considered as part of the wages. In the case of Luizina Cyril Vaz v. Caltex(India) Limited, reported in 1973 Vol. 27 FLR 321, the Bombay High Court held that the word wages or remuneration or earning would include all that a workman gets as incidental to his employment and that Food Allowance, Overseas Allowance, Devaluation Supplement and overtime wages paid to a seaman, who is workman as defined in Section 2(1)(n) of the Workmen's Compensation Act, 1923, in addition to his basic wages, are privileges or benefits which are capable of being estimated in money and are, therefore, wages within the meaning of Section 2(1)(m) of the Act. In the instant case also, the amount of daily allowance given for the purpose of food or which may be termed as diet expenses per day is a privilege and benefit which can be estimated in terms of money and, therefore, it would be included in the definition of 'wages' as per the definition of wages given in the Act."

23. In the case of ***Basantabai and another vrs. Shamim Bee and another,*** reported in ***2012 ACJ 1858 (Vol.3),*** the learned Single Judge of the Madhya Pradesh High Court, Indore Bench, has held that 'bhatta' received by deceased should form part of his income while computing compensation. It has been held as follows:

"[3] In respect of income of the deceased it is submitted that deceased was working as cleaner on the truck bearing registration No. MP 13-E 0553 and during the course of employment he met with an accident in which he sustained grievous injuries. During the treatment on 10.10.2005 he died at Government Hospital. Mandsaur. At the time of death he was 18 years of age and his salary was Rs. 4,000 per month. Apart from his salary he was getting the dainik bhatta of Rs. 50 per day. Exhs. P1 to P7 are the documents in respect of wages of the deceased. Learned counsel for the appellants submits that Basantabai in her statement has deposed that

income of the deceased was Rs. 3,000 per month, but she in her evidence has not stated that the deceased was not getting Rs. 50 per day as bhatta and submitted that the learned Commissioner wrongly disbelieved the said part of the evidence and assessed his income at Rs. 3,000 per month.

[4] On the other hand, Mr. M. Upadhyay, learned counsel for respondent insurance company, supported the order passed by Commissioner and submitted that bhatta is not a part of wages as defined in clause (m) of sub-section (1) of section 2 of the Workmen's Compensation Act, 1923. This question was considered by the Division Bench of Madhya Pradesh High Court at Gwalior Bench in the case of Shakuntala v. Kanna Dangi, 2007 ACJ 2486. Para 11 which is relevant reads as herein-below:

To determine the question whether the bhatta (daily allowance) is a part of wages for computing the compensation under Motor Vehicles Act and ultimately to determine the question of wages of a driver, we have to consider the evidence and if it has come in the evidence that he was also getting Rs. 50 per day as daily allowance, whether the same can form part of wages. The term 'wages' has been defined in many Central Acts, such as, under the Payment of Wages Act, 1936; the Minimum Wages Act, 1948, the Industrial Disputes Act, 1947; and under the Workmen's Compensation Act, 1923, which are as under:

Payment of Wages Act, 1936:

Section 2(vi)--'wages' means all remuneration (whether by way of salary allowance, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and include--

(a) xxx

(b) xxx

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name):

(d) xxx

(e) xxx

Minimum Wages Act, 1948:

Section 2(h)--'wages' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance, but does not include--

(i) the value of

(a) xxx

(b) any other amenity of any service excluded by general or special order of the appropriate Government;

(ii) xxx

(iii) any travelling allowance or the value of any travelling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(v) xxx

Industrial Disputes Act, 1947:

(rr) 'wages' means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment and includes:

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;

(ii) xxx

(iii) xxx

Workmen's Compensation Act, 1923:

(m) 'wages' includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment;

From a bare reading of the definitions of 'wages' under the Minimum Wages Act, 1948, Industrial Disputes Act, 1947 and the Workmen's Compensation Act, 1923, it is amply clear that the 'wages' means all remuneration whether by way of salary, allowance or otherwise expressed in terms of money or capable of being so expressed, payable to a person employed in respect of his employment or of work done in such employment and includes any additional remuneration, any travelling allowance or the value of any travelling concession or any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment, shall form part of the wages. These definitions are quite exhaustive and it prima facie appears that any amount paid to the driver either as additional remuneration payable in terms of employment or any travelling allowance or any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment, would be included in the definition of 'wages'. Therefore, any bhatta or daily allowance that is paid to the driver under any special contract as additional remuneration or as daily allowance may be considered as part of the wages but if any sum is paid for defraying any expenses towards food as and when the driver will go outside the city then it may not form part of the wages. For that the claimant has to prove that the amount of daily bhatta is paid as additional remuneration or as travelling allowance and it may depend from case to case and on the nature of the vehicle as well as the nature of duties and if it is found proved that the bhatta is paid as additional remuneration under the terms of contract for the purposes mentioned in the definition of 'wages' then as per the evidence on record the court may include the aforesaid bhatta as part of wages.

[6] For the above-mentioned reasons, the substantial question of law No. 2 framed by this court is answered in favour of the appellants by holding that bhatta is part of the wages for the purpose of computation of compensation."

24. In the instant case, the learned Commissioner has come to the wrong conclusion that there was no connection between the work and death of the deceased. The very fact that the deceased was working as a driver and that too of oil tanker, his job was full of stress and strain. It was not necessary for the petitioner to prove that her son was

suffering from heart ailment before the accident. The Court can take judicial notice that at times the person may die due to first massive heart attack. The learned Commissioner has come to a wrong conclusion that the deceased has not died due to stress and strain while driving the oil tanker. It was not necessary for the claimant to examine the doctor in view of material placed on record. The substantial questions of law are answered accordingly.

25. The petitioner is the legal heir of the deceased and is entitled to compensation amount and penalty as under:

(1) Age 27 years, salary Rs. (4000 – 2000) = Rs. 2000 per month, for the purpose of compensation i.e Rs. 2000 x 213.57 = 4,27,140.

(2) Simple interest @ 12% per annum from 10.8.2001, till date, comes out to Rs. 7,15,629.18.

(3) Penalty @ 20% comes out to Rs. 85,428.

(4) Total amount comes out to Rs. **12,28,197.18**. (Twelve lacs twenty eight thousand one hundred and ninety seven only).

26. Accordingly, the appeal is allowed. The appellant is entitled to compensation of Rs. 12,28,197.18, as computed hereinabove. The Insurance Company is directed to pay the principal amount as well as interest but the penalty has to be borne by the employer i.e. respondent No. 1. The awarded amount be deposited in the Registry of this Court within four weeks.

****

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

Shriram General Insurance Company Limited ....Appellant

Versus

Leela Vati and others. ...Respondents.

FAO (ECA) No. : 295 of 2014
Reserved on : 25.6.2015
Decided on: 29.7.2015

Employees Compensation Act, 1923- Section 22- Deceased was a driver of the vehicle which met with an accident – he was aged 21 years- his salary was Rs. 4,500/- per month and he was being paid Rs. 120/- as daily diet money- held that diet money paid to the driver falls within the definition of income and has to be taken into consideration while assessing the compensation- the Insurance Policy did not exclude the provisions of interest, therefore, the Insurance Company is liable to pay the interest on the compensation from the date of the accident.

Cases referred:

Basantabai and another vs. Shamim Bee and another, 2012 ACJ 1858

Rani Kour and others vs. Jagtar Singh and another, 2012 ACJ 2072

Manju Sarkar and others vs. Mabish Miah and others, (2014) 14 SCC 21

Saberabibi Yakubbhai Shaikh and others vs. National Insurance Company Limited and others, (2014) 2 SCC 298

Kerala State Electricity Board vs. Valsala K., 2000 ACJ 5 (SC)

Project Officer, Basudeopur Colliery vs. Dhaneswari Devi, 2014 ACJ 1325

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents : Mr. L.S. Mehta, Advocate for respondent Nos. 1 and 2.
Mr. Malkiyat Singh, Advocate vice counsel for respondent No.3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the award dated 31.8.2013 rendered by the Commissioner under Employee's Compensation Act, 1923, Karsog in W.C. Pet. No. 2 of 2011.

2. "Key facts" necessary for the adjudication of this appeal are that respondent Nos. 1 and 2 instituted a petition for the grant of compensation under section 22 of the Workmen Compensation Act against the appellant as well as respondent No.3- Paras Ram Bansal. Respondent No.1 is the mother of deceased Prem Singh and respondent No.2 is the father of deceased Prem Singh. Prem Singh was deployed as a Driver of ill-fated truck of respondent No.3. The truck met with an accident on 22.12.2009 at 11.30 P.M. Prem Singh died on the spot. The post-mortem was conducted at C.H. Karsog. FIR was registered. Prem Singh was 21 years old at the time of accident. His salary was Rs. 4,500/- per month and despite that he was also paid a sum of Rs. 120/- as daily diet money by respondent No.3. Thus, his salary was Rs. 4500+3600 = Rs.8,100/- per month.

3. Petition was contested by the owner of the truck. He has admitted that deceased Prem Singh was employed as a Driver. The accident was caused due to mechanical defect in the truck. He had engaged the deceased at Rs. 2,500/- per month. The appellant-insurance company also contested the petition. According to the plea taken by the insurance company, the truck was being driven in violation of the terms and conditions of the insurance policy. The person driving the vehicle at the time of accident was not holding a valid and effective driving licence.

4. Issues were framed by the Commissioner under Employee's Compensation Act on 31.8.2013. He awarded a sum of Rs. 8,97,925/- to the claimants with simple interest @ 12% per annum. Hence, the present petition. This appeal was admitted on the following substantial questions of law:

> **1. "Whether the learned Commissioner is right in considering the daily allowance/Bhatta received by the deceased as part of wages, while computing compensation?**
>
> **2. Whether the appellant being insurance company is liable to pay interest on the insured amount under Employee's Compensation Act?**
>
> **3. Whether the learned Commissioner below is right in taking the monthly wages of the deceased as Rs. 8,100/- instead of Rs. 4,000/- per month when the accident has taken place prior to the amendment dated 31.5.2010 vide notification S.O. 1258 (E)?"**

5. Mr. Jagdish Thakur, learned counsel for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that daily allowance/Bhatta received by the deceased could not be included as part of wages. He then contended that the insurance company was not liable to pay interest on the insured amount. He has lastly

contended that the monthly wages of the deceased were to be taken as Rs. 4,000/- instead of Rs. 8,100/- per month.

6. Mr. L.S. Mehta and Mr. Malkiyat Singh have supported the award dated 31.8.2013.

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

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

9. Respondent No.2 Udham Singh has appeared as AW-3. According to him, his son was a Driver. He met with an accident on 22.12.2009. His monthly salary was Rs. 4,500/- and Rs. 120/- as daily diet money. He used to look after the apple orchard. He used to sell potato and peas and was earning Rs. 2,00,000/- per year. He has proved copy of insurance policy Ex.AW-3/A and R.C. of the vehicle AW-3/B.

10. AW-1 Dr. Chetan Chauhan has proved the post-mortem report Ex.PW-4/A. AW-2 Gian Chand has proved the FIR Ex.AW-2/A. Respondent No.1 Leela Vati has appeared as AW-4. She has deposed on the line of AW-3 Udham Singh.

11. The owner of the truck Paras Ram Bansal has appeared as RW-1. He has admitted that he had employed Prem Singh as a Driver. The driving licence was valid with effect from 15.10.2007 to 14.10.2010. He used to pay him monthly salary of Rs. 2,500/- per month alongwith daily diet money. He has identified copy of driving licence Ex.RW-1/A, registration certificate of vehicle Ex.RW-1/B, copy of insurance Ex.RW-1/C and permit Ex.RW-1/D. He has also admitted that accident occurred on 22.12.2009.

12. According to RW-2 Head Constable Chajju Ram, FIR No. 196/2009 dated 23.12.2009 under sections 279 and 304-A of the Indian Penal Code was registered against the driver.

13. The question whether the daily allowance was to be calculated for the purpose of wages of the deceased is no more *res integra* in view of the law laid down by learned Single Judge of Madhya Pradesh High Court (Indore Bench) in ***Basantabai and another*** vs. ***Shamim Bee and another***, 2012 ACJ 1858. Learned Single Judge has held that *bhatta* received by deceased should form part of his income while computing compensation. Learned Single Judge has held as under:

> **[4]..... To determine the question whether the bhatta (daily allowance) is a part of wages for computing the compensation under Motor Vehicles Act and ultimately to determine the question of wages of a driver, we have to consider the evidence and if it has come in the evidence that he was also getting Rs. 50 per day as daily allowance, whether the same can form part of wages. The term 'wages' has been defined in many Central Acts, such as, under the Payment of Wages Act, 1936; the Minimum Wages Act, 1948, the Industrial Disputes Act, 1947; and under the Workmen's Compensation Act, 1923, which are as under:**
>
> **Payment of Wages Act, 1936:**
>
> **Section 2(vi)--'wages' means all remuneration (whether by way of salary allowance, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and include--**

(a) xxx

(b) xxx

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name):

(d) xxx

(e) xxx

Minimum Wages Act, 1948:

Section 2(h)--'wages' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance, but does not include--

(i) the value of

(a) xxx

(b) any other amenity of any service excluded by general or special order of the appropriate Government;

(ii) xxx

(iii) any travelling allowance or the value of any travelling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(v) xxx

Industrial Disputes Act, 1947:

(rr) 'wages' means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment and includes:

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;

(ii) xxx

(iii) xxx

Workmen's Compensation Act, 1923:

(m) 'wages' includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment;

From a bare reading of the definitions of 'wages' under the Minimum Wages Act, 1948, Industrial Disputes Act, 1947 and the Workmen's Compensation Act, 1923, it is amply clear that the 'wages' means all remuneration whether by way of salary, allowance or otherwise expressed in terms of money or capable of being so expressed, payable to a person employed in respect of his employment or of work done in such employment and includes any additional remuneration, any travelling allowance or the value of any travelling concession or any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment, shall form part of the wages.

These definitions are quite exhaustive and it prima facie appears that any amount paid to the driver either as additional remuneration payable in terms of employment or any travelling allowance or any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment, would be included in the definition of 'wages'. Therefore, any bhatta or daily allowance that is paid to the driver under any special contract as additional remuneration or as daily allowance may be considered as part of the wages but if any sum is paid for defraying any expenses towards food as and when the driver will go outside the city then it may not form part of the wages. For that the claimant has to prove that the amount of daily bhatta is paid as additional remuneration or as travelling allowance and it may depend from case to case and on the nature of the vehicle as well as the nature of duties and if it is found proved that the bhatta is paid as additional remuneration under the terms of contract for the purposes mentioned in the definition of 'wages' then as per the evidence on record the court may include the aforesaid bhatta as part of wages.

[6] For the above-mentioned reasons, the substantial question of law No. 2 framed by this court is answered in favour of the appellants by holding that bhatta is part of the wages for the purpose of computation of compensation."

14. Mr. Jagdish Thakur has also argued that interest was not to be paid by the Insurance Company but he has not pointed out any clause of Insurance Policy excluding the provision of interest.

15. Learned Single Judge of Madhya Pradesh High Court (Indore Bench) in ***Rani Kour and others*** vs. ***Jagtar Singh and another***, 2012 ACJ 2072 has held that where insurance company has not expressly stipulated non-liability for payment of interest in the policy, it is liable to pay the interest on the amount of compensation. Learned Single Judge has held as under:

"[14] Learned Advocate Mr. Sandip Shah appearing for respondent No. 1-original plaintiff in all the appeals referred to the documentary evidences as well as the pleadings in detail and submitted that the operations were performed on the left eye by defendant No. 3 and thereafter the operation was performed for removal of the left eye-ball by defendant No. 5 and again for cataract in the right eye the operation was performed by defendant No. 5. He submitted that if the chronology of events and the dates are considered, it is evident that there was sepsis in his left eye when the operation was performed. He submitted that with the same condition the operation could not have been performed. The submission with regard to endogenous infection in some other part of the body is misconceived as the pathological reports clearly state that the plaintiff was normal. He submitted that, thus, at the time of treating the patient when there was an injury and the blood had clotted, both defendant Nos. 3 and 4 tried to hush up, played mischief keeping the respondent-plaintiff in the dark which led to deterioration in not only the left eye but also affected his right eye. Learned Advocate Mr. Sandip Shah, therefore, submitted that if the pleadings in the form of written statement as well as the depositions are considered, it clearly suggests negligence in performance of the duty by all concerned including defendant Nos. 3 and 5. The Civil

Hospital would be liable vicariously for the act of negligence by defendant No. 3.

[15] He, therefore, submitted that when the person has lost vision of both the eyes because of any such carelessness or negligence, it cannot be a ground for further scrutiny on any technical grounds raised on the medical opinion. He submitted that the evidence on record as discussed at length in the impugned judgment clearly suggests that there was negligence on the part of original defendant No. 3-Dr. Bhikubhai Patel as well as defendant No. 5-Dr. Jagdishbhai Shah and both the doctors have failed in discharge of their duty exhibiting reasonable care and standard expected of a person in the medical profession. He, therefore, submitted that the appeals may be dismissed."

16. Their Lordships of the Hon'ble Supreme Court in ***Manju Sarkar and others*** vs. ***Mabish Miah and others***, (2014) 14 SCC 21 have held that in the absence of clause of contract of insurance excluding provision for interest, the insurance of company is liable to pay interest. Their Lordships have held as under:

"13. A contention was raised by the learned counsel for the Respondent No.3 Insurance Company that they are not liable to pay the interest component and reliance was placed on the decision of New India Assurances Co. Ltd. Vs. Harshad Bhai Amrut Bhai Modhiya and another [(2006) 5 SCC 192] In the facts of the case on which the said decision arose, the contract of insurance entered into between the parties contained a proviso that the insurance granted is not extended to include any interest. In the present case there is nothing on record to show that respondent No.3 Insurance Company either pleaded about existence of such a clause in the contract of insurance or led any evidence to the said effect and hence the said decision will not help respondent No.3 in any way and the contention raised is devoid of merit."

17. The amount of interest has to be paid from the date of accident and not from the date of award.

18. Their Lordships of the Hon'ble Supreme Court in ***Saberabibi Yakubbhai Shaikh and others*** vs. ***National Insurance Company Limited and others***, (2014) 2 SCC 298 have held that appellants were entitled to 12% interest from date of accident. Their Lordships have held as under:

"[8] We have perused the aforesaid judgment. We are of the considered opinion that the aforesaid judgment relied upon by the learned counsel for the appellants is fully applicable to the facts and circumstances of this case. This Court considered the earlier judgment relied upon by the High Court and observed that the judgments in the case of National Insurance Co. Ltd. v. Mubasir Ahmed, 2007 2 SCC 349 and Oriental Insurance Co. Ltd. v. Mohd. Nasir, 2009 6 SCC 280 were per incuriam having been rendered without considering the earlier decision in Pratap Narain Singh Deo v. Srinivas Sabata, 1976 1 SCC 289. In the aforesaid judgment, upon consideration of the entire matter, a four-judge Bench of this Court had held that the compensation has to be paid from the date of the accident.

[9] Following the aforesaid judgments, this Court in Oriental Insurance Company Limited versus Siby George and others reiterated the legal position and held as follows:

"11. The Court then referred to a Full Bench decision of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi and approved it insofar as it followed the decision in Pratap Narain Singh Deo.

12. The decision in Pratap Narain Singh Deo was by a four-judge Bench and in Valsala K. by a three-judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala K. were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

13. In the light of the decisions in Pratap Narain Singh Deo and Valsala K., it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala K. do not express the correct view and do not make binding precedents."

[10] In view of the aforesaid settled proposition of law, the appeal is allowed and the judgment and order of the High Court is set aside. The appellants shall be entitled to interest at the rate of 12% from the date of the accident."

19. Their Lordships of the Hon'ble Supreme Court in ***Kerala State Electricity Board*** vs. ***Valsala K.*** 2000 ACJ 5 have held that the relevant date for determination of the rate of compensation is the date of the accident and not the date of adjudication of the claim. Their Lordships have held as under:

"[3] A four Judge Bench of this Court in Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289 : (AIR 1976 SC 222 : 1976 Lab IC 222) speaking through Singhal, J. has held that an employer becomes liable to pay compensation as soon as the personal injury is caused to the workmen by the accident which arose out of and in the course of employment. Thus, the relevant date for determination of the rate of compensation, is the date of the accident and not the date of adjudication of the claim.

[4] A two Judge Bench of this Court in The New India Assurance Company Limited v. V. K. Neelakandan, Civil Appeal Nos. 16904-16906 of 1996, decided on 6-11-1996, however, took the view that Workmen's Compensation Act, being a special legislation for the benefit of the workmen, the benefit as available on the date of adjudication should be extended to the workmen and not the compensation which was payable on the date of the accident. The two Judge Bench in Neelakandan's case (supra) , however, did not take notice of the judgment of the larger Bench in Pratap Narain Singh Deo's case (AIR 1976 SC 222 : 1976 Lab IC 222) as it presumably was not brought to the notice of their Lordships. Be that as it may, in view of the categorical law laid down by

the larger Bench in Pratap Narain Singh Deo's case, the view expressed by the two Judge Bench in Neelakandan's case is not correct.

[7] Insofar as these special leave petitions are concerned, we find that the accident took place long time back. Compensation became payable to the workmen, as it is not disputed that the accidents occurred during the course of employment, as per the law prior to the amendment made in 1995. Keeping in view the peculiar facts and circumstances of these cases, pettiness of the amounts involved in each of the cases and the time that has since elapsed, we are not inclined to interfere with the impugned orders, decided on the basis of the 1995 amendment, in exercise of our jurisdiction under Art. 136 of the Constitution of India and, therefore, dismiss the special leave petitions, but, after clarifying the law, as noticed above."

20. The accident has admittedly taken place on 22.12.2009. The explanation (II) under section 4 (1) of Employee's Compensation Act, 1923 has been omitted with effect from 18.1.2010. Thus, the income of the deceased was to be calculated as per the existing explanation (II), which was in vogue at the time of accident. Thus, the income of the deceased was to be computed at Rs. 4,000/- instead of Rs. 8,100/- per month. Learned Commissioner has over looked this important aspect of the matter while computing the income of the deceased.

21. Their Lordships of the Hon'ble Supreme Court in ***Kerala State Electricity Board*** vs. ***Valsala K.***, 2000 ACJ 5 (SC) have held that sections 4 and 4-A of the Workmen's Compensation Act, 1923 as amended in 1995 would not apply retrospectively. Their Lordships have held as under:

"[4] A two Judge Bench of this Court in The New India Assurance Company Limited v. V. K. Neelakandan, Civil Appeal Nos. 16904-16906 of 1996, decided on 6-11-1996, however, took the view that Workmen's Compensation Act, being a special legislation for the benefit of the workmen, the benefit as available on the date of adjudication should be extended to the workmen and not the compensation which was payable on the date of the accident. The two Judge Bench in Neelakandan's case (supra) , however, did not take notice of the judgment of the larger Bench in Pratap Narain Singh Deo's case (AIR 1976 SC 222 : 1976 Lab IC 222) as it presumably was not brought to the notice of their Lordships. Be that as it may, in view of the categorical law laid down by the larger Bench in Pratap Narain Singh Deo's case, the view expressed by the two Judge Bench in Neelakandan's case is not correct.

[7] Insofar as these special leave petitions are concerned, we find that the accident took place long time back. Compensation became payable to the workmen, as it is not disputed that the accidents occurred during the course of employment, as per the law prior to the amendment made in 1995. Keeping in view the peculiar facts and circumstances of these cases, pettiness of the amounts involved in each of the cases and the time that has since elapsed, we are not inclined to interfere with the impugned orders, decided on the basis of the 1995 amendment, in exercise of our jurisdiction under Art. 136 of the Constitution of India and, therefore, dismiss the special leave petitions, but, after clarifying the law, as noticed above."

22. Learned Single Judge of Jharkhand at Ranchi High Court in ***Project Officer, Basudeopur Colliery*** vs. ***Dhaneswari Devi***, 2014 ACJ 1325 has held that the calculation of compensation amount should be made under the provision existing on the date of incident relying upon ***Kerala State Electricity Board*** vs. ***Valsala K.***, 2000 ACJ 5 (SC). Learned Single Judge has held as under:

> **"[3] It is further pointed out that the original claim of the claimant was also under the same calculation, but the learned Presiding Officer, Labour Court, Dhanbad has wrongly calculated the amount under the amended provision and therefore, the aforesaid finding of the learned Presiding Officer, Labour Court is liable to be set aside and the amount payable to the claimant shall be calculated in view of the existing provision as contained under section 4 at the relevant point of time. In this context learned Counsel appearing for the appellant has relied upon the judgment in Kerala State Electricity Board and another v. Walsala Kr. and another, 1999 AIR(SC) 3502 In paragraph-5 their lordships have held as follows:--**
>
> **5. Our attention has also been drawn to a judgment of the Full bench of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi,1998 80 FLR 72 wherein the Full Bench precisely considered the same question and examined both the above noted judgments. It took the view that the injured workmen becomes entitled to get compensation the moment he suffers personal injuries of the types contemplated by the provisions of the Workmen's Compensation Act and it is the amount of compensation payable on the date of the accident and not the amount of compensation payable on account of the amendment made in 1995, which is relevant. The decision of the Full Bench of the Kerala High Court, to the extent it is in accord with the judgment of the larger Bench of this Court in Pratap Singh Narain Singh Deo v. Srinivas Sabata and another lays down the correct law and we approve it."**

23. Thus, the claimants would be entitled to Rs. 4000-2000 = Rs. 2000x221.71 = Rs.4,43,420/- alongwith interest @ 12% per annum from the date of accident till its realization and funeral expenses at the rate of Rs.5000/-.

24. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is partly allowed. Claimants are held entitled to a sum of Rs.4,43,420/- alongwith interest @ 12% per annum from the date of accident till its realization and funeral expenses at the rate of Rs.5000/-. Pending application(s), if any, also stands disposed of. No costs.

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

Rajesh Kumar and others ....Petitioners.

Vs.

Roshan Lal and others. .....Respondents.

CMPMO No. 241 of 2015
Reserved on: 28.07.2015.
Date of decision: 30.07.2015

Code of Civil Procedure, 1908- Order 23 Rule 1- Plaintiffs filed a suit for seeking declaration- defendants pleaded that they had become the owners after the conferment of the proprietary rights and that original owners had filed a suit which was dismissed- plaintiffs filed an application for seeking liberty to file a fresh suit on the same cause of action which was allowed- application for withdrawal was filed after seven years and six months of the filing of the suit- it was necessary for the plaintiffs to prove that there was a formal defect in the suit necessitating the withdrawal of the same- plaintiffs could have filed an application for amendment and cannot be permitted to start a fresh round of litigation- suit cannot be allowed to be withdrawn on the ground of defect of substance- petition allowed and the application filed by the plaintiff dismissed. (Para-7 to 10)

Case referred:
K.S. Bhoopathy and others Vs. Kokila and others, AIR 2000 Supreme Court 2132

For the petitioners: Mr. Pawan K. Gautam, Advocate.
For the respondents: Mr. Dheeraj K. Vashishta, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This petition is instituted against the order, dated 20.02.2015, rendered by the learned Civil Judge (Junior Division), Court No. 1, Una, H.P. in C.M.A. No. 53 of 2015 in Civil Suit No. 94 of 2006.

2. Key facts necessary for the adjudication of this petition are that the respondents have filed a Civil Suit No. 94/2006 for declaration to the effect that they were co-sharers to the extent of 6/10 share and the petitioners to the extent of 4/10 shares in the land, measuring 15733-01, comprised in Khewat No.45, Khatauni Nos.125 to 128 bearing Khasra numbers, as per the details given in the plaint, as per Jamabandi for the year 1996-97.

3. The written statement was filed by the petitioners. According to them, they were coming in possession of the suit land previously as tenant-at-will and as owners since 01.10.1975 under Section 104(3) of the Himachal Pradesh Tenancy and Land Reforms Act. It was also averred that the original owners had filed a Civil Suit No. 370 of 1983 against the petitioners qua the suit land with the prayer that they were owners in possession of the suit land. The suit was dismissed by the learned Trial Court on 31.10.1985.

4. The respondents have also moved an application for amendment of the plaint. The respondents have led their evidence. The respondents thereafter moved an application under Order 23 Rule 1 read with Section 151 of the Code of Civil Procedure with

the prayer to withdraw the suit with liberty to file a fresh suit on the same cause of action. It was contested by the petitioners. The said application was allowed by the learned Trial Court on 20.02.2015. Hence this petition.

5. Mr. Pawan K. Gautam, learned counsel for the petitioners has vehemently argued that the leanred Trial Court has not taken into consideration the principles governing the withdrawal of the Suit under Order 23 Rule 1 (3) of the Code of Civil Procedure.

6. Mr. Dheeraj K. Vashishta, learned counsel for the respondents has supported the order, dated 20.02.2015. According to him, a fresh Civil Suit No. 255 of 2015 was filed on 07.04.2015. He also contended that the petitioners have put in their appearance on 22.04.2015.

7. Civil Suit No. 94/2006 was instituted on 22.08.2006. An application to withdraw the suit has been filed after 7 years and 6 months of the filing of the suit. It was necessary for the respondents to prove that there was "formal defect" in the suit necessitating the withdrawal of the same. The respondents have already led their evidence and the application has been filed at a very belated stage. The respondents could have moved an application under Order 6 Rule 17 of the Code of Civil Procedure for the amendment of the plaint instead of preferring an application under Order 23 Rule 1 (3) of the Code of Civil Procedure. The parties cannot be vexed twice for the same cause of action. The substantive rights of the petitioners would be definetely affected by permitting the respondents to withdraw the suit. The parties cannot be permitted to start a fresh round of litigation on the same cause of action.

8. The respondents could not be permitted to withdraw the Civil Suit after they come to know about their inherent weekness in the case after leading their evidence. Merely that the petitioners have put in their appearence before the leanred Trial Court in Civil Suit No. 255/15 on 22.04.2015, would not affect the merits of the present petition. The principles of acquisence, waiver and estoppel would not be applicable in this case, since the respondents have been permitted to withdraw the Civil Suit without there being a formal defect in the same. A formal defect is 'a defect of form' unrelated to the claim of the plaintiff on merits." It is necessary for the applicability of Order 23, Rule 1(3) of the Code of Civil Procedure that there should be a formal defect and defect which cannot be cured by an amendment. The Civil Suit can never be permitted to be withdrawn for a defect of substance, as in the instant case. The Court has to apply its mind/satisfaction while permitting the parties to withdraw the Civil Suit. The learned Trial Court, in the instant case, has not even noticed that there was any formal defect while allowing the application. The plea of formal defect is required to be taken specifically in the application seeking permission to withdraw a Civil Suit.

9. Their Lordships of the Hon'ble Supreme Court in **K.S. Bhoopathy and others** Vs. **Kokila and others,** AIR 2000 Supreme Court 2132 have held that it is the duty of the Court to feel satisfied about existence of proper grounds/reasons for granting permission to withdraw the suit with leave to file suit. Their Lordships have held as under:-

> *"12. The provision in Order XXIII, Rule 1, CPC is an exception to the common law principle of non suit. Therefore on principle an application by a plaintiff under sub-rule 3 cannot be treated on par with an application by him in excercise of the absolute liberty given to him under sub-rule 1, In (he former it is actually a prayer for concession from the Court after satisfying the Court regarding existences of the circumstances justifying the grant of the such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is*

at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit roust fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases."

10. Accordingly, the present petition is allowed. The order, dated 20.02.2015, passed by the learned Civil Judge (Junior Division), Court No. 1, Una H.P. in C.M.A. No. 53 of 2015 in Civil Suit No. 94 of 2006, is set aside. Consequently, the Civil Suit No. 255/15, titled as Roshan Lal Vs. Rajesh Kumar & others pending before the leanred Civil Judge (Junior Division), Court No. 1, Una, H.P., is dismissed. The parties are directed to appear before the learned Civil Judge (Junior Division), Court No. 1, Una in Civil Suit No. 94/2006. The Civil Suit shall commence from the stage it was permitted to be withdrawn on 20.02.2015. Since the Civil Suit was instituted in the year 2006, the Civil Judge (Junior Division), Court No. 1, Una, H.P. is directed to decide the same within a period of four months from today. The miscellaneous application(s), if any, also stand(s), disposed of. No costs.

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

Kundan Singh & Others .....Appellants.

Versus

Dheru & Others ....Respondents.

RSA No. 474 of 2003
Reserved on : 28.7.2015
Decided on : 3.8.2015

Specific Relief Act, 1963- Section 38- Plaintiffs prayed that suit land was allotted to them by State of Himachal Pradesh- they had improved the land by spending huge amount - defendants are interfering with their possession- it was prayed that defendants be restrained from interfering with their possession- defendants pleaded that plaintiffs never remained in possession of suit land- plaintiffs were in possession of adjacent land, this fact came into notice during the demarcation- - defendant No. 2 had taken plea of adverse possession which was subsequently withdrawn- the Courts below had found plaintiffs to be in possession- however, Courts had ignored the document which showed the possession of predecessor of defendants No.1 and 2 over old khasra numbers- plaintiffs further stated in cross-examination that they had acquired the knowledge regarding the possession of the suit land during settlement, which means that they were not earlier aware about the possession- held, that in these circumstances, plaintiffs had failed to prove their possession.

(Para-8 to 10)

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.
For the Respondents: Mr. N.K Thakur, Sr. Advocate with Mr. Rahul, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the impugned judgment and decree rendered by the learned District Judge, Una in Civil Appeal No. 81 of 2002 of 7.10.2003, whereby he while affirming the judgment and decree rendered by the learned Senior Sub Judge Una in Civil Suit No. 210/92 of 24.8.2002 dismissed the appeal preferred before him by the defendants/appellants.

2. The brief facts of the case are that the plaintiff Dheru filed a suit for permanent injunction restraining the defendants from interfering in the suit land. It has been averred in the plaint that the suit land is owned and possessed by the plaintiff. The suit land was allotted to the plaintiff by the State of Himachal Pradesh in the year 1976 and thereafter the plaintiff reclaimed the land and made a lot of improvements thereon by spending huge amount. Now the defendant started threatening to interfere over the suit land. Hence, the present suit.

3. The defendants/appellants contested the suit and filed written-statement. Defendants in their written-statement have taken preliminary objection of the suit being not legally maintainable. It has been alleged that the suit land bearing old Khasra No. 971 measuring 6 Kanals 17 marlas was allotted to the plaintiff in the year 1976 but plaintiff was never in physical possession of the same. The plaintiff was in possession of Khasra nos. 980 and 982 being owned and possessed by him. The plaintiff was told by the revenue staff that he was allotted land comprising Khasra No. 972 which is adjoining to his own land. The said khasra number is adjoining to Khasra No. 971 which was in physical possession of deceased Phandi for the last 30 years and after his death the same is in possession of the answering defendants. The land comprised in khasra No. 972 was allotted to Chint Ram but the same was in physical possession of the plaintiff. On 12.12.1991 when demarcation was conducted then the parties came to know about wrong possession. Thereafter the plaintiff moved an application before the D.C for correction, on the basis of which an inquiry was made. The plaintiff made a statement on 23.11.1992 admitting the possession of Phandi. The defendants have denied other averments made in the plaint.

4. The plaintiff/respondent filed a replication to the written-statement filed by the defendants and reasserted the stand taken in the plaint.

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

> *"1. Whether the plaintiff is entitled to the relief of injunction, as prayed? OPP.*
>
> *2. Whether the suit is not maintainable in the present form? OPD.*
>
> *3. Whether the defendants have become owners of the suit land by way of adverse possession ? OPD.*
>
> *4. Relief."*

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit filed by the plaintiff/respondent. In appeal, preferred by the defendants/appellants before the learned First Appellate Court against the judgment and decree of the learned trial Court the learned First Appellate Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now, the defendants/appellants have instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned courts below in their impugned judgments and decrees. When the appeal came up for admission on 11.10.2004, this court admitted the appeal instituted by the defendants/appellants on the hereinafter extracted substantial questions of law:-

> *" (1) Whether both the Courts below have taken an erroneous view of law in holding the suit of the plaintiff/respondent to be maintainable by merely relying upon the revenue entries and ignoring the material documents i.e Ex. DW-4/A, DW-5/A, DW-5/C, and Ex. DW-6/A. which prove the possession of the defendants-appellants over the suit land before the institution of the suit? Have not both the courts below acted in excess of their jurisdiction in granting a decree of injunction in favour of the plaintiff-respondent who was not proved to be in possession of the suit land?*
>
> *2. Whether the trial Court has ignored the material evidence i.e Ex. DW-4/A the report of Shri Pirtam Chand merely on the ground that he was not examined by the defendants-appellants, when the statement of the said witnesses was recorded as DW-7, have not the finding of the Trial Court being adversely effected by ignoring such material evidence, which if considered, would have titled the scale?*
>
> *3. Whether both the courts below have taken wrong view of law in holding the plaintiff/respondent to be entitled to the relief claimed in the suit, when the plaintiff-respondent failed to plead and prove his dispossession during the pendency of the suit or otherwise?*

Substantial question of Law No. 1, 2 and 3:-

8. The suit of the plaintiff which stood decreed by both the Courts below was for permanent injunction restraining the defendants/appellants from interfering in the suit land. The decree of injunction rendered in favour of the plaintiff/respondent would stand vindication only when there was manifest portrayal in the evidence existing on record of the plaintiff/respondent being in possession of the suit land. In the plaint it is averred that the

suit property was allotted in favour of the plaintiff/respondent by the Government of Himachal Pradesh in the year 1976. Uncontrovertedly the suit land bore old Khasra No. 971 measuring 6 kanals 17 marlas. However, the land adjacent to it comprised in Khasra Nos. 980 and 982 also stood owned and possessed by the plaintiff/respondent. The pointed contention as canvassed by the defendants in their written-statement was of Khasra No. 971 which stood allotted in favour of the plaintiff/respondent having remained in physical possession of deceased defendant No.2 Phandi. An assertion of his having acquired title by adverse possession to the Khasra number aforesaid was bedrocked upon his having with an animus possidendi remained in physical possession thereof continuously for 30 years hitherto. However the assertion of the deceased Phandi having acquired title to the suit land by adverse possession stood withdrawn under a statement recorded on 4.3.2002. The effect of abandonment by the defendant Phandi of his plea of his having acquired title to the suit land by adverse possession concomitantly in entwinement with the proclamations in Ex. DW-4/A and DW-5/A of old Khasra No. 971 being owned by the plaintiff/respondent besides of Khasra No. 973 being owned by the predecessor-in-interest of the defendants/appellants No. 1 & 2 fosters, an apt conclusion especially when the communications qua the facts aforesaid as pronounced in DW-4/A and DW-5/A have not suffered repudiation by adduction of cogent evidence or the proclamations therein to the above effect having hence remained un-dislodged, that Khasra No. 971 is owned by plaintiff/respondent whereas old Khasra No. 973 is owned by defendants/appellants. The clinching pronouncements in DW-4/A and DW-5/A of Khasra No. 971 being owned by the plaintiff/respondent whereas Khasra No. 973 being owned by the defendant Phandi yet would not rest the controversy whether the plaintiff/respondent was tenably afforded a decree of injunction. Needless to say that a decree of injunction for it to acquire legal sinew or vigor necessitates loud and open pronouncements by evidence existing on record of the plaintiff/respondent being in possession of old Khasra No. 971. Both the learned courts below had concluded that old Khasra No. 971 was in possession of the plaintiff/respondent. On the anvil of the conclusions drawn by both the Courts below of the plaintiff/respondent being in possession of old Khasra No. 971 they proceeded to afford the decree of injunction in favour of the plaintiff/respondent. For the decree under challenge before this Court to be foisted with legitimacy, it is incumbent upon this Court to discern from the available evidence on record whether the findings and conclusions recorded by the both the courts below qua the plaintiff/respondent having held possession of old Khasra No. 971 hence his being entitled for decree of injunction acquire an aura of invincibility or legal formidability. The relevant, admissible and best evidence which necessitated besides warranted an appropriate appraisal was constituted in Ex. DW-4/A and DW-5/A. Both the learned courts below discarded on legally unsound and frail reasons the probative efficacy and worth of both Ex. DW-4/A and DW-5/A. The untenable rejection of the Exhibits aforesaid by both the courts below has sequelled rendition of erroneous conclusions and findings on the contentious and germane fact of whether the plaintiff/respondent held possession of old Khasra No. 971 as such was entitled to a decree of injunction. Both DW-4/A and DW-5/A stand for the reasons ascribed hereinafter bestowed with legal sanctity in their respectively proclaiming the fact that the possession of Khasra No. 971 is held by the predecessor-in-interest of the defendants/appellants No. 1 & 2. The primadonna reason which prompts this Court to so conclude is that both Ex. DW-4/A and DW-5/A loudly bespeak the fact of possession of old Khasra No. 971 qua which a decree of injunction is sought by the plaintiff/respondent being held by the predecessor-in-interest of the defendants/appellants No. 1 and 2. Both Exhibits DW-4/A and DW-5/A have been proved by DW-7 and DW-5 respectively. A perusal of the recorded deposition of PW-5 underscores the fact of his having proceeded to the spot for conducting/measuring the lands of the contesting parties. Even a perusal of the deposition of DW-7 who has proved Ex. DW-4/A does not_unravel the

fact that the Exhibits aforesaid with a portrayal therein of possession of old Khasra No. 971 being held by predecessor-in-interest of defendants No 1 and 2 has been prepared without his carrying out the requisite measurements/demarcations. Consequently, when both concurrently besides depose in harmony qua the preparation of Ex. DW-4/A and DW-5/A having been preceded by theirs carrying out the mandated measurements/demarcations, an apt inference which is, as a corollary drawable by this Court is that the portrayals recorded respectively in Ex. DW-4/A and DW-5/A qua possession of old Khasra No. 971 being not held by plaintiff/respondent rather by the defendants/appellants acquires immense legal fervor. Amplifying vigor to the inference aforesaid is garnerable from the factum of the counsel for the plaintiff while cross-examining them having omitted to put apposite suggestions to them for constraining apposite elicitations connoting the fact that the measurements/demarcations of the lands of the contesting parties which sequelled the preparation at their respective instances of DW-4/A and DW-5/A were not carried out or conducted in accordance with the provisions mandated in the HP Land Records Manual. Omission or absence on the part of the Counsel for the plaintiff to put appropriate suggestion to both DW-5 and DW-7 for seeking elicitations from them qua the fact that the measurements/demarcations of the lands of the contesting parties were not conducted or carried out in consonance with the mandate of the H.P land Records manual constrains an inference that the plaintiff/respondent hence acquiesce to the fact of the preparation of DW-4/A and DW-5/A having been preceded by a valid demarcation/measurement of the lands of the contesting parties. The effect of acquiescence hence of the plaintiff/respondent of both Exs. DW-4/A and DW-5/A being anchored besides harbored upon a valid demarcations/measurements of the lands of the contesting parties is obviously that an aura of finality, solemnity besides conclusiveness is to be imputed to the findings and conclusions recorded in both Ex, DW-4/A and DW-5/A.

9. In addition, the testimony in the cross-examination of the plaintiff/respondent whereunder he has admitted the fact that he has acquired knowledge qua the factum of possession of the suit land during the settlement proceedings besides with a communication therein that he had filed an application before the Deputy Commissioner for correction of entries of possession qua the suit land as also with his, in his cross-examination voicing the factum that he was previously unaware that he did not hold possession of the land allotted to him enlightenment whereof dawned upon him only at the stage of the carrying out/conducting of measurements/demarcations of his land as well as of the land of the defendants/appellants, while hence constituting admissions of the plaintiff/respondent of his not holding possession of old Khasra No. 971 imputes amplifying sanctity to the pronouncements in Ex. DW-5/A and DW-4/A of the plaintiff/respondent not holding possession of old Khasra No. 971. Both the learned courts below have gone wayward besides strayed while dis-imputing probative potency to the aforesaid material pieces of evidence. Even though, for the reasons ascribed hereinabove both the aforesaid pieces of evidence marshaled legal vigor as well as tenacity and theirs having been for flimsy reasons overlooked by both the courts below has sequelled discarding of material pieces of evidence by them with the concomitant effect of theirs mis-appraising the evidence on record hence leading to formation of fallacious conclusions. The effect of mis-appraisal of evidence by both the Courts below has sequelled a grossly fallacious inference by them of the plaintiff/respondent being in possession of old Khasra No. 971, concomitantly it has led both the courts below to hence erroneously conclude that a decree of injunction as prayed for by the plaintiff qua old Khasra No. 971 was renderable in his favour. Dehors the above with the emanation in both Ex. DW-4/A and DW-5/A of old Khasra No. 971 having come to be allotted in favour of the plaintiff/respondent besides given the fact of abandonment by the predecessor-in-interest of defendants No. 1 and 2 of his plea of his having acquired title qua the suit land by adverse possession hence personificatory of an admission of the

plaintiff/respondent having a legally sustainable title to old Khasra No. 971, prods this Court to, in the face of the plaintiff/respondent having in the alternative sought a decree for possession of old Khasra No. 971, hence afford in his favour a decree for possession of old Khasra No. 971.

10. The up-shot of the above discussion is that the findings and conclusions recorded by the courts below on issue No. 1 stand reversed. In consequence, the appeal stands allowed and the impugned judgments and decrees are set aside. Nonetheless for the reasons adverted to hereinabove the plaintiff/respondent is entitled to a decree on the strength of his title thereto for possession of old Khasra No.971, however, subject to the plaintiff/respondent within one month affixing on the plaint the court fee equivalent to the market value/land revenue of the suit land. Substantial questions of law answered accordingly. Records be sent back.

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

Om Devi and others .....Appellants.

Vs.

Krishan Kumar and another .....Respondents.

RSA No. 434 of 2006
Reserved on: 27.07.2015
Date of decision: 03.08.2015

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellate Court has power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other substantial cause- true test is whether Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. (Para-21 and 22)

Specific Relief Act, 1963- Section 20- Plaintiffs pleaded that an agreement was entered into between the parties on 20.9.1996 for sale of the suit land for consideration of Rs.1,35,000/-- defendants delivered the possession of the suit land to the plaintiffs after receiving a sum of Rs. 20,000/- as earnest money- it was agreed that suit land was under attachment and the sale deed would be executed after releasing the suit land- land was released on 3.11.1997- defendants did not perform their part of the agreement- hence, suit was filed for seeking the relief of specific performance- plaintiffs had duly proved the execution of the agreement and that they were put into possession- order of attachment was only a formal entry which could not have remained after the pronouncement of the judgment- held, that in these circumstances, suit was rightly decreed by the Appellate Court. (Para-18 to 20)

Cases referred:

North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (2008) 8 SCC 511
Union of India Vs. Ibrahim Uddin and another (2012) 8 Supreme Court Cases 148

For the appellants : Mr. Ajay Sharma, Advocate.
For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Mukul Sood, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, J.

This Regular Second Appeal is directed against the judgment and decree, dated 01.09.2006, passed by the learned District Judge, Kangra at Dharamshala, H.P. in Civil Appeal No. 75-N/XIII/03.

2. Key facts necessary for the adjudication of this Regular Second Appeal are that the respondents-plaintiffs (hereinafter referred to as "the plaintiffs" for the sake of convenience) had filed a suit against the appellants-defendants (hereinafter referred to as "the defendants" for the sake of convenience) for possession by way of specific performance of contract of sale of land comprised in Khewat No. 29, Khatauni No. 68, Khasra No. 471/1, measuring 0-06-59 HM and Khewat No. 30, Khatauni No. 69, Khasra Nos. 468 and 472, plots 2, measuring 0-45-40 HM, total land measuring 0-51-99 HM, situated in Mohal and Mauza Bhungtial, Tehsil Nurpur, District Kangra (hereinafter referred to as "the suit land" for the sake of convenience), as per Jamabandi for the year 1991-92. According to the plaintiffs, an agreement was entered into between the parties on 20.09.1996 vide Ex. PW1/A for sale of the suit land for consideration of Rs.1,35,000/- and the defendants delivered the possession of the same to the plaintiff after receiving a sum of Rs.20,000/- as earnest money. It was agreed that since the suit land was attached under the Court order, therefore, as soon as it was released, sale deed would be registered within one month of the release order before the Sub Registrar, Nurpur and balance money would be paid to the defendants. The suit land was released by the Court of learned Sub-Judge (I), Nurpur on 03.11.1997 vide Ex. P2, as such, the plaintiffs had right to get the specific performance of contract of sale being performed by the defendants within one month. A legal notice was issued to the defendants calling upon them to execute the sale deed within a period of seven days. It was duly received by the defendants. However, the fact of the matter is that the sale deed was not executed. The plaintiffs were ready and willing to perform their part of the contract, but the defendants were avoiding the execution of the same on one pretext or the others.

3. The suit was contested by the defendants. It was denied by the defendants that they had entered into an agreement with the plaintiffs for the sale of the suit land for consideration of Rs.1,35,000/-. They also denied that the possession was delivered after receiving a sum of Rs.20,000/- as earnest money. However, it was admitted that the suit land was attached.

4. Replication was filed by the plaintiffs. The learned Sub Judge 1st Class (I), Nurpur, District Kangra, H.P. framed the issues on 23.02.1999. He dismissed the suit on 26.05.2003.

5. Plaintiffs preferred an appeal before the learned District Judge, Dharamshala, H.P. against the judgment and decree, dated 26.05.2003. He allowed the same on 01.09.2006. Hence, this Regular Second Appeal.

6. This Regular Second Appeal was admitted on the following substantial questions of law on 11.06.2007:

> *"1. Whether illegal and wrong application under Order 41 Rule 27 CPC vitiated the impugned judgment and decree passed by the learned District Judge below?*
>
> *2. Whether document Ex. PW1/A without its proof having been marked as exhibit and read in evidence vitiated the impugned judgment and decree?*

3. *Whether Ex. PW1/A particularly its clauses 4 and 5 stand misread and mis-appreciated by both the Courts below, thereby vitiating the judgment passed by learned District Judge and to that extent the same is against the defendants?*

7. Mr. Ajay Sharma, learned counsel for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that application under Order 41 Rule 27 of the Code of Civil Procedure was wrongly allowed by the learned District Judge. He then contended that the plaintiffs have failed to prove Ex. PW1/A. Clauses 4 and 5 of Ex. PW1/A were misread and misappreciated.

8. Mr. K.D. Sood, learned Senior Advocate has supported the judgment and decree, dated 01.09.2006, passed by the learned District Judge, Dharamshala, H.P.

9. I have heard the learned counsel for the parties and gone through the pleadings, judgments and the records, carefully.

10. 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.

11. PW-1 Krishan Kumar testified that the suit land was earlier owned by Todarmal, husband of Omi Devi. He was mentally ill. The defendants succeeded to his estate. Omi Devi used to reside at Nurpur. She was serving in the bank and was looking after the land of the defendants. They used to look after Todarmal and his mother and were cultivating their land. They had entered into an agreement with the defendants on 20.09.1996 for consideration of Rs.1,35,000/-. They paid a sum of Rs.20,000/- as advance as per agreement Ex. PW1/A. It was scribed by Rajesh, document writer. He read over and explained the same to the defendants. The document was signed by all of them and Janak Suri and Tarlochan were marginal witnesses. It was also agreed that the remaining amount was to be paid at the time of registration of the sale deed. He further stated that they were already in possession of the suit land. They asked the defendants to execute the sale deed, but to no effect. A legal notitce was issued vide Ex. PW1/B, postal receipt of which is Ex. PW1/C and acknowledgement is Ex. PW1/D. They were ready and willing to perform their part of the contract.

12. PW-2 Rajesh Kumar, document writer has scribed the agreement Ex. PW1/A. He could not register the same due to rush of work. PW-3, Janak Raj Suri is the marginal witness of the deed. He has admitted his signatures on Ex. PW1/A. According to him, it was typed by Rajesh Typist.

13. PW-4 Nathu Ram, Numberdar testified that Todarmal remained mentally ill and Omi Devi used to reside at Nurpur. The suit land was looked after by the plaintiffs. The plaintiff used to provide food to Todarmal and his mother and the possession over the suit property was of the plaintiffs.

14. Plaintiffs have placed on record the copy of death certificate of Todarmal Ex.-PX, showing that Todarmal died on 18.03.1996. Ex. P1 is the copy of Jamabandi of the suit land and Ex. P2 is the copy of order passed by the learned Sub Judge 1st Class, Nurpur, dated 03.11.1997, whereby the suit land was released from attachment.

15. DW-1 Om Devi stated in her examination-in-chief that she never entered innto an agreement with the plaintiffs. The age of her daughter Shashi Bala at that time was 17 years only. According to her, the plaintiffs have never redeemed the mortgage and even she had to pay the amount in the attachment case. The plaintiffs have not paid Rs.20,000/-.

However, the fact of the matter is that she has admitted her signatures on Ex. PW1/A. She has also admitted that Janak Raj Suri and Tarlochan Singh were marginal witnesses and PW-2 Rajesh Kumar has scribed the document. The contents of the documents were read over and explained by PW-2 Rajesh Kumar, document writer. She received a sum of Rs.20,000/- as advance in the presence of the witnesses on that day. According to her, the consideration was for Rs.2,35,000/- and not Rs.1,35,000/-. She did not mention in the agreement that her daughter was minor.

16. DW-3 Shashi Bala is the daughter of defendant No. 1. She never entered into any agreement with the plaintiffs. However, she admitted her signatures in Ex. PW1/A. In Ex. PW1/A, the age of Shashi Bala has been shown as 20 years.

17. The defendants have also examined DW-4, Vijay Kumari Gupta, Head Teacher, G.P.S. Nurpur as well as DW-5 Nirso Devi, J.B.T. Teacher, to prove the certificate Ex.-D2. However, the fact of the matter is that the defendants have failed to prove that the age of Shashi Bala was 17 years at the time of execution of agreement, Ex. PW1/A. Moreover, according to agreement, Ex. PW1/A, as noticed above, the age of Shashi Bala was 20 years.

18. The plaintiffs have duly proved the execution of agreement Ex. PW1/A, dated 20.09.1996 for consideration of Rs.1,35,000/-. A sum of Rs.20,000/- was already paid. They were put into possession of the suit land. The suit was dismissed by the learned Sub Judge 1st Class (I), Nurpur, District Kangra, H.P. only on one ground that as per Clause 4 of agreement Ex. PW-1/A, the plaintiffs were obliged to make payment of the money involved for getting the suit land released from Court attachment and that since the plaintiffs have not done so, they were not entitled to specific performance of the agreement of sale. The plaintiffs have moved an application under Order 41 Rule 27 of the Code of Civil Procedure for permitting them to place on record copy of judgment, dated 14.12.1979, rendered by the learned Sub Judge, 1st Class, Nurpur and a copy of judgment, dated 08.03.1982 rendered in appeal by the learned District Judge, Dharamshala, dismissing the appeal. The application was contested by the defendants. The application was allowed by the learned District Judge, Kangra at Dharamshala, H.P. and the plaintiffs were permitted to place on record the copy of judgment, dated 08.03.1982 rendered by the learned District Judge, Dharamshala in Civil Miscellaneous Appeal No. 13/1980, Ex.-PA and copy of judgment, dated 14.12.1979, rendered by the learned Sub Judge, 1st Class, Nurpur Ex. PB, copy of Execution application Ex. PC, copy of Jamabandi for the year 1975-76, Ex. PD, copy of jamabandi for the year 1975-76 Ex. PE, copy of Jamabandi for the year 1996-97, Ex. PF, copy of Jamabandi for the year 1996-97, Ex. PG, Copy of Misal Hakiat Bandobast Jadid Sani, Ex. PH and copy of Missal Hakiat Bandobast Jadid Sani, Ex. PJ. Learned Advocate appearing on behalf of the defendants had admitted before the learned First Appellate Court that the judgment rendered by the learned District Judge, dated 08.03.1982, Ex.- PA had attained finality, since no appeal or revision was filed against the same. A perusal of judgment, dated 14.12.1979, rendered by the learned Sub Judge 1st Class, Nurpur shows that Todarmal was declared as marginal farmer and it was held that decree-holder Sugreev was not entitled to recover the disputed amount from him. The moment the judgment has become final after the judgment, dated 08.03.1982, rendered by the learned District Judge, Dharamshala, the entry of attachment was only a formal entry. The property could not remain attached after the judgment, dated 08.03.1982. The plaintiffs have not moved any application for release of the property/suit land from attachment. It is in these circumstances that the learned First Appellate Court has allowed the application under Order 41 Rule 27 of the Code of Civil Procedure. The plea raised by the plaintiffs in application under Order 41 Rule 27 was not in variance with the plaint. The order, dated 03.11.1997, Ex. P2, reads as under:

> *"Respondent, Sugreev Singh has given the statement that he has received a sum of Rs.3405.50 from the J.D. and he has no objection in case the present application of the applicant is allowed. Accordingly, application is allowed and the property attached, i.e. land bearing Khata No. 23, Khatauni No. 26, Khasra Nos. 332, 340, 341, 346, measuring 11 Kanals 17 Marlas and Khewat No. 31, Khatauni No. 36, Khasra Nos. 337, 338, 339, plots 3 measuring 1 Kanal 15 Marlas as total area 13 Kanal, 12 Marlas, situated in Bungtial, Tehsil Nurpur, District Kangra, is ordered to be released."*

19. It is reiterated that once Todarmal has been absolved of the liability to pay the amount, the entries in the subsequent record of rights qua the attachment of the suit land were mere paper entries as the charge or encumbrance on the suit land no more existed after the judgment, dated 08.03.1982, Ex.-PA, therefore, clog put in para-4 of Ex.-PW1/A was otiose. It could not come in the way of plaintiffs to get the sale deed executed. There is nothing in Clause 4 of Ex. PW1/A to suggest that in case the plaintiffs did not make payment of Rs.3405-50/- to the defendants, the plaintiffs would not be entitled to seek execution of the sale deed. The plaintiffs had issued notice to the defendants vide Ex. PW1/B, postal receipt whereof is Ex. PW1/C and acknowledgement of the same is Ex. PW1/D. But, the notice was not replied by the defendants.

20. What emerges from the facts enumerated hereinabove is that an agreement was entered into between the plaintiffs and the defendants on 20.09.1996 vide Ex. PW1/A. The suit land was released from attachment. The defendants despite receiving the legal notice and release of the attachment, did not execute the sale deed, though a sum of Rs.20,000/- was already received as earnest money. The learned First Appellate Court has correctly appreciated Clauses 4 and 5 of the agreement, dated 20.09.1996, Ex. PW1/A. Agreement, dated 20.09.1996 Ex. PW1/A has been duly proved by the plaintiffs by producing PW-2 Rajesh Kumar, deed writer and PW-3 Janak Raj Suri, marginal witness. Application under Order 41 Rule 27 of the Code of Civil Procedure has been allowed as per law by permitting the plaintiffs to place on record the documents which were necessary for proper adjudication of the case.

21. Their Lordships of the Hon'ble Supreme Court in **North Eastern Railway Administration, Gorakhpur** Vs. **Bhagwan Das** (2008) 8 Supreme Court Cases 511 have held that appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment", but also for "any other substantial cause". Their Lordships have held as under:

> *"12. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 C.P.C. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said rule are found to exist. The circumstances under which additional evidence can be adduced are :*
>
> (i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, (clause (a) of sub rule (1)) or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, (clause aa, inserted by Act 104 of 1976) or

(iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. (clause (b) of sub rule (1)).

15. *Again in K. Venkataramiah Vs. A. Seetharama Reddy Ors. a Constitution Bench of this Court while reiterating the afore-noted observations in Parsotim's case (supra), pointed out that the appellate court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment' but also for 'any other substantial cause'. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Thus, the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the Court at the time of hearing of the appeal on merits.*

20. In any event, had the Court found the additional documents, sought to be admitted, necessary to pronounce the judgment in the appeal, in a more satisfactory manner, it would have allowed the application and, if not, the application would have been dismissed. Nonetheless, it was bound to consider the application before taking up the appeal. We say no more at this stage, as the aforementioned applications are yet to be considered by the High Court on merits in the light of the legal position, briefly set out hereinabove. In view of the afore-noted factual scenario, we are of the opinion that the impugned judgment and the orders are erroneous and cannot be sustained."

22. Their Lordships of the Hon'ble Supreme Court in **Union of India** Vs. **Ibrahim Uddin and another** (2012) 8 Supreme Court Cases 148 have held that the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Their Lordships have held as under:

"38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But

the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra).

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053).

23. It was incumbent upon the defendants to get the sale deed executed within the period prescribed as per agreement, dated 20.09.1996 after release of the property from attachment. The substantial questions of law are answered accordingly.

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

Parkash Chand Sharma alias Mitter Dev ..... Petitioner

Vs.

Prem Kumar & ors. ..... Respondents

CMPMO No. 7 of 2015.
Judgement reserved on: 30.7.2015.
Date of decision: 3.8.2015.

Code of Civil Procedure, 1908- Section 152- An application for amendment of the judgment and decree was filed pleading that due to the accidental slip or omission, the relief granted in favour of the petitioner had not been incorporated in the judgment and decree- application was dismissed holding that the terms of the original judgment and decree cannot be modified- held, that decree is only formal expression of the relief granted in the judgment- the operative portion of the judgment passed by the appellate court was silent regarding the relief granted – hence, the judgment and decree ordered to be rectified. (Para-7 to 13)

Case referred:
Srihari (dead) through legal representative Ch. Niveditha Reddy vs. Syed Maqdoom Shah and others (2015) 1 SCC 607

For the petitioner : Mr. Vivek Sharma, Advocate vice Mr. Ajay Kochhar, Advocate.
For the respondents : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition, under Article 227 of the Constitution of India, is directed against the order dated 5.8.2014 passed by the learned Additional District Judge, Mandi, whereby the application preferred by the petitioner, under section 152 of the Code of Civil Procedure (for short, the Code), for correction of the decree, came to be dismissed.

The facts in brief may be noticed.

2. The petitioner had filed a suit bearing No.7 of 1995 against the respondents in the court of learned Sub Judge Ist Class, Karsog, inter- alia, seeking relief of permanent prohibitory injunction to the effect that respondents No. 1 to 7 be restrained from raising any construction over khasra No. 105, situated in Main Bazar, Karsog measuring 0-9-4 bighas. The petitioner claimed himself to be the co-owner to the extent of 1/3rd share.

3. The respondents No. 1 to 7 contested the suit filed by the plaintiff- petitioner, but claimed that petitioner was not owner of 1/3rd share but owner to the extent of half share and the remaining half share was claimed by the respondents on the basis of a family partition which had taken place in the year 1978 and subsequently ratified by the parties.

4. The suit was dismissed by the learned trial court against which the petitioner filed an appeal before the learned District Judge, Mandi. In appeal, following two additional issues, being issue No.6-A and 6-B were framed:-

6-A. Whether the respondent No. 1 is raising construction over the suit land as alleged? OPP.

6-B If issue No. 6-A is proved in affirmative, whether the respondent is liable to be directed not to cause any obstruction on the path of the house of respondent which is being used by plaintiff from time of their forefathers on both eastern as well as back side as alleged? OPP.

5. The learned lower appellate court after framing the aforesaid additional issues remitted the case to the learned trial court and directed it to return findings on the said issues. The learned trial court returned findings on the said issues. Issue No. 6-A was decided in the affirmative, whereas issue No. 6-B was decided in the negative. The learned Additional District Judge allowed the appeal in the following manner:-

> "In view of my findings on Point No.1 above, there is merit in the appeal and the same is allowed. The impugned judgement of trial court is set-aside. The record of trial court alongwith copy of judgement be sent forthwith and file of this court after completion be consigned to record room."

6. Against the aforesaid judgement and decree, the respondents No. 1 to 7 filed RSA No. 25 of 2004 before this court, however, the said appeal came to be dismissed vide order dated 27.5.2004 on the ground that since no decree had been passed against the respondents herein, therefore, they cannot be said to be the aggrieved party.

7. The petitioner thereafter moved the present application, under section 152 of the Code for correction in the judgement and decree on the ground that it was a result of accidental slip of omission and the relief granted in favour of the petitioner had not in fact been incorporated in the judgement and decree.

8. The respondents contested and resisted the application by disputing that there was accidental slip or omission in passing of the judgement and decree.

9. The learned Additional District Judge dismissed the application by holding that the terms of original decree, judgement or order cannot be modified as it does not empower the court to have second thought over the matter when it finds out that a better order could have been passed. It has further held that no amendment should be allowed when third party has acquired rights or it would be inequitable or unjust to allow ratification.

10. Section 152 of the Code reads thus:-

> "**152 Amendment of judgements, decrees or orders.-** Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

11. It is evident from the bare perusal of the aforesaid provision that court may at any time correct the clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission.

12. The scope and ambit of the aforesaid section has been subject matter of recent decision of Hon'ble Supreme Court in **Srihari (dead) through legal representative Ch. Niveditha Reddy** vs. **Syed Maqdoom Shah and others (2015) 1 SCC 607** wherein it was held as under:-

> "13. From the language of Section 152 of the Code, as quoted above, and also from the interpretation of the section given in the case of State of Punjab vs. Darshan Singh (2004) 1 SCC 328, the section is meant for correcting the clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. *It is true that the powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court under guise of invoking after the result of the judgment earlier rendered. The corrections contemplated under the section are of correcting only accidental omissions or mistakes and not all omissions and mistakes. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152*. In Bijay Kumar Saraogi v, /state if Hgarjgabd (2005) 7 SCC 748 also it has been reiterated that Section 152 of the Code can be invoked

for the limited purpose of correcting clerical errors or arithmetical mistakes in judgments or accidental omissions.

14. Now we have to examine whether by the impugned order, the High Court has only corrected the clerical, arithmetical or accidental omission in the decree passed or not. To appreciate the same, first we think it necessary to mention as to what the word "expression accidental omission" means. In Master Construction Co. (P) Ltd. vs. State of Orissa and Another AIR 1966 SC 1047, expression – accidental slip or omission has been explained as an error due to a careless mistake or omission unintentionally made. It is further observed in the said case that:

> *"7. .....there is another qualification, namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, elaborate arguments on questions of fact or law.* (emphasis supplied)

15. Whether the High Court has acted within the scope of Section 152 of the Code or not, we have to see as to what were the pleadings of parties, what was the decree passed, and what was the correction made in it. "

13. It is not in dispute that Additional District Judge at the time of deciding the appeal had in fact allowed the appeal and the judgement of the trial court had specifically been set-aside. Further, it is only on account of the decree of the trial court having been reversed that respondents herein had preferred RSA No. 25 of 2004 before this court, which was dismissed in limine by according the following reasons: -

> "Heard.
>
> Since no decree has been passed against the defendants-appellants, they cannot be said to be aggrieved by the impugned judgment of the first Appellate Court. On this short ground alone, the appeal is dismissed.
>
> CMP No. 338/04
>
> Infructuous, in view of the orders passed in the main matter."

14. Now in the teeth of the reversal of the trial court judgement and filing of appeal by the respondents themselves, can they now question the decree passed by the lower appellate court by contesting the application filed under section 152 of the Code for rectification of the judgement and decree passed by the learned Additional District Judge Mandi on 25.9.2003? The answer to this is obviously in the negative as the law has to be interpreted in a manner, which would advance the cause of justice and not defeat it. Once the lower appellate court had specifically set-aside the judgement of the trial court, the necessary corollary of the same was that suit which had earlier been dismissed by the trial court would be deemed to have been decreed unconditionally. If that was not so, then why did the respondents challenge this judgement and decree by filing RSA No. 25 of 2004. Therefore, the respondents at this stage are estopped by their act and conduct in opposing the application for correction as sought for.

15. The learned senior counsel for the respondents would however contend that the application moved by the petitioner is nothing short of review and therefore, not maintainable. I am afraid, I cannot accede to such submission for the simple reason that it was the respondents themselves who after construing and understanding the impugned judgement had assailed the same by filing RSA No. 25 of 2004. In case the judgement and decree had not been passed against the respondents, then where was the occasion for them to have filed an appeal?

16. Even otherwise, the decree drawn up by the learned lower appellate court is only a formal expression of the relief granted in the judgement. It is evident from the bare perusal of this judgement that the findings of the trial court whereby it had dismissed the suit of the plaintiff had in fact been set-aside by the learned lower appellate court.

17. In view of my aforesaid discussion, I find merit in this petition and accordingly the same is allowed. The order passed by the learned Additional District Judge (I), Mandi on 5.8.2014 is ordered to be set-aside and the judgement and decree is ordered to be rectified by specifically rectifying the same so as to clearly specify the extent and manner of appropriate relief(s) to which the petitioner has been found entitled consistent with the intention expressed in the judgement and accordingly thereafter appropriate decree be drawn up.

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

Rajiv Kumar Sharma ...Petitioner
Versus
Renu Sharma ....Respondent

CMPMO No. 253 of 2015.
Judgment reserved on: 30.7.2015
Date of decision: 03.08.2015

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Route permit was granted to the petitioner against the bus bearing registration No. HP-68-2281- petitioner had sold the bus to the respondent- trial Court concluded that since the permit was issued against the particular bus, therefore, permit stood transferred along with bus- held, that in view of Section 82 of Motor Vehicles Act, Route Permit can be transferred only with the written permission of the Transporting Authority and without such permission the same cannot be used- transfer of the ownership of the vehicle is different from the transfer of the permit- sale of vehicle does not mean, the transfer of the permit automatically- petition allowed and the order passed by the Courts holding that the route permit stood automatically transferred set aside. (Para-5 to 14)

Cases referred:

Maniam Hiria Gowder vs. Naga Maistry, AIR 1957 MADRAS 620
Ram Shanker Misra and brothers vs. Regional Transport Authority, Kanpur and others, AIR 1960 Allahabad 247
Tekumalla Rama Rao vs. Durga Suryanarayana and others AIR 1964 Andhra Pradesh 256
A.V. Varadarajulu Naidu (decd.) and others vs. K.V. Thavasi Nadar, AIR 1963 Madras 413
Inderjit Singh v. Sunder Singh, AIR 1969 Rajasthan 155
Khawaz Bux v. Mirza Mohammad Ismail AIR 1984 Allahabad 83
Nerati Pichamma and another vs. Pasumala Arogiya and others (1991) 2 ACC 197
Pushpa alias Leela and others vs. Shakuntala and others (2011) 2 SCC 240

For the Petitioner : Mr. Ajay Sharma, Advocate.
For the Respondents : Mr. Ajay Kumar, Senior Advocate, with Mr. Gautam Sood, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Article 227 of the Constitution of India is directed against the order passed by learned Additional District Judge-I, Kangra at Dharamshala on 26.7.2013 whereby he upheld the restraint order passed by learned Civil Judge (Senior Division), Kangra at Dharamshala on 1.8.2011.

2. It is fairly conceded by learned counsel for the petitioner that the issue of transfer or sale of vehicle No. HP-68-2281 is not in issue as the petitioner has no right, title or interest in this bus save and except to see that the installment as undertaken by the respondent is paid within the stipulated time. The instant petition therefore is only confined to the route permit which had been granted to the petitioner against bus purchased by him bearing registration No. HP-68-2281, which admittedly has been sold to the respondent for sale consideration of Rs.9,50,000/- and the remaining amount was to be paid by her as per the settlement.

3. The learned trial Court upheld the plea of the respondent with regard to the transfer of the route permit by concluding that since the route permit had been issued against a particular bus, therefore, the same stood transferred alongwith the bus at the time of transfer of the bus. It is apt to reproduce paras 14 and 15 of the judgment, which reads as under:

> *"14. So far as the application of the defendant is concerned, his grievance is that the route permit was taken away by the plaintiff decisively and he has in fact not sold the route permit. The copy of the route permit has been filed on the record which shows that it was issued against a particular bus i.e. Bus involved in this case. So far the case of the defendant to the effect that he want to purchase a new bus. On the strength of this route permit the law does not permit him to do so. Since the route permit has been issued against the particular bus and the bus is being driven on the route. Even this fact is lost the sight of the plea of defendant is tenable when he states that he never made a mention of sale of route permit in agreement to sell. When the agreement is carefully gone through, it does not make any specific provision of other documents as well as. There is not even a reference of other documents in this agreement to sell. In case the defendant did not intend to hand over the route permit to the plaintiff, the specific mention thereof would have been made in the agreement, which is lacking. Once no mention of any document with holding of or retaining thereof, has been made in this agreement, it cannot be prima facie be taken to mean that it was agreed between the parties that route permit was not transferred. Had any such intention between the parties developed at the time of entering into an agreement it would have made in the agreement.*
>
> *15. Since the route permit has been issued against a particular bus as a civil court cannot restrain the person in possession of the bus from plying the same against the route regarding which he has got the route permit. No such injunction can be granted at this stage. Mandatory injunction cannot be granted at this stage when there is nothing on the file to suggest that the route permit was to be not sold alongwith bus. Thus, the defendant has neither any prima facie nor balance of convenience is in favour of not any irreparable loss and injury which cannot be compensated in terms of money in case the*

mandatory injunction is with held. Hence point No.1 is held in affirmative and point No.2 is held in negative."

4. In the appeal carried out before the learned lower Appellate Court, this aspect of the matter does not appear to have been dealt with and it was simply held that since the bus was being plied by the respondent, therefore, the injunction granted by the learned trial Court called for no interference.

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

5. It is not in dispute that Section 59 (1) and Section 61 of the Motor Vehicles Act, 1939 (for short Act of 1939) correspond with the provisions of Section 82 (1) and Section 82 (2) of the Motor Vehicles Act, 1988 (for short Act of 1988).

Section 82 of the Act, 1988 reads thus:

"**Section 82.*Transfer of permit.—*** *(1) Save as provided in sub-section (2), a permit shall not be transferable from one person to another except with the permission of the transport authority which granted the permit and shall not, without such permission, operate to confer on any person to whom a vehicle covered by the permit is transferred any right to use that vehicle in the manner authorised by the permit.*

(2) Where the holder of a permit dies, the person succeeding to the possession of the vehicle covered by the permit may, for a period of three months, use the permit as if it had been granted to himself: Provided that such person has, within thirty days of the death of the holder, informed the transport authority which granted the permit of the death of the holder and of his own intention to use the permit: Provided further that no permit shall be so used after the date on which it would have ceased to be effective without renewal in the hands of the deceased holder.

(3) The transport authority may, on application made to it within three months of the death of the holder of a permit, transfer the permit to the person succeeding to the possession of the vehicles covered by the permit:

Provided that the transport authority may entertain an application made after the expiry of the said period of three months if it is satisfied that the applicant was prevented by good and sufficient cause from making an application within the time specified."

6. In ***Maniam Hiria Gowder*** vs. ***Naga Maistry, AIR 1957 MADRAS 620,*** a Division Bench of the Madras High Court while interpreting the provisions of Section 59 (1) of the Act of 1939 held that transfer of a permit could only be effected with the written permission of the transport authority.

7. In ***Ram Shanker Misra and brothers*** vs***. Regional Transport Authority, Kanpur and others, AIR 1960 Allahabad 247,*** it was held that Section 59 (1) merely lays down who, in the eye of law, would be the holder of the permit and which person can use the vehicle in the manner authorized by the permit. An illegal transfer of the permit would be void and is consequently ineffective. Such a transfer would not confer any right in the transferee, and the holder of the permit, namely, the transferor shall continue to be the permit-holder entitled to use the vehicle.

8. In ***Tekumalla Rama Rao v***s***. Durga Suryanarayana and others AIR 1964 Andhra Pradesh 256*** it was held that the language of Section 59 (1) of the Act of

1939 was mandatory and therefore, the permission of the transport authority was a pre-requisite for the transfer of the permit. Without such permission, even if the stage carriage covered by the permit was transferred, it could not be used. The prohibition against the transfer of a permit enacted in Section 59 had relation to matters of public interest. It was further held that even if the transfer is mutually agreed to, disregarding this provision, it was fundamental that Courts would not enforce such an agreement as its object were forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of the law within the meaning of Section 23 of the Contract Act. The express interdiction enacted in the statute on grounds of public policy could not be whittled down to a matter of routine and form and the statutory prohibition could not be construed as permitting such transfers as the contravention of such provision attracted penalty under Section 112 of the Act of 1939.

9. A Division Bench of Madras High Court in ***A.V. Varadarajulu Naidu (decd.) and others*** vs***. K.V. Thavasi Nadar, AIR 1963 Madras 413*** held that a partnership between A and B for the purchase of a lorry and to use it for carrying on the business of transport service with a permit obtained in B's name was not only illegal but was opposed to public policy as it contravened the provisions of Section 42 (1) and Section 59 (1) of the Act of 1939. It was further held that the partnership firm being the owner of the vehicle could not use the permit obtained in B's name unless the permit was transferred in the name of the partnership, that too, with the permission of the transport authority under Section 59 (1) of the Act of 1939.

10. A learned Single Judge of the Rajasthan High Court in ***Inderjit Singh v. Sunder Singh, AIR 1969 Rajasthan 155*** held that transfer of motor vehicle permit without permission of transport authority was forbidden by Section 59 (1) of the Act of 1939 and therefore, was unlawful under Section 23 of the Contract Act.

11. A Full Bench of Allahabad High Court in ***Khawaz Bux v. Mirza Mohammad Ismail AIR 1984 Allahabad 83,*** has held that a person who seeks to ply the vehicle must not only be the owner of the vehicle but also the owner of the permit. It was further held that where the title in a vehicle has been transferred, Section 59 (1) of the Act of 1939 prohibits the use of the vehicle in the manner authorized by the permit, unless the transport authority grants the permission. The section negatively makes a permit non-transferable without permission and positively provides that the transfer of the vehicle without the permission does not confer the right to use it. It was lastly held that enforcing an agreement whereby the permit as well as the vehicle covered by it are transferred without the requisite permission under Section 59 of the Act of 1939 by issuance of an injunction restraining the defendant from interfering with the plaintiff using the vehicle in the manner authorized by the permit, will be violative of Section 59. It was further held that Section 23 of the contract Act forbids enforcement of a contract which would defeat the provisions of any law.

12. A learned Single Judge of the Andhra Pradesh High Court in ***Nerati Pichamma and another*** vs***. Pasumala Arogiya and others (1991) 2 ACC 197,*** held that under Section 59 of the Act, the general conditions attached to the permit are that the same shall not be transferred except with the permission of the transport authority which granted the permit and that the owner continues to be governed by the provisions of the Act for use of the vehicle in the public place in the manner provided in the permit.

13. From a conspectus of aforesaid decisions, it is absolutely clear that the transfer of the ownership of the vehicle is entirely different from the transfer of the permit, whereas, the transfer of the vehicle is governed by the provisions of the Sales of Goods Act, whereas the transfer of the permit would be regulated by the provisions of the Motor

Vehicles Act, 1988. Therefore, the sale of vehicle does not essentially mean that even the permit has been transferred or sold as the same can only be transferred after complying with the provisions as contained in Chapter-V of the Act of 1988.

14. Learned Senior counsel for the respondent at this stage would rely upon the judgment of the Hon'ble Supreme Court in ***Pushpa alias Leela and others*** vs**.** ***Shakuntala and others (2011) 2 SCC 240***, to contend that once there is no dispute that the vehicle has been transferred, then the route permit is deemed to be transferred. I cannot accept this contention for the simple reason that this case does not relate to the transfer of the route permit and in fact relates to the transfer of the insurance policy of sale of the vehicle and is thus not applicable to the facts of the instant case.

15. In view of the aforesaid discussion, the orders passed by both the learned Courts below holding that the route permit stood transferred on the sale of the bus as it was issued against a particular bus is not sustainable in the eyes of law as the transfer of permit can only be transferred as per the provisions of Section 82 of the Motor Vehicles Act, 1988 and the same are accordingly set-aside by holding the petitioner to be the holder of permit which was granted to him against bus No. HP-68-2281.

16. The petition is disposed of in the aforesaid terms, 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 SURESHWAR THAKUR, J.

Sahani Devi .....Petitioner.

Versus

State of H.P. & Others ....Respondents.

CWP No. 1081 of 2015.
Decided on: 3rd August, 2015.

Constitution of India, 1950- Article 226- Petitioner was declared elected in an election to Panchayat- respondent No. 5 instituted an Election Petition challenging the eligibility of the petitioner to contest the election- Election Petition was dismissed, however, decision was reversed in the appeal- respondent No. 3 had contended that petitioner was an encroacher on the government land – petitioner stated that she had abandoned the government land more than six years prior to the date of the election- petitioner had sworn an affidavit stating that she was not holding any government land as encroacher- held, that it was for the petitioner to lead the satisfactory evidence to show that she had abandoned/left the government land six years prior to the date of the election and in absence of it, her plea cannot be accepted- appeal dismissed. (Para-2)

For the Petitioner: Mr.Vinay Kuthiala,Senior Adv. with Mr.Naresh Kaul, Adv.
For Respondents No.1 to 4: Mr. R.S. Thakur, Additional Advocate General.
For respondent No.5 to 7: Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The petitioner had contested elections to the office of Pradhan, Gram Panchayat, Gahaliana, Kangra, H.P. She was declared elected. Respondent No.5 had

instituted an election petition before the Authorized Officer under the H.P. Panchayati Raj Act-cum-Sub Divisional Officer (Civil), Kangra, District Kangra, H.P., wherein, the eligibility of the petitioner herein to contest elections to the office of Pradhan, Gram Panchayat, Gahaliana, Kargra, H.P. was challenged. Under orders comprised in Annexure P-1, the election petition was dismissed by the Authorized Officer under the H.P. Panchayati Raj Act-cum-Sub Divisional Officer (Civil), Kangra, District Kangra, H.P. An appeal was preferred by the respondent No.5 before the respondent No.3. The respondent No.3 under orders comprised in Annexures P-2 and P-3, reversed and set aside the conclusions and findings recorded in Annexure P-1 and allowed the appeal. The petitioner herein had appealed against the orders rendered by the Deputy Commissioner wherein he upset the conclusions and findings arrived at by the Authorized Officer under the H.P. Panchayati Raj Act-cum-Sub Divisional Officer (Civil), Kangra, District Kangra, H.P. comprised in Annexure P-1, before the respondent No.2. The latter also under Annexure P-7 dismissed the appeal preferred by the petitioner herein before him. Consequently, the petitioner has instituted the instant petition before this Court.

2. The apposite provisions of the Himachal Pradesh Panchayati Raj Act, 1994 are contained in Section 122 of the Act, the relevant portion whereof is extracted hereinafter:-

> **"122. Disqualifications.-** (1) A person shall be disqualified for being chosen, as and for being, an office bearer, of a Panchayat-
>
> (a).....
>
> (b).....
>
> (c) if he or any of his family member(s) has encroached upon any land belonging to, or taken on lease or requisitioned by or on behalf of, the State Government, a Municipality, a Panchayat or a Co-operative Society unless a period of six years has elapsed since the date on which he or any of his family member, as the case may be, is ejected there from or ceases to be the encroacher; or"

The anvil, of the submission of the learned counsel appearing for the petitioner in seeking the benefit besides drawing leverage from the latter part of Clause (c) of sub section (1) to Section 122, contemplating that in case a period of six years elapses since the date when the petitioner is ejected from government land encroached upon by her or ceases to be an encroacher thereon till hers filing nomination papers for contesting elections to the post of Pradhan, Gram Panchayat, Gahalian, Kangra, would render her ineligible to contest elections, is that even if assuming the petitioner herein had applied for, as is evident from Ex.PW7/A as spelt out in Annexure P-1, regularization of encroachment upon government land comprised in khasra Nos. 1260/3, 1628/1, 1247/1, 1259, 1249, 314 situated in Mohal Pantehar, in the year 2002, yet, when the petitioner herein at the stage contemporaneous to hers filing nomination papers for contesting elections to the office of Pradhan, Gram Panchayat, Gahalian, Kangra, H.P., in 2010 having furnished a sworn affidavit portraying the fact of hers being no longer an encroacher of Government Land, as a corollary, he contends that hence when a period of six years stood elapsed since hers vacating government land purportedly encroached upon by her till hers taking to file nomination papers for contesting elections to the office of Pradhan, Gram Panchayat, Gahalian, Kangra, concomitantly the rigour of Clause (c) of sub section (1) to Section 122 of the H.P. Panchayati Raj Act stood, as mandated in the latter part thereof relaxed, rendering the petitioner herein to be eligible to contest elections to the office of Pradhan, Gram Panchayat, Gahalian, Kangra, H.P. The above argument, though, has been with much vigour and formidability canvassed before this Court, especially on the score of the petitioner having

disclosed in her sworn affidavit filed at the time of hers filing nomination papers the fact of hers no longer holding government land as an encroacher which hence has been contended to entail upon rather make it incumbent upon respondent No.5 to adduce evidence in repudiation thereof, whereas such concerted efforts having been omitted to be made at the instance of respondent No.5 to disprove the contents of the affidavit sworn by the petitioner herein manifesting the fact of hers in the year 2010 not holding any government land as an encroacher, as such, renders her eligible to contest the apt elections. However, the contention as raised by the learned counsel for the petitioner to make it rather incumbent upon the respondent No.5 to dislodge the assertions and contentions in the affidavit filed by the petitioner herein is unacceptable. The reason for so holding is embedded in the fact that when the petitioner as manifested by Ex.PW7/A had applied on 2.8.2002 before the authority concerned for regularization of encroachment at her instance upon government land, as such, had projected her acquiescence to the factum of hers having encroached upon government land, now in case she six years prior to hers filing nomination papers for contesting elections to the office of Pradhan, Gram Panchayat, Gahalian had surrendered or had abandoned government land held by her as an encroacher, it was incumbent upon her to adduce cogent and worthy evidence manifesting the factum aforesaid, so as to foist in her a right to, at the stage contemporaneous to the holding of elections to the office of Pradhan, Gram Panchayat, Gahalian held in the year 2010 claim eligibility within the ambit of the latter part of Clause (c) of sub section (1) to Section 122 of the Himachal Pradesh Panchayati Raj Act, 1994 en-grafted in relaxation of the rigour of the earlier part, to contest elections to the office of Pradhan, Gram Panchayat, Gahalian, Kangra. However, when no proof has been adduced by the petitioner herein that she had surrendered or abandoned government land held by her as an encroacher six years prior to hers filing nomination papers for contesting elections to the office of Pradhan, Gram Pancyhayat, Gahalian, Kangra, rather when the Court of the Assistant Collector 1st Grade, Kangra is seized of a lis against the petitioner herein for hers having encroached upon government land naturally when the lis stands not terminated, as a concomitant the conclusion which hence is to be drawn is that the petitioner herein is an encroacher upon government land. Besides, when she has omitted to move an appropriate application at the earliest inasmuch as six years prior to the filing of nomination papers by her for contesting elections to the office of Pradhan, Gram Panchyat, Gahalian before the Assistant Collector 1st Grade, Kangra for the carrying out of measurement/spot inspection/demarcation for unearthing besides proving the facts of hers within the ambit of the latter part of clause (c) of sub section (1) to Section 122 of the Himachal Pradesh Panchayati Raj Act, having six years prior to hers filing nomination papers for contesting elections to the office of Pradhan, Gram Panchayat, Gahalian, Kangra, surrendered government land held by her as an encroacher, renders such omissions or want of endeavours to fillip an inference that she is disabled to derive any succor from the latter part of clause (c) of sub section (1) to Section 122 of the Himachal Pradesh Panchayati Raj Act, 1994. As a corollary, it has to be held that the recitals in the affidavit furnished by her at the time of hers filing nomination papers for contesting elections to the office of Pradhan, Gram Panchayat, Gahalian, are ingrained with falsity, besides are wholly in gross detraction as also not meting out compliance with the latter part of clause (c) of sub section (1) to Section 122 of the Himachal Pradesh Panchayati Raj Act, 1994 so as to render the petitioner eligible to contest elections. Moreover, for reiteration, as a concomitant a further inference which is to be drawn by this Court is that hence she did not six years prior to her filing nomination papers for contesting elections to the office of Pradhan, Gram Panchyayat, Gahalian had either surrendered or abandoned government land held by her as an encroacher. Resultantly, no leverage or capital can be drawn by the petitioner on the anvill of the latter part of clause (c) of Section 122 of the H.P. Panchayati Raj Act, 1994, especially when there is abysmal want of evidence of hers six years prior to

hers filing nomination papers for contesting elections to the office of Pradhan, Gram Panchayat, Gahalian, having abandoned or surrendered government land held by her as an encroacher, naturally then she is rendered ineligible to contest elections to the office of Pradhan, Gram Panchayat, Gahalian, Kangra. Formidable strength is marshalled by an inference that she at the earliest since hers applying for regularization of encroachment upon government land in the year 2002, had wilfully abandoned the above manner of concert at her instance, as the carrying out of spot inspection/measurement/demarcation of government land purportedly encroached upon by her would have unravelled the factum of hers as a matter of fact having encroached upon it. As a corollary then the ensuing deduction is that she did not either surrender or relinquish government land held by her as an encroacher six years prior to hers filing nomination papers for contesting elections to the office of Pradhan, Gram Panchayat, Gahalian,. In aftermath, she was forbidden while hence acquiring the vice of hers holding government land as an encroacher to contest elections to the office of Pradhan, Gram Panchayat, Gahalian, Kangra. Consequently, there is no merit in this petition which is accordingly dismissed and the impugned orders are maintained and affirmed. All pending applications also stand disposed of.

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

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

Versus

Kishori Lal & ors. .....Respondents.

Cr. Appeal No. 510 of 2009
Reserved on: July 31, 2015.
Decided on: August 03, 2015.

Indian Penal Code, 1860- Sections 320 and 498-A- Deceased was taken to the Hospital as a burn case- she made a statement that accused had poured the kerosene on her and had ignited with match stick- subsequently, she succumbed to her injuries- trial Court had discarded the dying declaration- PW-18 had moved an application before the Medical Officer seeking his opinion regarding the feasibility of recording the statement- Medical Officer made an endorsement that she was fit to make the statement- she made a subsequent statement that she had put herself on fire- however, subsequent statement was not endorsed by the Doctor- trial Court had erred in discarding the statement- it was duly proved by the statements of witnesses that accused had sprinkled kerosene on deceased and had put her on fire- second statement is doubtful and could not have been relied upon- accused No. 2 to 10 were aware of the commission of offence by accused No. 1 and despite this they had obtained second dying declaration to screen the accused No. 1 from legal punishment - accused had failed to prove alibi taken by accused- accused No. 1 convicted of the commission of offence punishable under Section 302 of IPC and accused No. 2 to 10 were convicted of the commission of offence punishable under Section 201 read with Section 34 of IPC. (Para-33 to 36 and 63 to 72)

Indian Evidence Act, 1872- Section 32- If dying declaration is acceptable as truthful, the Court can rely upon the same and can convict the accused- first statement in point of time must be preferred to any of the subsequent statements- merely because the person making dying declaration had suffered injury is not sufficient to discard the same- if both the hands were burnt, it is permissible to take thumb impression of the deceased. (Para-37 to 62)

Cases referred:

Suleman Rahiman Mulani and another vrs. State of Maharashtra, AIR 1968 SC 829

Tapinder Singh vrs. State of Punjab and another, AIR 1970 SC 1566
Kodali Purnachandra Rao and another vrs. The Public Prosecutor, Andhra Pradesh, (1975) 2 SCC 570
V.L.Tresa vrs. State of Kerala, (2001) 3 SCC 549
Mohan Lal Ganga Ram Gehani vrs. State of Maharashtra, (1982) 1 SCC 700
Ramawati Devi vrs. State of Bihar, AIR 1983 SC 164
State of Punjab vrs. Amarjit Singh, AIR 1988 SC 2013
Mafabhai Nagarbhai Raval vrs. State of Gujarat, (1992) 4 SCC 69
Om Parkash vrs. State of Punjab, AIR 1993 SC 138
Balbir Singh vrs. State, 1994 Cri.L.J. 1079
Hans Raj and others vrs. State of Rajasthan, 1995 Cri. L.J. 1004
Ramesh s/o Bisan Parteki vrs. The State of Maharashtra, 2001 Cri. L. J. 3780
Rambai vrs. State of Chhatisgarh, (2002) 8 SCC 83
P.V.Radhakrishna vrs. State of Karnataka, AIR 2003 SC 2859
Sri Kumar alias B.A. Jayakumar vrs. State of Karnataka, 2003 Cri. L.J. 252
State of Karnataka vrs. Shariff, AIR 2003 SC 1074
Vidhya Devi and another vrs. State of Haryana, (2004) 9 SCC 476
Nallam Veera Stayanandam & ors.vs.Public Prosecutor,High court of A.P., (2004)10 SCC 769
Muthu Kutty and another vrs. State by Inspector of Police, T.N., (2005) 9 SCC 113,
State of Karnataka vrs. Smt. Akkamahadevi, 2005 Cri. L.J. 703
Dashrath alias Champa and others vrs. State of Madhya Pradesh, (2007) 12 SCC 487
Krishan vrs. State of Haryana, (2013) 3 SCC 280
State of Madhya Pradesh vrs. Dal Singh and others, (2013) 14 SCC 159
Tanua Rabidas Vrs. State of Assam, AIR 2014 SC 3769
Prempal vrs. State of Haryana, AIR 2014 SC 3785
Mohinder Singh Nand Singh vrs. State of Punjab, 1971 Cri. L.J. 1764
State of Haryana Vrs. Sher Singh and others, AIR 1981 SC 1021
State of Maharashtra vrs. Narsingrao Gangaram Pimple, AIR 1984 SC 63
Binay Kumar Singh vrs. State of Bihar, AIR 1997 SC 322

For the appellant: Mr. M.A.Khan, Addl. Advocate General.
For the respondents: Mr. Vikrant Thakur, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is at the instance of the State against the judgment dated 22.6.2009, rendered by the learned Addl. Sessions Judge, (FTC), Hamirpur, H.P. in Sessions Trial No. 4 of 2009, whereby the respondent No.1-accused (hereinafter referred to as accused No.1), who was charged with and tried for offences punishable under Sections 302, 498-A IPC and accused Nos. 2 to 10 who were charged with and tried for offence punishable under Section 201/34 IPC, have been acquitted.

2. The case of the prosecution, in a nut shell, is that on the intervening night of 7/8.10.2008, at about 12:20 AM, an information was received from M.O., R.H. Hamirpur in the Police Station, Sadar that one women, namely, Veena Devi wife of Kishori Lal, accused No. 1 was admitted for treatment as burn case. HC Surjit Singh alongwith other staff reached RH Hamirpur and found Veena Devi admitted as indoor patient. Request was made

to M.O.RH Hamirpur as to whether Veena Devi was fit to make statement. The M.O. opined in the affirmative that she was fit to make statement, on the basis of which, statement under Section 154 Cr.P.C. was recorded in the presence of the Medical Officer. Smt. Veena Devi stated that on 7.10.2008 at 9:00 PM, after serving meals to her children, she was sleeping in the room and accused No. 1 Kishori Lal, her husband, was in drunken state and had come to home from his place of work Balakrupi after one month. Accused No. 1 Kishori Lal asked her to account for the money given to her. He abused her and thereafter she slept on the bed. Accused No. 1 Kishori Lal brought a big lamp containing kerosene oil and poured it on her person and ignited it with match stick. She ran outside the room engulfed in flames towards the courtyard. Her husband absconded from the spot. Her father-in-law, mother-in-law, brother-in-law and sister-in-law doused the fire. The statement of Veena Devi was attested by Dr. R.K.Agnihotri and scribed by police Head Constable. She appended her right hand thumb impression over the same. It was endorsed to SHO, PS Sadar, Hamirpur, on which the FIR under Sections 498-A and 307 IPC was recorded. Pending investigation, accused was arrested on 9.10.2008 in District Kangra. Smt. Veena Devi was medically examined at RH Hamirpur and the MO noted that there were 70% burn injuries on her person. As the injuries were serious in nature, Veena Devi was referred to Dr. R.P.G.M.C. Tanda for treatment. The I.O. visited the place of occurrence and took into possession the sample of earth from the room of the house of accused No. 1 Kishori Lal. Dupatta of pink colour of Smt. Veena Devi which was smelling of kerosene oil was also taken into possession. One half bottle 375 ml with lid and wick containing few drops of kerosene oil was also taken into possession. Clothes of Veena Devi were also taken into possession from 50 meters away from the place of occurrence. Accused No. 1 applied for bail before the learned Sessions Judge. The statement of Veena Devi was recorded by accused Nos. 2 to 10 at Dr. R.P.G.M.C., Tanda on 25.10.2008. She claimed that she herself, out of anger and heated discussion with the accused No. 1 had poured kerosene oil on her person and ignited herself. This aspect was investigated into and found that her statement was engineered one with a view to screen accused No. 1 from legal punishment. Smt. Veena Devi expired on 26.10.2008 in Dr. R.P.G.M.C., Tanda. Her post mortem was conducted by Dr. D.P. Swami. According to him, it was a case of 80% burn 5% plus minus, which led to asphyxia due to septicemia, toxecemia and infection upto liver, spleen and kidneys. Site plan was also prepared. The case property was sent to FSL. Accused No. 1 was booked under Section 302/498A IPC and accused Nos. 2 to 10 were booked for offences punishable under Section 201/34 IPC. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 23 witnesses. The accused were also examined under Section 313 Cr.P.C. They denied the incriminating circumstances put to them. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal at the instance of the State.

4. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved the case against the accused. On the other hand, Mr. Vikrant Thakur, Advocate, for the accused has supported the judgment of the learned trial Court dated 22.6.2009.

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

6. PW-1 Prem Chand is the father of deceased Veena Devi. He testified that the marriage of his daughter was solemnized with accused No. 1 on 8.10.2008. Two sons were born out of the wed lock. Accused No. 1 Kishori Lal used to harass his daughter. He used to tear off the clothes of her daughter. The Panchayat was called. He was informed by Ami

Chand, his brother that his daughter was in serious condition admitted in R.H. Hospital, Hamirpur. He alongwith his wife rushed to the hospital. He was told that his daughter has been referred to Dr. R.P.G.M.C. Tanda for treatment. He went to the Police Station, Hamirpur. He came to know that his daughter Veena Devi was burnt after pouring kerosene oil by her husband. In the bed room one burnt broom, match box and sticks were found. One lamp and wick were separately lying on the shelves of the room. There were few drops of kerosene oil in the lamp. One Dupatta of pink colour was also lying on the bed which was smelling kerosene oil. Bed sheet was also smelling of kerosene oil. The police has taken sample of soil from two places, out of which one was smelling of kerosene oil. The samples were put in parcels. He identified dupatta Ext. P-6, broom Ext. P-8, lamp lid Ext. P-9, Lamp Ext. P10, wick Ext. P-11, bed sheet Ext. P-13. His wife had told him that deceased Veena Devi had apprised her that Pradhan, Ward Panch and others had come and obtained her thumb impression on a paper on the pretext that she poured the kerosene oil on her person herself. In his cross-examination by the learned Advocate appearing on behalf of the accused, he admitted that Smt. Veena Devi had not told him that Ward Panch and others had taken her statement. It was narrated to him by his wife.

7. PW-2 Pritam Chand deposed that he heard cries from the house of Titu Ram and he went there. He found Smt. Veena Devi wife of accused No.1 burnt. He called Taxiwala Bidhi Chand and shifted her to RH Hamirpur. The Doctor informed the police and police came to the hospital. The police recorded her statement. He inquired from Veena Devi about the cause of burn injuries. She told him that kerosene oil had been poured on her by accused Kishori Lal. The police took into possession the burnt clothes of deceased Veena Devi which were thrown in the "nalla". He identified shirt Ext. P-15 and trouser Ext. P-16. The clothes were identified by Savitri Devi, mother-in-law of deceased Veena Devi. In his cross-examination, he admitted that he was elected as BDC Member in December, 2005. He was not on talking terms with the family of Titu Ram for the last decade. Titu Ram had restrained deceased to visit his house on 2-3 occasions. Smt. Veena Devi was admitted in the Emergency Ward. At the time of visit of the police, the doctor was present in the room. He admitted that the doctor had opined the condition of Veena Devi as serious. He also admitted that the deceased talked to none on the way from Village Brahmani to R.H. Hamirpur. He admitted that the speech of Veena Devi was slurred. The mental condition of Smt. Veena Devi was not stable due to burn injuries till his arrival at the house of Titu Ram and upto Tanda.

8. PW-3 Titu Ram is father-in-law of deceased Veena Devi. He deposed that accused No. 1 Kishori Lal was present in his house. His daughter-in-law Veena Devi was also present with accused in the house. After taking meals, they slept in their room. At 11:00 PM in the night, he heard the cries of Smt. Veena Devi. He woke up and found her in the verandah of first floor burning. He threw water on her and the fire was extinguished. She was covered with sheets. Pritam Singh, Member of the BDC also came to the spot and Veena Devi was taken to RH Hamirpur for treatment. She was inquired but her speech was slurred. She did not tell him that accused No. 1 Kishori Lal poured kerosene oil on her and ignited fire with match stick. He was declared hostile and cross-examined by the learned P.P. He did not know that the accused Kishori Lal absconded from the spot. He also did not make any inquiry from accused Kishori Lal as to how Veena Devi suffered burn injuries. In his cross-examination by the learned Advocate appearing on behalf of accused No. 1 Kishori Lal, he deposed that Veena Devi had told him that she herself poured kerosene oil on her person and then ignited fire.

9. PW-4 Dr. R.K.Agnihotri, testified that he was on night duty in RH Hamirpur and Smt. Veena Devi, wife of Kishori Lal was admitted in the hospital as a burn case. She

was brought to the hospital by her relatives. The patient disclosed the alleged history of homicidal burn by her husband at about 11:30 pm on 7.10.2008 by putting kerosene oil over her while she was sleeping. There were no clothes over her body. The condition of the patient was very serious. She was referred to Department of Surgery Dr. R.P.G.M.C. Tanda. He informed the police regarding burn case. The police reached the spot. She was admitted in Surgical Ward. On 8.10.2008, HC No. 31 had moved an application vide Ext. PW-4/B seeking his opinion regarding the feasibility of recording the statement of Veena Devi. He declared her fit to make statement. He made endorsement Ext. PW-4/B. The police official recorded the statement of Veena Devi in his presence in Surgical Ward. The statement of Veena Devi is Ext. PW-4/C. He appended his signatures on statement Ext. PW-4/C and also appended an endorsement that statement was recorded before him and she could not sign as her both hands were burnt. She appended thumb impression on statement Ext. PW-4/C. The police officer had read over and explained the contents of Ext. PW-4/C to Veena Devi. She admitted the contents to be correct and then appended her left thumb impression. Veena Devi remained admitted in the Surgical Ward. He remained present with the patient throughout as it was an emergency case and the patient was serious. He admitted in his cross-examination by the learned Advocate appearing on behalf of the accused No. 1 Kishori Lal that Veena Devi was under shock. The person with 70% bun injuries may be conscious, unconscious, semi-conscious or dead. He also admitted that if kerosene oil is poured on the person in sleeping position, there is a possibility of bed sheet and mattresses catching fire. Smt. Veena Devi put two thumb impression marks on Ext. PW-4/C. He denied the suggestion that the statement Ext. PW-4/C was not recorded in his presence. 2-3 persons had accompanied Smt. Veena Devi but their names were not known to him. They were asked not to be present in the room where Smt. Veena Devi was admitted at the time of recording her statement. He denied the suggestion that Veena Devi was not fit to make statement as she was in serious condition.

10. PW-5 Krishani Devi deposed that on 8.10.2008 at about 7/8:00 AM, in the morning, her nephew Amin Chand informed her and her husband that their daughter Veena Devi was in serious condition admitted in R.H. Hamirpur. She alongwith her husband rushed to the hospital and at about 9:00 AM, they were told that she had been referred and shifted to Dr. R.P.G.M.C., Tanda for treatment. They reached Tanda hospital at about 11:00 AM. Her daughter Veena Devi was admitted in the hospital and was in serious condition. They returned to their village. Again they went to the Tanda hospital on 14.10.2008 and came back. They did not have much talk with her. Again on 17.10.2008, they went and stayed with her daughter in the night. She inquired from Veena Devi the cause of burn injuries. She told her that on 7.10.2008 accused Kishori Lal had returned to his house and asked from her the expenditure of the amount which he had given to her. The accused was not satisfied with the explanation furnished by her. He thereafter took a lamp from the shelf and poured kerosene oil on her and set her on fire with the match box. On 17.10.2008, she also saw impression of ink on the left thumb of Veena Devi and on inquiry she told that on 15.10.2008, Pradhan Saroj Kumari, Ward Panch Bihari Lal and one BDC Member and others had come to her and forcibly taken her statement giving clean chit to accused No. 1 Kishori Lal. The Pradhan and Members had insisted her to make a statement that she herself had poured kerosene oil on her person. The Pradhan and others had told her daughter that if she gives such like statement, accused Kishori Lal will be released and he will take care of minor children. Veena Devi died on 26.10.2008. In her cross-examination, she deposed that her daughter Veena Devi told her that on the material date, accused No. 1 had brought two sweet packets, one was distributed to the people in the temple and the other at home.

11. PW-7 Neelama Devi deposed that she was associated by the police in the investigation. The accused had given demarcation of the clothes which were thrown by him in the "nalla". The police has taken the clothes into possession vide memo Ext. PW-2/A.

12. PW-8 Dr. Ramesh Chand Chauhan, has examined Savitra Devi wife of Titu. He issued MLR Ext. PW-8/B. He noticed blister over right middle finger in middle part on palmer aspect.

13. PW-9 Ajay Sehgal proved report Ext. PW-9/A.

14. PW-10 Dr. D.P.Swami, conducted the post mortem examination on the dead body. He noticed following ante mortem injuries:

> "**Antemortem:** Superficial burn all over the body except face upper 2/3 and scalp (6%), both lower of legs 9% and back of lower back 5%. So total 80± 5% superficial burn. Different areas of large pus formation, reddish area of ante mortem burn, areas of scab formation, pale and while areas of healing seen at places."

According to him, Veena Devi died of asphyxia due to septicemia, taxaemea and infection of liver, spleen and kidneys consequent to ante mortem superficial burn 80± 5%. Time elapsed between injuries and death was 2 to 4 weeks and between death and post mortem was 12 to 24 hours. He proved post mortem report Ext. PW-10/C.

15. PW-12 HHG Baldev Singh, deposed that he accompanied HC Surjeet Singh to RH Hamirpur. He had proved MLR Ext. PW-4/A which was received by him from Dr. Agnihotri, RH Hamirpur. The statement of Veena Devi was recorded by HC Surjeet Singh and MLC was taken by him to PS Hamirpur for registration of the case.

16. PW-13 HC Rajinder Kumar has taken the photographs of the spot. In his cross-examination, he deposed that in the photograph Ext. PW-13/A-4 and 5, the marked area is a place where sprinkled kerosene oil was found. The bed sheet was not found burnt on the spot.

17. PW-14 Const. Vinod Kumar has taken the photographs of dead body of Veena Devi vide Ext. PW-14/A-1 to Ext. PW-14/A-8.

18. PW-15 MHC Prakash Chand deposed that SI Guler Chand has deposited the case property with him on 8.10.2008. He made entries in the malkhana register. SI Guler Chand again on 11.10.2008 deposited with him the case property. All the parcels were sent to Director FSL, Junga for analysis on 12.10.2008 through Const. Jitender Kumar.

19. PW-16 Const. Jitender Kumar deposed that he has taken the case property to FSL, Junga.

20. PW-18 HC Surjeet Singh is the material witness since he has recorded the statement Ext. PW-4/C. According to him, on 8.10.2008, he visited Surgical Ward RH Hamirpur. Veena Devi was found as in- patient in Room No. 9, Bed No. 30. Dr. Agnihotri was attending her. He made a request Ext. PW-4/B to the doctor for her medical and sought his opinion whether she was fit to make a statement or not. The doctor opined that she was fit to make statement. In presence of Dr. Agnihotri, he enquired from Veena Devi the cause of burns. In the room, he alongwith Dr. Agnihotri were present and other persons were asked to leave the room. Smt. Veena Devi got her statement Ext. PW-4/C recorded. She told him that on 7.10.2008 at about 9:00 PM, accused Kishori Lal, her husband, poured kerosene oil on her and ignited the fire. She was unable to sign as her both hands were

burnt. Statement Ext. PW-4/C was read over and explained to her by him. She had appended her left hand impression at two places on Ext. PW-4/C. The entire statement was made by Smt. Veena Devi in presence of Dr. Agnihotri. The doctor also signed the statement as witness. He appended endorsement for the registration of the case and submitted to SHO PS Sadar through HHG Baldev Singh. In his cross-examination by the learned Advocate on behalf of accused No. 1 Kishori Lal, Veena Devi he deposed that Veena Devi had made statement in narrative form and it was not in question and answer form. She was talking normal but was in serious condition as she had suffered burn injuries. Her chin was also burnt. Her remaining face was intact.

21. PW-19 Anjani Kumar has proved reports Ext. PW-19/A, Ext. PW-19/C and Ext. PW-19/D.

22. PW-21 SI Guler Chand is the I.O. He deposed that on the intervening night of 7/8th October, 2008, at about 12:10-20 AM, a telephonic message was received from M.O. RH Hamirpur, to the effect that one lady was admitted in hospital as a burn case. He recorded the rapat. He deputed HC Surjeet Singh and HC Baldev Singh to visit the hospital. The statement of Veena Devi Ext. PW-4/C was received in the Police Station for the purpose of registration of the case. He recorded formal FIR Ext. PW-21/A. Site plan was also prepared. The case property was taken into possession. In his cross-examination, he deposed that his findings in the investigation were that accused No. 2 to 10 recorded statement of Veena Devi on the request of Titu Ram, father of accused No. 1 Kishori Lal.

23. PW-22 Nasib.Singh. Patial, proved FSL report Ext. PW-19/C.

24. The case of the prosecution, precisely, is that on the intervening night of 7/8.10.2008, accused No. 1 Kishori Lal came to his house. There was exchange of hot words with his wife. The family went on to sleep. Accused Kishori Lal poured kerosene oil on deceased Veena Devi and put her on fire. She was taken to Regional Hospital, Hamirpur. The dying declaration of deceased was recorded vide Ext. PW-4/C. She was referred to Dr. R.P.G.M.C., Tanda. She died on 26.10.2008.

25. PW-1 Prem Chand is the father of the deceased Veena Devi. According to him, accused Kishori Lal used to harass his daughter. He received the information and went to R.H. Hamirpur. He was told that his daughter has been referred to Dr. R.P.G.M.C, Tanda. He visited the house of in-laws of his daughter. He noticed in the bed room one burnt broom, match box and sticks. Some of the sticks were burnt. One lamp and wick were separately lying on the shelves of the room. There were few drops of kerosene oil in the lamp. One Dupatta of pink colour was also lying on the bed which was smelling kerosene oil. His wife told him that deceased Veena Devi had apprised her that Pradhan, Ward Panch and others had come and obtained her thumb impression on a paper on the pretext that she poured the kerosene oil on her person herself.

26. PW-2 Pritam Chand was the first person to reach the spot. He took the deceased to RH Hamirpur. The Doctor informed the police. The police reached the spot and recorded the statement of Veena Devi. He inquired from Veena Devi the cause of burn injuries. She told him that kerosene oil was poured on her by accused Kishori Lal. PW-3 Titu Ram is father-in-law of deceased Veena Devi. He deposed that at 11:00 PM in the night, he heard the cries of Smt. Veena Devi. He woke up and found her in the verandah of first floor burning. He threw water on her and the fire was extinguished. PW-4 Dr. R.K.Agnihotri, testified that Veena Devi was brought to the hospital by her relatives. The patient disclosed the alleged history of homicidal burn by her husband at about 11:30 pm on 7.10.2008 by putting kerosene oil over her while she was sleeping. He has categorically

stated that on 8.10.2008, HC No. 31 had moved an application vide Ext. PW-4/B, seeking his opinion regarding the feasibility of recording the statement of Veena Devi. He declared her fit to make statement. He made endorsement Ext. PW-4/B. The police official recorded the statement of Veena Devi in his presence in the Surgical Ward. He proved statement of Veena Devi Ext. PW-4/C. He also appended his signatures on statement Ext. PW-4/C with an endorsement that statement was recorded before him. Veena Devi could not sign the same as her both hands were burnt. She appended thumb impression on statement Ext. PW-4/C. The contents of her statement Ext. PW-4/C were read over and explained to her. The police officer had read over and explained the contents of Ext. PW-4/C to Veena Devi. She admitted the contents to be correct and then appended her left thumb impression.

27. PW-18 HC Surjeet Singh is the material witness. He deposed that on 8.10.2008, he was sent to RH Hamirpur. He made request vide Ext. PW-4/B to the doctor for the medical examination of Veena Devi. He sought the opinion of doctor as to whether she was fit to make a statement or not. The doctor opined that she was fit to make statement. Dr. Agnihotri was present in the room and other persons were asked to leave the room. Smt. Veena Devi got her statement vide Ext. PW-4/C recorded. She narrated the incident the manner in which the incident had happened. She was unable to sign as her both hands were burnt. The contents of statement Ext. PW-4/C were read over and explained to her by him. She had appended her left thumb impression at two places on Ext. PW-4/C. The entire statement was made by Smt. Veena Devi in presence of Dr. Agnihotri. The doctor also signed the statement as witness. The doctor also appended endorsement regarding the fact that her both hands were burnt. PW-10 Dr. D.P. Swami, has noticed the burn injuries to the extent of 80 $\pm$ 5% superficial burns. According to him, Veena Devi died of asphyxia due to septicemia, taxaemea and infection of liver, spleen and kidneys.

28. The learned trial Court has discarded the dying declaration Ext. PW-4/C and relied upon Ext. PW-21/G. Mr. M.A.Khan, learned Addl. Advocate General for the State, has vehemently argued that the statement Ext. PW-4/C could not be ignored since the same was recorded by HC Surjeet Singh in the presence of PW-4 Dr. R.K. Agnihotri. On the other hand Mr. Vikrant Thakur, Advocate, for the accused has strenuously argued that Veena Devi was not in fit condition to make statement on 8.10.2008 and he has relied upon the statement (second dying declaration) Ext. PW-21/G.

29. PW-18 HC Surjeet Singh has moved an application Ext. PW-4/B before PW-4 Dr. R.K.agnihotri, seeking his opinion regarding the feasibility of recording statement as per Ext. PW-4/B. The statement of Veena Devi was recorded by PW-18 HC Surjeet Singh in the presence of the doctor. The contents of the statement were read over and explained to Veena Devi. Since her both hands were burnt, she put her left thumb impression on Ext. PW-4/C. Only PW-18 HC Surjeet Singh and PW-4 Dr. R.K.Agnihotri were present in the room. Her statement was voluntary and PW-4 Dr. R.K. Agnihotri has given the endorsement that she was fit to make the statement. We are surprised how dying declaration Ext. PW-4/C has been discarded by the learned trial Court and relied upon second dying declaration dated 25.10.2008 Ext. PW-21/G. Smt. Veena Devi died on 26.10.2008.

30. According to the contents of statement (first dying declaration) Ext. PW-4/C, Veena Devi deposed that on 7.10.2008 at about 9:00 PM, she was sleeping in her room with children. Her husband came and asked her to account for the money he has given to her. He started abusing her. Thereafter, she lied on the bed and in the meantime her husband came on the spot with lamp and sprinkled kerosene oil on her and put her on fire with match stick. She ran towards the courtyard. She was taken care of by her father-in-law, mother-in-law, brother-in-law and sister-in-law. She could not put her signatures since her both hands were burnt. The doctor has made the endorsement that the deceased has put

her thumb impression in his presence. PW-4 Dr. R.K. Agnihotri has also made endorsement, as noticed hereinabove, that deceased was fit to give statement. Statement Ext. PW-4/C inspires confidence.

31. Now, we will advert to second dying declaration made on 25.10.2008 vide Ext. PW-21/G. In this statement, Veena Devi has deposed that her husband asked about the accounts and started abusing her. She, in a fit of anger, put herself on fire. She made this statement before all the persons in her full senses. The earlier statement given by her was given in unconscious condition. She has put her thumb impression on the same and accused Nos. 2 to 10 have also signed the same. It is apparent that deceased Veena Devi was forced to give statement Ext. PW-21/G during the bail application of accused No. 1 Kishori Lal. There is no endorsement by the doctor that she was in fit condition to make this statement on 25.10.2008. To the contrary, when the earlier dying declaration was recorded on 8.10.2008, PW-4 Dr. R.K. Agnihotri had opined that she was fit to give statement. Accused No. 2 to 10 have procured Ext. PW-21/G to screen accused No. 1 Kishori Lal. They have made deliberate attempt to destroy the evidence by procuring Ext. PW-21/G. The findings recorded by the learned trial Court that Veena Devi was not in fit condition to make statement on 8.10.2008 Ext. PW-4/C, is contrary to the evidence led by the prosecution. PW-2 Pritam Chand has categorically deposed that Veena Devi has told him that accused No. 1 Kishori Lal has put her on fire by sprinkling kerosene oil. This proves that deceased Veena Devi was in a position to talk while being taken to hospital and thereafter as well. The trial Court has given undue importance that accused No. 1 Kishori Lal and his father were not supporters of PW-2 Pritam Chand and accused No. 3 had fought election against him. It is PW-2 Pritam Chand who has taken the deceased to RH Hamirpur. PW-3, father-in-law of the deceased has also admitted in his examination-in-chief that Pritam reached the spot and he took Veena Devi for RH Hamirpur for treatment. PW-4 Dr. R.K. Agnihotri, in his cross-examination has deposed that a person with 70% burn injuries may be conscious, unconscious, semi-conscious or dead, but the fact of the matter is that he has given opinion vide Ext. PW-4/B that Veena Devi was in a fit condition to make statement. The learned trial Court has given undue importance to the statement of PW-HC Rajinder Kumar who deposed that bed sheet on the cot was not found burnt. It has come in the statement of PW-1, father of the deceased that bed sheet was smelling of kerosene oil. Pink coloured dupatta was also lying on the bed which was also smelling kerosene oil. It has come in Ext. PW-19/D, report of FSL that traces of kerosene oil were detected in the contents of parcels P/1, P/5 and P/8. Parcel P/5 is the pink coloured dupatta and P/8 is partially burnt salwar and undervest. PW-4 Dr. R.K. Agnihotri has only deposed that if kerosene oil is poured, there is every possibility of mattress catching fire. Whether the bed sheet would catch fire or not, it would depend on the amount of kerosene oil used by accused Kishori Lal. The learned trial Court has highlighted the traces of kerosene oil not found on Ext. P/2, P/3, P/4, P/6 and P/7 but ignored traces of kerosene oil on parcels P/1, P/5 and P/8.

32. PW-21 SI Guler Chand in his cross-examination has deposed that traces of kerosene oil were found on the floor at a distance of about 2 ¾ feet from the bed. According to the learned trial Court, if the kerosene oil was poured by accused No. 1 Kishori Lal on sleeping bed, how traces were found at a distance of 2 ¾ feet. The learned trial Court has given undue importance to this aspect of the matter. Since the accused Kishori Lal has brought the lamp from the shelf, the possibility of the traces of the oil being sprinkled at a distance of 2 ¾ feet cannot be ruled out. There was no need for recording the supplementary statement of Veena Devi as stated in the judgment by the learned trial Court. The learned trial Court has gravely erred in coming to the conclusion that deceased Veena Devi has put herself on fire due to heated discussion with her husband.

33. The prosecution has proved beyond reasonable doubt that it was accused No. 1 Kishori Lal who has sprinkled oil on deceased Veena Devi and set her ablaze, which resulted in her death by asphyxia due to septicemia, toxecemia and infection upto liver, spleen and kidneys. The learned trial Court has also given undue importance to the fact that accused No. 1 Kishori Lal has brought two packets of sweets out of which one was distributed in the temple and other in the house. This fact, of trivial nature, would not advance the case of the accused. Merely bringing sweets in the house would not mean that the relations between the husband and wife were cordial, more particularly, when PW-1 Prem Chand, father of the deceased said that the accused Kishori Lal used to maltreat his daughter Veena Devi.

34. The learned trial Court has recorded specific findings that accused No. 2 to 10 had visited Dr. P.P.G.M.C, Tanda. They have forced Veena Devi to sign second declaration Ext. PW-21/G. No evidence has been led by the accused as to who was the author of dying declaration Ext. PG-21/G and whether Veena Devi was in fit condition to make statement or not, more particularly, when second declaration was made on 25.10.2008 and Veena Devi died on 26.10.2008. It is second dying declaration, which is doubtful and not the first which was made on 8.10.2008 itself. Accused No. 2 to 10 have got recorded Ext. PW-21/G from deceased Veena Devi definitely to screen accused No. 1 Kishori Lal from conviction.

35. Their lordships of the Hon'ble Supreme Court in the case of ***Suleman Rahiman Mulani and another vrs. State of Maharashtra,*** reported in ***AIR 1968 SC 829,*** have held that in order to establish charge under Section 201 IPC, the prosecution must first prove that an offence had been committed and that the accused knowing or having reason to believe that such an offence had been committed and with the intent to screen the offender from legal punishment, had caused the evidence thereof to disappear. It has been held as follows:

> "6. The conviction of the appellant No. 2 under s. 201 IPC depends on the sustainability of the conviction of appellant No. 1 under s. 304A IPC. If appellant No. 1 was rightly convicted under that provision, the conviction of appellant No. 2 under s. 201 IPC on the facts found cannot be challenged. But on the other hand, if the conviction of appellant No. 1 under s. 304A IPC cannot be sustained, then, the second appellant's conviction under s. 201 IPC will have to be set aside, because to establish the charge under s. 201, the prosecution must first prove that an offence had been committed not merely a suspicion that it might have been committed-and that the accused knowing or having reason to believe that such an offence had been committed, and with the intent to screen the offender from legal punishment, had caused the evidence thereof to disappear. The proof of the commission of an offence is an essential requisite for bringing home the offence under s. 201 IPC-see the decision of this Court in Palvinder Kaur v. State of Punjab (1)."

36. In the present case, accused No. 2 to 10 knew the commission of offence by accused No. 1 Kishori Lal and despite that they have obtained second dying declaration Ext. PW-21/G in order to screen the offender from legal punishment.

37. Their lordships of the Hon'ble Supreme Court in the case of ***Tapinder Singh vrs. State of Punjab and another,*** reported in ***AIR 1970 SC 1566,*** have held that if the dying declaration is acceptable as truthful then even in the absence of other

corroborative evidence the Court can act upon it and convict the accused. It has been held as follows:

> "5. The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under.. s. 32(1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances. This Court in Kushal Rao v. The State of Bombay(') laid down the test of reliability of a dying declaration as follows :
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> > "On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the -opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence-. (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the 'facts stated had not been impaired at the time he was making the statement, by Circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.
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> > Hence in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the

> statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corrobo- ration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the. reported cases, but from the fact that the court, in a given case, has come to the conclusion that that parti- cular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

This view was approved by a Bench of five Judges in Harbans Singh v. State of Punjab. Examining the evidence in this case in the light of the legal position as settled by this Court we find that the dying declaration was recorded by the Magistrate within four hours of the occurrence. It is clear and concise and sounds convincing.It records :

> "Today at 4.45 p.m. my Sandhu (wife's sister's husband) Tapinder Singh fired shots with his pistol at me in the, presence of Harnek Singh, Sher Singh and Gurdial Singh at the taxi stand. He suspected that I had illicit relations with his wife. Tapinder Singh injured me with these fire shots."

Considering the nature and the-number of injuries suffered by the deceased and the natural anxiety of his father and others present at the spot to focus. their attention on efforts to save his life we are unable to hold that he had within the short span of time between the occurrence and the making of the dying declaration been tutored to falsely name the, appellant as his assailant in place of the real culprit and also to concoct a non-existent motive for the crime. It is unnecessary for us to refer to the earlier declarations contained in Ex. PM, Ex. DC and Ex. PH/ 13 because the one recorded and proved by the Magistrate seems to us to be acceptable and free from infirmity. If the dying decla- ration is acceptable as truthful then even in the absence of other corroborative evidence it would be open to the court to act upon the dying declaration and convict the appellant stated therein to be the offender. An accusation in a dying declaration comes from the victim himself and if it is worthy of acceptance then in view of its source the court can safely act upon it. In this case, -however, we have also the evidence of eye witnesses Gurdial Singh, (P.W. 7), Hamek Singh (P.W. 8) and Sher Singh (P. W. 9) whose testimony appears to us to be trustworthy and unshaken. No convincing reason has been urged on behalf of the appellant why these three witnesses and particularly the father of the deceased should falsely implicate the appellant substituting him for the real assailant. It is not a case in which, along with the real culprit, someone else, with whom the complainant has some scores to settle, has been added as a co-accused. The only argument advanced on behalf of the appellant was that the deceased was shot at somewhere else and not at the place where the prosecution witnesses allege he was shot at. It was emphasised that these three witnesses were not present at the _place and time where the occurrence actually took place. This

submission is, in our view, wholly unfounded,and there is absolutely no material in support of it on the existing record. The probabilites are clearly against it. The fact that Hari Singh, A.S.I. (P.W. 2) went to the place of occurrence and from there he learnt from someone, 13Sup. Cl/70-10 that the injured person bad been taken to Dayanand Hospital clearly negatives the appellant's suggestion. The fact that the A.S.I. did not remember the name of the person who gave this information would not detract from its truth. On the contrary it appears to us-to be perfectly natural for the A.S.I. in those circumstances not to attach much importance to the person who gave him this information. And then, the short duration within which the injured person reached the hospital also shows that those who carried him to the hospital were closeby at the time of the occurrence and the suggestion that Gurdial Singh (P.W. 7), Hamek Singh (P.W. 8) and Sher Singh (P.W. 9) must have been informed by someone after the occurrence does not seem to us to fit in with the rest of the picture. We are, therefore, unable to accept the appellant's suggestion that the deceased was shot at somewhere else away from the place of the occurrence as deposed by the eye witnesses."

38. Their lordships of the Hon'ble Supreme Court in the case of ***Kodali Purnachandra Rao and another vrs. The Public Prosecutor, Andhra Pradesh,*** reported in ***(1975) 2 SCC 570,*** have held that in order to bring home an offence under Section 201 Penal Code, the prosecution has to prove:

"(a) that an offence has been committed;

(b) that the accused knew or had reason to believe that the offence has been committed;

(c) that with such knowledge or belief he,

(i) caused any evidence of the commission of that offence to disappear, or,

(ii) gave any information respecting that offence which he then knew or believed to be false;

(d) that he did so with the intention of screening the offender from legal punishment; and

(e) if the charge be of an aggravated form, as in the present case, that the offence in respect of which the accused caused evidence to disappear was punishable with death or with imprisonment for life or with imprisonment extending to 10 years."

39. Similarly in the case of ***V.L.Tresa vrs. State of Kerala,*** reported in ***(2001) 3 SCC 549,*** their lordships of the Hon'ble Supreme Court have reiterated the following principles to prove charge u/s 201 IPC:

"12. Having regard to the language used, the following ingredients emerge:

(I) Committal of an offence;

(II) person charged with the offence under Section 201 must have the knowledge or reason to believe that the main offence has been committed;

(III) person charged with the offence under Section 201 IPC should have caused disappearance of evidence or should have given false information regarding the main offence and

(IV) (IV) the act should have been done with the intention of screening the offender from legal punishment. The impact ofSection 201 thus is the intent to screen the offender from legal punishment.

14. Having regard to the language used, mere suspicion would not be sufficient. There must be available on record cogent evidence that the accused has caused the evidence to disappear in order to screen another known or unknown. The fore-most necessity being that the accused must have the knowledge or have reason to believe that such an offence has been committed. This observation finds support in the oft-cited decision of this Court in Palvinder Kaur v. State of Punjab (AIR 1952 SC 354). Further, in Roshan Lal v. State of Punjab (AIR 1965 SC 1413) this Court in paragraph 12 of the report observed:

> "(12) Section 201 is somewhat clumsily drafted, but we think that the expression knowing or having reason to believe in the first paragraph and the expression knows or believes in the second paragraph are used in the same sense. Take the case of an accused who has reason to believe than an offence has been committed. If the other conditions of the first paragraph are satisfied, he is guilty of an offence under S.201. If it be supposed that the word believes was used in a sense different from the expression having reason to believe, it would be necessary for the purpose of inflicting punishment upon the accused to prove that he believes in addition to having reason to believe. We cannot impute to the legislature an intention that an accused who is found guilty of the offence under the first paragraph would escape punishment under the succeeding paragraphs unless some additional fact or state of mind is proved."

40. It is clear from Ext. PW-4/A that in MLC, the deceased has narrated that she has been set ablaze by her husband by pouring kerosene oil, while she was sleeping. She was conscious when brought to the hospital. There was smell of kerosene oil. The police has recovered lamp containing drops of kerosene oil, match box, broom and clothes of the deceased. The report of the FSL proves that dupatta and her clothes were smelling kerosene oil. The dying declaration recorded vide Ext. PW-4/C on 8.10.2008 is duly corroborated by PW-1 Prem Chand and PW-5 Krishani Devi, medical evidence as per MLC, statement of PW-4 Dr. R.K.Agnihotri and post mortem report Ext. PW-10/C. Veena Devi died of asphyxia due to septicemia, toxecemia and infection upto liver, spleen and kidneys.

41. Their lordships of the Hon'ble Supreme Court in the case of ***Mohan Lal Ganga Ram Gehani vrs. State of Maharashtra,*** reported in ***(1982) 1 SCC 700,*** have held that the first statement in point of time made by the injured must be preferred to any of his subsequent statements. It has been held as follows:

> "17. Thus, the reason given by the High Court for distrusting the evidence of Dr. Heena is wholly unsustainable. Moreover, the statement of the injured to Dr. Heena being the first statement in point of time must be preferred to any subsequent statement that Shetty may have made. In fact, the admitted position is that Shetty did not know the appellant before the occurrence nor did he know his name which was disclosed to him by one Salim. Therefore, Salim who is now dead, being the source of information of Shetty would be of doubtful admissibility as it is not covered by s. 32 of the Evidence Act. And, once we believe the evidence of P.W. 11, as we must, then the entire bottom out of the prosecution case is knocked out."

42. In the case of ***Ramawati Devi vrs. State of Bihar,*** reported in ***AIR 1983 SC 164,*** their lordships of the Hon'ble Supreme Court have held that dying declaration recorded before a police officer is admissible and can be relied for conviction. It need not be recorded before the Magistrate. It has been held as follows:

> "7. In our opinion neither of these two decisions relied on by the appellant is of any assistance in the facts and circumstances of this case. These decisions do not lay down, as they cannot possibly lay down, that a dying declaration which is not made before a Magistrate, cannot be used in evidence. A statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible under Section 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case. In the instant case, the dying declaration has been properly proved. It is significant to note that in the course of cross-examination of the witness proving the dying declaration, no questions were put as to the state of health of the deceased and no suggestion was made that the deceased was not in a fit state of health to make any such statement. The Doctor's evidence also clearly indicates that it was possible for the deceased to make the statement attributed to her in the dying declaration in which her thumb impression had also been affixed. In the instant case, it cannot also be said that there is no corroborative evidence of the statement contained in the dying declaration. The evidence of PWs. 1, 4, 5 and 8 clearly corroborates the statement recorded in the dying declaration. We do not find any material on record on the basis of which the testimony of these witnesses can be disbelieved. It may also be noticed that none of these witnesses including the Police Officer who recorded the statement could be attributed with any kind of ill-feeling against the accused. The High Court has elaborately dwelt on this aspect and has carefully considered all the materials on record and also the arguments advanced on behalf of the appellant. We are in agreement with the view expressed by the High Court and in our opinion the High Court was right in upholding the conviction of the appellant.
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> 8. We, accordingly, dismiss the appeal. The conviction of the appellant under Section 302 of the Indian Penal Code and the sentence imposed on her are upheld. The appellant is now on bail. The bail bond of the appellant is hereby cancelled and the appellant is directed to be taken into custody for serving out the sentence."

43. Their lordships of the Hon'ble Supreme Court in the case of ***State of Punjab vrs. Amarjit Singh,*** reported in ***AIR 1988 SC 2013,*** have held that dying declaration recorded by the Investigating Officer in the absence of Magistrate, in circumstances, could not be rejected. It has been held as follows:

> "18. It is true as this Court has observed in Dalip Singh v. State of Punjab () that the practice of Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged and it would

be better to have dying declaration recorded by Magistrate. But no hard and fast rule can be laid down in this regard. It all depends upon the facts and circumstances of each case.

19. In this case, ASI belongs to the Police Station at Bhogpur. Upon intimation by wireless message that Balwinder Kaur was admitted in Ludhiana Hospital, he straight went to that place. He met the Doctor and recorded her statement. The FIR was issued on the basis of that statement. It was then an offence under Section 307 IPC. The investigation went on accordingly at Bhogpur. The Police Station at Bhogpur is 92 kms from Ludhiana and we are told that Bhogpur is in a different district altogether. In these circumstances, we cannot find fault with the ASI for not getting the dying declaration recorded by a Magistrate."

44. Their lordships of the Hon'ble Supreme Court in the case of ***Mafabhai Nagarbhai Raval vrs. State of Gujarat,*** reported in ***(1992) 4 SCC 69,*** have held that unless there is something inherently defective, Court cannot substitute its opinion for that of the doctor. It has been held as follows:

"2. Learned Counsel for the appellant submitted that the deceased had serious burns on her and it would not have been possible for her to make dying declarations and that P.W. 2 the Doctor who recorded the first dying declaration has not truly recorded the same in the words of the deceased and that his evidence itself shows that the deceased would not have been in a position to make the declaration. It is also his submission that P.W. 3 the Executive Magistrate who recorded the second dying declaration did not record the same in the form of questions and answers and the statement recorded by him cannot be taken to be the true version alleged to have been given by the deceased.

3. The deceased aged about 40 years was the widow of one Savaji and was living in a wooden cabin near the maternity hospital in Harij and she was maintaining herself by doing casual work in the maternity hospital. She developed illicit intimacy with the accused. Her grown-up children were dissatisfied with her character and other members of her community were also dissatisfied. Since then she was living alone in the wooden cabin near the maternity hospital. There was some quarrel between the accused and the deceased. At about midnight on 9.7.78 the accused went to her cabin and sprinkled kerosene oil on her and set fire to her clothes and then fled. The deceased ran from her cabin inside the compound of the maternity hospital raising cries. One Patavala Motibhai came there and put a quilt on her body. The said Patavala Motibhai went and informed the Medical Officer, P.W. 2 of the Government Hospital who immediately ran to the spot and separated the burnt clothes from her body and gave first aid. He questioned as to who had set lire and the deceased replied that the accused was the culprit. P.W. 2 recorded her statement which is the first dying declaration in the case. P.W. 2 shifted her to the hospital and he himself went to the police station and gave a report. The police Jamadar also recorded her statement in the hospital which is yet another dying declaration in the case. By that time information was sent to the Taluka Magistrate with a request to record the dying declaration. P.W. 3, the Taluka Magistrate went to the spot and he also recorded the dying declaration. The deceased died in the early morning of 10.7.78. Inquest was held over the dead body and post-mortem was conducted by P.W. 2. The learned Sessions Judge, in our view, has

unnecessarily doubted the veracity of P.W. 2, the Doctor. He observed that the moment the flames had been seen by the deceased on her person she must have received a severe shock and the same must have become "graver and graver" and in that state of mind it is not believable at all that the deceased could keep balance of her mind and full consciousness so as to make the statement. With this initial doubt the learned Sessions Judge proceeded to examine the evidence of the Doctor. The Doctor stated that in some cases mental shock immediately does . not develop and that in the instant case the deceased developed the mental shock for the first time at 4 A.M. Thereafter it gradually increased. The learned Sessions Judge called it irresponsible statement. It is in the medical evidence that 99% of the body of the deceased was affected by extensive bums and that the clothes of the deceased were also burnt to ashes. Therefore, the learned Judge thought that it was not at all possible to believe that the lady might. have developed the shock only at 4 A.M. and he gave his firm opinion that the moment the deceased had seen the flames she must have sustained mental shock and these circumstances convinced him that right from the very beginning she must have been under a mental shock and on that ground the learned Judge disbelieved the Doctor. Likewise he has pointed out certain circumstances purely based on surmises and on his inferences. It is needless to say that the Doctor who has examined the deceased and conducted the post-mortem is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective the court cannot substitute its opinion to that of the Doctor."

45. In the instant case, the first dying declaration was truthful and trustworthy.

46. In the case of ***Om Parkash vrs. State of Punjab,*** reported in ***AIR 1993 SC 138,*** their lordships of the Hon'ble Supreme Court have held that the dying declaration of deceased could not be rejected merely because of serious burn injuries on her person. It has been held as follows:

"7. The learned counsel appearing for the appellants submitted that it is always open to the Court to convict the accused on the basis of a dying declaration but before any such order of conviction is passed the Court must be satisfied that the dying declaration said to have been made by the victim before death is genuine and truthful. She pointed out that the so-called dying declaration which is said to have been made by Rita before ASI Amrit Lal does not appear to be a genuine and natural statement. According to her, because of the burn injuries Rita must not be in a position to make any such declaration. In this connection, she drew our attention to the post mortem examination report of Rita and the findings of Doctor who held the post mortem examination. It was urged that the Doctor had found second and first degree septic burns on the person of Rita and as such by 6.25 when she is alleged to have made the dying declaration, in normal course of the event she must not be in aposition to make any such declaration. Dr. Devinderpal Singh (PW 4) has stated on oath that it was the statement of Rita which was recorded, According to him, she remained conscious till 11.00 p.m. on March 17, 1979. Dr. Haris Chander Vaid (PW 2), who examined the injuries of Rita before her statement was recorded, also has not mentioned in his report that she was unconscious, It may be mentioned that during the examination of aforesaid Dr. Harish Chander Vaid (PW 2) no question was put to him that because of the injuries on the person of Rita whether she will be in a position

to make the dying declaration. It is true that there were serious burn injuries, on the person of Rita but still she survived till March 29, 1979 i.e. for about twelve days. in this background we are not inclined to hold that because of the burn injuries, Rita was not in a position to make any statement before ASI Amrit Lal."

47. In the case of ***Balbir Singh vrs. State,*** reported in ***1994 Cri.L.J. 1079,*** the Division Bench of the J & K High Court has held that even if there was 100% burns, the dying declaration recorded by I.O. in presence of doctor, was voluntary and in good state of mind. It was admissible though not recorded by a Magistrate and no corroboration was required. It has been held as follows:

"13. It was argued by the learned Counsel for the accused that as the dying declaration of the deceased was neither recorded by a Magistrate nor by a Doctor, but by the Investigation Officer himself without explaining the non availability of the Magistrate and the Doctor, therefore, such a dying declaration could not inspire confidence on which conviction could be recorded. Such an argument advanced and based upon the proposition of law as laid down in AIR 1986 SC 250 : (1986 Cri LJ 155) does not hold good in the circumstances of the case in question; firstly, on the ground that such a declaration was recorded by the SHO in presence of a Doctor witness soon after the occurrence had taken place, and the same was recorded instantly for the reason that the Doctor had opined to the S.H.O. that the lady (deceased) was in a critical stage and there was no hope of her survival. Secondly, the condition of the patient at that time necessitated that the Investigating Officer should have recorded her statement immediately, which he did and, although, the patient had 100% burns on her body and even was not in a position to put her thumb impressions on her statement, which were burnt, but was in a good state of mind to make such a statement without any waivering or in such a notch potch manner, which could show that she was actually in a semi conscious condition and talking incoherently, and there was a possibility that in that manner, her imagination might have played with her in giving out the name of the accused as her assailant. It is the case of the prosecution and defence as well, that both the deceased and the accused were enjoying a happy marital life and, therefore, her imagination could not play with her to blurt out the name of her husband as her assailant. The statement of the deceased, which formed the basis for initiation of criminal investigation against the accused and being her last statement before her death, has withstood all the tests of the Evidence Act, to be declared as a dying declaration, for it was made by the deceased before her death to the Investigating Officer relating the circumstances under which her death had taken place at the hands of the accused. Both the prosecution witnesses Investigating Officer Talib Hussain and Dr. Bashir Ahmed have been put to a lengthy cross examination and have succintly proved that such a statement was made by the deceased of her own free will, when she was in a good state of mind and was not influenced or tainted by anybody, for there was no relation of her present in the hospital at the time her statement was recorded. In AIR 1958 SC 22 : (1958 Cri LJ 106) it has been held "that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination, but, once the Court has

come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assilant of the deceased, there was no question of further corroboration. If, on the other hand, the Court after examining the dying declaration in all its aspects and testing its veracity has come to the conclusion that it is not reliable by itself and that is suffers from an infirmity, then without any corroboration, it cannot form the basis of a conviction". In above context of the law, it becomes very material to make mention of the circumstances, under which the dying declaration of the deceased has been recorded. The said declaration was recorded by its scribe P.W. Talib Hussain, soon after he received a secret information about the occurrence, he went to the house of the accused, and found that the deceased was laying in a burnt condition and he managed her shifting to Poonch hospital on a cot and recorded her statement in presence of Dr. Bashir Ahmad and her brother-in-law P.W. Parkash Singh. P.W. Parkash Singh did not support the prosecution story in literal sense of his statement recorded Under Section 161 of the Cr. P.C., but could not deny the fact that the deceased was burnt and she came out from her house in a burning condition while saying that she caught fire, for her stove had burst. He did not support the dying declaration to have been recorded in his presence, but admitted his signatures on the dying declaration, which, according to him, were recorded by the police on a blank paper. However, his statement is negatived by Dr. Bashir Ahmad who in unambiguous terms after being put to a lengthy cross-examination by the defence has stated and corroborated the fact that the dying declaration of the deceased Rajinder Kour was recorded in his presence by P.W. Talib Hussain, when he (the Doctor) verified the fact that the deceased who could make a statement was in a critical state of health and there was every likelihood of her non survival and the same prompted the Investigating Officer to record her statement immediately in presence of the Doctor, fully being of the view that she could die at any time. Dr. Bashir Ahmad was a Medical Officer and was, in no way, connected with the accused or the deceased. He being an expert with independent thinking about the matter, was not expected to speak a lie. He did not bear any ill will or enmity towards the accused or any soft corner for the deceased and, therefore, one could not say that he could attest a blank document, so as to involve the accused falsely in the case. He had been working as a Surgeon in Poonch Hospital. He was not bearing any ill will or grouse against the accused which could impel him to make a false statement against the accused. His position as an expert derives full confidence to believe him as an independent witness, who could say as to whether the deceased Rajinder Kour was in a fit condition to make a statement or not. He has testified that the deceased was in a good state of mind to make a statement, which she made before the Investigating Officer Talib Hussain. According to him, although the deceased had received 100% burns on her body, but she even then was conscious and in a fit state of mind to make a statement. He has stated that since the hands of the deceased were also burnt, therefore, she was not in a position to mark her thumb impressions on the statement. He narrated the whole sequence as to how her statement was reduced to writing by the Investigating Officer. According to him, she made her statement slowly and was in a great pain and also cried while her statement was being recorded. The evidence of Investigating Officer and Doctor could not be impeached in any manner by the defence to show that the said declaration of

the deceased was not free from any inducement or taintedness and, as such no conviction could be recorded on such evidence by the trial Judge. As the statement of the deceased was recorded immediately after the incident, therefore, there was no possibility for the S.H.O. to wait and call for the Magistrate to record her statement in a question answer form, for there was every likelihood that she could die any time. Therefore, the way and the circumstances in which her statement has been recorded shows that such a statement of the deceased was independently sufficient to form the sole basis for the conviction of the accused even if there would have been no corroboration to it. In this regard, one gets prompted to make mention of AIR 1958 SC 22 : (1958 Cri LJ 106) wherein it has been authoritatively held that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated. Each case must be determined on its own facts, keeping in view the circumstances in which the dying declaration was made, it cannot be laid down as a general proposition that the dying declaration is a weaker kind of evidence than other piece of evidence; a dying declaration stands on a same note as other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principle governing the weighing of evidence."

15. The deceased when removed from the place of occurrence to the hospital was surrounded by her in-laws and no relatives on her parents side were present when the dying declaration was recorded. This is an admitted case of the parties that some discord arose between the husband and wife about the solemnization of the marriage of their brother and sister respectively, as a result of which, they were sour to each other, and the same resulted into the non participation of the family members of the bridegroom, Balbir Singh in his marriage ceremony which on the eventful day took place at Gurdwara Nangali Sahib. In the circumstances when the occurrence took place at a time when the accused was present in his house, therefore, the evidence of dying declaration recorded by the Investigating Officer as far as practicable in the words of the maker of the declaration stands on a very higher footing than the dying declaration, which would have been made orally by the declarant and the same was likely to suffer from all infirmities of human memory and character. The present declaration has proved all the tests of Evidence Act, and the same has been recorded at the earliest opportunity by its scribe, who is Senior Officer in the police department in presence of the Doctor who testified to it in letter and spirit that such a statement was by the declarant which was free from any tutoring, inspiration or inducement. If such a statement could have been beyond her control, she could have easily indicted her inlaws people in the commission of the crime, even after she came crying to them and was ablaze in fire, but they did not take any leading part in putting out the fire from her person and ensured her despatch for medical assistance, unless the Investigating Officer reached on the spot and removed her to the hospital. Their cold shoulder towards her, shows that; either they were under the control of their son (accused) badly, who never wanted that the marriage of Gurjeet Kour and Darshaan Singh to take place or they were inimical towards the deceased, which created an impediment in their mind not to take a leading part in putting out the fire from her person and ensure her despatch to the hospital. But, the deceased made a natural sequence of the circumstances, as a result of which, she was

put on fire by her husband, which resulted into her death for she sustained 100% burns from such fire set on her by her husband after sprinkling kerosene oil on her body and was lit with a match stick. A. person at the verge of death is not supposed to make an untrue statement unless prompted or tutored by his friends or relatives. Infect; the shadow of immediate death is the best guarantee of the truth of the statement made by dying man the cause of circumstances leading to his death, which are absolutely fresh in his mind and is un-tainted or discoloured by any other consideration except speaking of truth. It is for these reasons that the Statute (The Evidence Act) attaches a special sanctity to a dying declaration. Thus, if the statement of a dying person passes the test of graver scrutiny applied by the Courts, it becomes the most reliable piece of evidence which does not require any corroboration. Suffice it to say, that it is now well established by a long course of decisions. If, on a careful scrutiny of such a declaration, the Court is satisfied that the dying declaration is true and free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a dying declaration, even if there is no corroboration. The above mentioned view has been taken in AIR 1988 SC 558 (sic). In the instant case, the dying declaration has withstood all the tests laid down under the Evidence Act, and the trial court has very clearly on proper scrutiny of the evidence of the scribe of the dying declaration and its attesting witness Dr. Bashir Ahmad clearly after satisfying its conscience found that the dying declaration made by Rajinder Kour was true, and free from any effort which prompted her to make such a statement which was coherent and consistent and, therefore, there was no legal impediment in founding the conviction of the accused on such a dying declaration, even if it would be found that there is no corroboration.

17. The said dying declaration has assumed the importance of correctness on account of the other fact as well that soon after the dying declaration was recorded at 11.15 a.m. on the eventful day, the same alongwith the report of its scribe (Investigating Officer in the case) was dispatched to the police station, Poonch, when FIR was registered at 11.40 a.m. We have never seen a case, in which such a promptness has been shown by a police officer, who has forwarded the dying declaratin of a deceased moments after it was recorded, to the Police Station, for it forming the part of FIR on which the investigating Agency swung into action and it (declaration) ultimately formed the basis for recording the conviction of the accused, after the said declaration went through all the requisite tests of evidence Act, to which the veracity of witnesses was put at the time their statements were recorded. The statements i.e. the statement of Doctor Bashir Ahmad and the scribe of the declaration Talib Hussain withstood all the cross-examination, to which they were put by the defence and after their evidence was scrutinized on the touch stone of Evidence Act, they were found to have correctly and independently proved the dying declaration, which was made before them by the deceased soon after the occurrence took place when her mind was free from any inspiration or promptness from any corner and the statement made by her was coherent and consistent in the natural sequence of the circumstances, under which such a statement was by her.

20. Even, the close relatives of the accused, brothers, bhabies and mother have been susceptible to narrate that the deceased had sustained burns on

her body in their house and they sprinkled water on her body to extinguish the fire upon her body and, ultimately, covered her with a blanket which extinguished the fire. Although, they have turned hostile, but they could not resist the fact to say that the deceased sustained injuries out of burns which, according to them, had taken place due to a stove burst. No such damaged stove was either seized by the police or produced before them by the prosecution witnesses to testify that actually the fire upon the body of the deceased had taken place due to a stove lit by the deceased, either for preparing the meals, tea or was going to boil some milk for the child. No plausible story has been put forth by the defence to show as to what for the stove was lit by the lady which burst due to her mishandling and she caught fire on her body from a burning stove. The certificate of death issued by the Doctor was impeached by the appellant's counsel on the ground that no autopsy of the deceased had taken place and, therefore, the certificate issued by him that she died out of burn injuries is not certificate. The said Doctor has categorically stated that he was vividly in know of the circumstances of the case from the time the lady was admitted in the hospital till her death and found it unnecessary to cause autopsy upon her body, for the cause of death was quite apparent from her body that she died due to 100% burn injuries and no post mortem was required.

21. The post mortem examination on the dead is not absolutely necessary to prove the murder, for, even in the absence of the dead body, murder may be proved by some other cogent and credible evidence, in the case on hand, it has been admitted by the Doctor that the deceased had sustained 100% burns, which resulted into her death, because she had sustained toxemiria due to bruns, which led to her cardio respiratory failure. The duration of burns at the time of admission was six hours. It shows that the Doctor who is an expert in the matter, on his medical wisdom found that it was not necessary to conduct the post mortem upon the dead body of the deceased when conclusively he had found that she had received 100% burns, which resulted into her death. He was specific in narrating the fact that it was due to such burns that she was not even able to affix her thumb impressions on the dying declaration, for her finger tips were also burnt. In all fours, the medical evidence is satisfactory and conclusive proof that the death of the decleased has taken place due to cardio respiratory failure, which led to her death.

24. In this case, if all other circumstaces would not have been proved, but, even, then, the mere circumstance of the dying declaration proved by cogent and substantial evidence was in itself sufficient to show that the accused and the accused alone was the person who sprinkled kerosene oil upon the body of the deceased on 7-10-1987 and put her ablaze, as a result of which, she died in the hospital on 13-10-1987. In all circumstances of the case, as discussed above, the accused is proved to have committed the murder of the deceased, and has, therefore, rightly been convicted by the learned trial court for an offence under Section 302 RPC which offence he has forgotten to mention in recording the order of conviction against the accused."

48. In the case of ***Hans Raj and others vrs. State of Rajasthan,*** reported in ***1995 Cri. L.J. 1004,*** the Division Bench of the Rajasthan High Court has held that the fact that deceased had 100% burn injuries of second degree and third degree, is not sufficient to

presume that deceased was not physically and mentally fit to give statement. It has been held as follows:

> "25. In view of the aforesaid facts and circumstances it can never be presumed that simply because the deceased had hundred percent burns injuries of second degree and third degree therefore, it must be presumed that deceased was not physically and mentally fit to give statement. Our aforesaid view is fortified from a decision of the Apex Court in Suresh v. State of ML P. 1981 Cri LJ 775 : AIR 1987 SC 860. In that case, deceased had got hundred percent burns of second degree. Their Lordships believed the statement of doctor, who recorded the dying declaration of the deceased. The statement of the doctor was believed in the aforesaid case by their Lordships that the deceased after receiving hundred percent burn injuries was in a fit state of health to make a declaration. The dying declaration was believed in that case although doctor had stated that when she was recording the dying declaration, the deceased had started going into coma. In that case, the dying declaration was recorded by the doctor hereself but in the instant case, the dying declaration has been recorded by the learned Judl. Magistrate PW 8 Shri Lalit Mohan, who has no interest in success or failure of the prosecution. The preponderance of the cases leads towards an irresistible conclusion that the dying declarations recorded by the learned Magistrates are ordinarily taken to be impartial and above suspicion unless some compelling reasons are brought to the notice of the Court. In the present case, nothing has been brought to our notice that the dying declaration Ex. D/3 recorded by the learned Magistrate PW 8 Shri Lalit Mohan suffers from any infirmity. Thus we are of the opinion that the learned Sessions Judge has not committed any error in appreciating the dying declaration Ex. D/3 and recording a finding of guilt against the accused-appellants on the basis of Ex. D/3 and a contention contrary to it raised before us is untenable."

49. The Division Bench of Bombay High Court, Nagpur Bench, in the case of ***Ramesh s/o Bisan Parteki vrs. The State of Maharashtra,*** reported in ***2001 Cri. L. J. 3780,*** has relied upon the dying declaration recorded by the police constable, since the statement was recorded in the presence of the doctor who has stated that the deceased was in a fit state to make statement. It has been held as follows:

> "16. In the case beofre hand, as to the condition of the deceased to make a statement, there is overwhelming evidence of Dr. Ezaz Ahmed. In his evidence, he has stated that Police recorded her statement in his presence and while recording the statement, her condition was fit to make the statement. He further stated that after recording the statement he gave his endorsement as to the condition of the patient on the same statement. He has also stated that he had examined the patient and found her to be fit to make a statement. The Police Head Constable Lohi who recorded the statement, has stated in his evidence that doctor was present when he recorded the statement. He has also stated that the patient was conscious when her statement was recorded. He has stoutly denied the suggestion of the defence that the patient was unconscious. Dr. Ezaz Ahmed also denied the suggestion that the deceased was in unconscious condition and she did not make any statement before him. Having regard to this clinching evidence of Dr. Ezaz Ahmed and Police Head Constable Lohi, we have no doubt that the patient was conscious and fit enough, physically and mentally, when her statement was recorded. In this background, we also take a note of the fact

that both the witnesses, Police Head Constable Lohi and Dr. Ezaz Ahmed, were quite disinterested and as such there was no reason for them to falsely implicate the appellant. That is why the statement of the deceased in the dying declaration Exh. 32 is found to be truthful and inspiring confidence. Therefore, we have no hesitation in placing reliance on the dying declaration Exh. 32. As stated earlier, the circumstantial evidence as to the positive detention of kerosene residue in the burnt pieces of clothes of the deceased lends assurance to the statement of the deceased in the dying declaration Exh. 32 that it was the appellant who poured kerosene on her person and set her on fire. Therefore, the prosecution has clinchingly established that the victim Gulabwati was done to death by the appellant, by setting her on fire by pouring kerosene and as such the appellant is responsible for committing murder of the victim Gulabwati. Therefore, the trial Court has committed no error in holding the appellant guilty for having committed murder of his wife Gulabwati."

50. In the case of ***Rambai vrs. State of Chhatisgarh,*** reported in ***(2002) 8 SCC 83,*** their lordships of the Hon'ble Supreme Court have held that physical state of injuries on the declarant was not by themselves determinative of mental fitness of the declarant to make the statement. In this case victim had suffered 85% burn injuries. The doctor himself has given declaration that deceased was in fit mental condition to make dying declaration. It has been held as follows:

"6. So far as the position of law in regard to the admissibility of the dying declaration which is not certified by the doctor, the same is now settled by a Constitution Bench judgment of this Court reported in Laxman vs. State of Maharashtra, (JT 2002 (6) 313) wherein overruling the judgment of this Court in Laxmi(Smt.) vs. Om Prakash and ors., (2001 (6) SCC 118), it is held that a dying declaration which does not contain a certificate of the doctor cannot be rejected on that sole ground so long as the person recording the dying declaration was aware of the fact as of the condition of the declarant to make such dying declaration. If the person recording such dying declaration is satisfied that the declarant is in a fit mental condition to make the dying declaration then such dying declaration will not be invalid solely on the ground that the same is not certified by the doctor as to the condition of the declarant to make the dying declaration. Be that as it may, so far as this case is concerned, that question does not arise because in the instant case PW.19, Dr. Ashok Sharma though not a doctor who treated the deceased but being the duty doctor when summoned came and examined the deceased and noted in the dying declaration itself as to the capacity of the deceased to make a dying declaration. That apart from the narration of the questions and answers in the dying declaration it is clear that the deceased was in a fit state of mind to make the statement. But the learned counsel for the appellant contended that we should examine the contents of the dying declaration in the background of the fact that the deceased had suffered nearly 85% burns and ever since her admission to the hospital she was alternating between consciousness and unconsciousness, as also earlier attempts to record her dying declaration had failed. Therefore the learned counsel contends that it is not safe to place reliance on the dying declaration. We have carefully perused the evidence of PWs.12 and 19 who recorded the dying declaration and PW.19 who is the doctor who certified the condition of Vidya Bai from their evidence. We are satisfied that the deceased

at the time she made the dying declaration was in a fit condition of mind to make such statement. Having found no discrepancy in the statement of the deceased we are inclined to accept the same as held by the courts below. Learned counsel then contended that from the evidence of the husband, DW.2 himself, it is clear that the deceased must have suffered burn injuries while she was cooking lunch, therefore, it is not safe to rely upon the prosecution evidence to convict the appellant. We notice the courts below have considered this argument and taking the preponderance of evidence and also the factum that the husband of the deceased had resiled from his statement made before the investigating officer have held that it is not safe to rely upon DW.2. In such a situation we are unable to take a contra view from the one taken by the courts below."

51. Their lordships of the Hon'ble Supreme Court in the case of ***P.V.Radhakrishna vrs. State of Karnataka,*** reported in ***AIR 2003 SC 2859,*** have held that dying declaration can be the sole basis for conviction. In this case, the deceased sustained 80-85% burn injuries. It was held that the absence of certification as to the state of mind of declarant, was not fatal when police official recorded statement of deceased in presence of the doctor. Their lordships have further held that the percentage of burns suffered by the deceased is not alone the determinative factor. It has been held as follows:

"15. There is no material to show that dying declaration was result of product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.

17. The residuary question whether the percentage of burns suffered is determinative factor to affect the credibility of the dying declaration and the improbability of its recording. There is no hard and fast rule of universal application in this regard. Much would depend upon the nature of the burn, part of the body affected by the burn, impact of the burn on the faculties to think and convey the idea or facts coming to mind and other relevant factors. Percentage of burns alone would not determine the probability or otherwise of making dying declaration. As noted in Rambai's case (supra) physical state or injuries on the declarant do not by themselves become determinative of mental fitness of the declarant to make the statement."

52. The Division Bench of the Karnataka High Court in the case of ***Sri Kumar alias B.A. Jayakumar vrs. State of Karnataka,*** reported in ***2003 Cri. L.J. 252,*** has held that though condition of deceased was precarious because of 100% burns, she was mentally fit and in clear state of mind to make correct and cogent statement. In the circumstances, dying declaration so recorded was acceptable. It has been held as follows:

"3. The appellant's learned Advocate started by pointing out to us that this was a case in which Laxmi was found with her clothes blazing and by the time the fire was extinguished that she had sustained virtually 100% burns. The learned Counsel submitted that there are indications from the evidence of P.W. 10, from the evidence of the doctor, from the evidence of the sister Rathna and her mother Muniyamma that even her face had been burnt and what is emphasised is the fact with this degree and level of burns that even when Laxmi was brought to the hospital her condition was precarious. There are entries to this effect in the case papers and the learned Counsel submits that it would have been totally and completely impossible for Laxmi to have either spoken to the doctor or given any case history and that as has now been routine that since she was taken to the hospital by the Head Constable

that he must have told the doctor that she was burnt by the husband and that this is what has been taken down. Furthermore, from the fact that Laxmi did not even survive in the hospital for a few hours. What is further pointed out to us is that she was virtually hanging between life and death during that period of time and that with every hour that passed she was virtually sinking. The dying declaration is supposed to have been recorded sometime around 9 PM and the learned Counsel submits that this was hardly 3 to 4 hours before Laxmi died; that the doctors have admitted that she was given sedatives and tranquilizers and that consequently, it is totally and completely impossible for the Court to accept the prosecution version that she was in a fit condition mentally and physically to make a valid dying declaration. Our attention was drawn to the fact that even though the doctor has endorsed the dying declaration to the effect that it was recorded before him that the dying declaration does not contain the most important endorsement namely the certificate from the doctor that the patient was in a fit condition to understand questions and give rational and cogent answers. It is true that a perusal of this dying declaration does indicate to us that it does not contain the certificate from the doctor in this form. The Supreme Court has further clarified the legal position in more than one judgment laying down that in a given case if there is sufficient evidence before the Court to indicate that the dying declaration is a valid and genuine document and that it reflects the true, correct and complete statement made by the deceased that the mere omission to obtain the fitness certificate from the doctor is not a fatal infirmity. In the present case however, there are two aspects which the learned Addl. S.P.P. has very vehemently laid emphasis on. Firstly, he points out that the doctor who is P.W. 1 has in no uncertain terms stated that Head Constable Srinivas sought his permission to record the dying declaration and that he accorded the permission because Laxmi was in a fit condition to make a statement. He has been seriously grilled by the defence and he has withstood the cross-examination in the course of which he has in terms stated that he was present right through the recording of the statement and that her mental condition was perfectly stable and furthermore that she was in a fit condition to understood the questions put to her and to give the answers and that she in fact did so. We then have the evidence of Head Constable Srinivas who is the scribe of the dying declaration and he has given evidence in identical terms. He points out that he had put the questions to Laxmi, that she answered the questions without any difficulty and that the dying declaration recorded by him represents Laxmi's statement. What we need to point out in this case is that the fitness certificate which was perhaps technically lacking on the original dying declaration has been more than completely established and strangely enough, the majority of these answers have been elicited in the course of cross-examination. We have no hesitation whatsoever in holding that even though Laxmi's condition was precarious because of the 100% burns that she was still in a mentally fit and clear state of mind around 10 to 10.15 PM on that night to make a correct and cogent statement. Under these circumstances, in our considered view, Ex.P-2 which has been seriously attacked by the defence will have to be accepted.

4. It was pointed out to us that Ex. P-2 is a long statement virtually covering two full pages and that it is too much to believe that Laxmi who was very close to her end at that point of time could have been in a position to recount

all this history when questions were put to her. It is true that the doctor was confronted with the position that she had been administered pain killers and sedatives but the doctor has still maintained that despite these medications that the patient was still in a fit condition. Speaking for ourselves all that we need to observe is that the doctor whose credibility we have no reason to doubt has given evidence and his evidence has withstood cross-examination and secondly that the Courts have come across numerous instances where as a result of the treatment meted out in the hospital particularly after pain killers and sedatives are administered that for some period of time the condition of the patient stabilises even if there is a sudden collapse thereafter. It appears from the case papers that Laxmi did survive till 5AM the next morning but the number of hours or the time factor is not the parameter in so tar as the Court is always guided by the evidence of the medical persons namely the doctor."

53. In the case of ***State of Karnataka vrs. Shariff,*** reported in ***AIR 2003 SC 1074,*** their lordships of the Hon'ble Supreme Court have held that dying declaration recorded by the police personnel cannot be discarded on that ground alone. There is no requirement of law that dying declaration must necessarily be made to a Magistrate. Their lordships have further held that dying declaration when not recorded in question-answer form, cannot be discarded on that ground alone. The statement recorded in narrative form is more natural and gives version of incident, as it has been perceived by victim. In this case also, the doctor has recorded in the Accident Register of hospital that patient was conscious, her orientation was good and that she answered well to questions. The dying declaration cannot be discarded merely on the basis of her injury report and post mortem examination, holding that having regard to nature of injuries sustained by deceased, she could not have been in a position to make statement. It has been held as follows:

"8. The most important evidence in this case is the series of statements given by deceased Muneera Begum to different persons on several occasions. PW 2 Syed Akbar has stated that his nephew PW 3 Rasheed came to his house at about 6.00 a.m. on July 24, 1986 and informed him that his father had burnt his mother. He then immediately rushed to the house of his sister and inquired what had happened and then she said that her husband had tied her hands and legs, covered her mouth and after pouring kerosene had set her on fire. PW 6 Abdul Razak resides in the premises of the mosque in the same village. He has stated that when he was returning from the mosque at 6.00 a.m. after finishing the prayers, he saw a crowd near the house of the accused. He went there and found Muneera Begum in burnt condition and when he inquired as to how it had happened, she told that her husband had tied her hands and legs, poured kerosene and brunt her. She could not raise any alarm as the accused covered her mouth with a cloth. PW 7 Baknu is another brother of the deceased and was working in Hosur stone quarry. According to his statement he received information about the incident at about 8 O'clock and thereafter he reached Victoria Hospital the same night. The deceased informed him that her husband had tied her hands and legs, poured kerosene and had set her on fire. No doubt PW 2 Syed Akbar and PW 7 Baknu are real brothers of the deceased, but PW 6 Abdul Razak is not related to her in any manner. He is the Imam in the mosque. There is no reason why he would give a false statement in order to implicate the accused. PWs 2 and 7 would not fabricate a story and falsely implicate the accused Shariff as he was also related to them as their brother-in-law. In our

opinion the testimony of these three witnesses is quite reliable and it shows that the deceased Muneera Begum made a statement that her husband had tied her hands and legs and after pouring kerosene had set her on fire in the morning of July 24, 1986.

9. As mentioned earlier the deceased Muneera Begum was taken to Victoria Hospital, Bangalore for treatment. PW 12 Dr. K.M. Nagabhushan was posted as Assistant Surgeon in the aforesaid hospital and was working as Casualty Medical Officer on July 24, 1986. He has stated that Muneera Begum was brought to the hospital at about 9.30 a.m. with burn injuries by her brother Syed Akbar. She gave her own statement with regard to the incident and stated that she sustained burn injuries when her husband poured kerosene on her body and set her on fire in his house at about 4.00 a.m. He has further stated that on examination he found her to be conscious and was answering the questions properly and her orientation was good. After examining her he made the necessary entries in the Accident Register and the relevant extract of the same have been proved by the witness as Exh. P12 and the same reads as under:-

> "Patient says that she sustained burn injuries when her husband Shariff thrown kerosene oil over her body in her house and put fire to it on 24.7.86 at 4.00 a.m. There was a quarrel between her and her husband for the last two days.
>
> On examination patient is conscious. Pulse 86/minute.
>
> CVS/RS NAD Answers well to the question and ` orientation was good.
>
> Brought by Akbar (brother) Kerosene smell over the body of the patient."

15. In our opinion the view taken by the learned Sessions Judge that it would be unsafe to rely upon the testimony of PW 3 regarding the actual factum of incident is not correct. A boy aged 8/9 years would be near his mother and would be sleeping in the same house where she was sleeping. There was no occasion for him to go to the house of Jaina Bi and to sleep with her. If PW 3 was not present in the house and was in the house of her grand-mother in the night in question, he could not have conveyed the information about the incident to PW 1 and PW 2 nor they would have come to know about the incident forthwith. If PW 3 was present in the house he was bound to witness the incident, namely picking up quarrel by the accused with his wife and setting her on fire. There was absolutely no reason why PW 3 would give a false statement against his own father that he had tied the hands and legs of his mother and had burnt her. We are of the opinion that the testimony of PW3 is fairly reliable on the factum of the incident and the same cannot be discarded only on account of a stray sentence in his cross- examination where he has stated that when his mother caught fire he was in his grand-mother's house. The High Court did not examine the testimony of this witness carefully and we find ourselves unable to agree with the view taken by it.

16. The other important piece of evidence against the accused is that of dying declarations and the most important one is that which was made by her to PW 12 Dr. KM Nagbhushan, Assistant Surgeon in the Victoria Hospital, Bangalore. He was the first doctor to examine her when she

reached there at 9.30 a.m. The witness has clearly stated that the deceased gave her own statement with regard to the history and stated that she sustained burn injuries when her husband poured kerosene and set her on fire on the same day at 4.00 a.m. He recorded all these facts in the Accident Register and relevant extract of the same has been brought on record and has been proved by him as Ex. P.12. There is absolutely no reason to discard the testimony of PW 12, who is a responsible government servant. The other two dying declarations were recorded by PW 11 BK Krishnappa ASI Victoria Police Station on July 24, 1986 and by PW 14 Kumar Swamy, PSI Anekal Police Station on July 26, 1986. These are fairly long dying declarations where she gave the background of the incident and also stated the fact that the accused picked up a quarrel in the morning of July 24, 1986 and thereafter after pouring kerosene set her on fire. These two dying declarations were recorded in the presence of PW 5 Dr. Rangarajan who was Assistant Surgeon in the Victoria Hospital at the relevant time. He made an endorsement that the dying declaration was recorded in his presence and thereafter he put his signature on the same. He has made a categorical statement that at the time when the statement of the deceased was being recorded on both the occasions, she was conscious and was in a fit condition to make a statement. In our opinion the aforesaid three dying declarations are wholly trustworthy and there is absolutely no reason at all to discard the same. Though PW 2 Syed Akbar and PW 6 Abdul Razak, who reached the spot in the village immediately after the occurrence, have also stated in their statements that the deceased told them that it was the accused who had set fire to her and their testimony in our opinion is trustworthy, but even if we do not take into consideration the aforesaid oral dying declaration of the deceased, the three dying declarations referred to above, are quite sufficient to fasten the liability upon the accused.

21. It is true that PW 11 and PW 14 were Police personnel and a Magistrate could have been called to the hospital to record the dying declaration of Muneera Begum, however, there is no requirement of law that a dying declaration must necessarily be made to a Magistrate. In Bhagirath v. State of Haryana AIR 1997 SC 234 on receiving message from the hospital that a person with gun shot injuries had been admitted a head constable rushed to the place after making entry in the police register and after obtaining certificate from the doctor about the condition of the injured took his statement for the purposes of registering the case. It was held that the statement recorded by the head constable was admissible as dying declaration. Similar view was taken in Munnu Raja & Anr. v. State of Madhya Pradesh 1976 (2) SCR 764, wherein the statement made by the deceased to the investigating officer at the police station by way of First Information Report, which was recorded in writing, was held to be admissible in evidence.

24. We are a little surprised that the High Court took the view that having regard to the nature of injuries sustained by the deceased she could not have been in a position to make a statement. PW 12 Dr. KM Nagabhushan clearly recorded in the Accident Register that the patient was conscious, her orientation was good and that she answered well to the questions. He also noted that her pulse was 86/minute, CVS/RS was NAD. PW 5 Dr. Rangarajan before whom the statements of the victim were recorded by PW 11 and PW 14 on 24th and 26th July, 1986 respectively

deposed that she was able to speak. He clearly stated that it is not true that the victim was not in a condition to make statement or that she was unconscious. In view of this clear statement of the Doctor that the victim was in a position to make a statement, the High Court, in our opinion erred in discarding the dying declarations merely on the basis of her injury report and post-mortem examination report. PW 4 Dr. KH Manjunath who had performed the post- mortem examination, had merely stated that he was not in a position to say if the victim was in a position to talk after sustaining the injuries and till she died. The last ground given by the High Court is regarding the language spoken by the deceased. PW 5 Dr. Rangarajan has stated in para 2 and 3 of his statement that the victim was answering in Kannada language in which language her statement was recorded by PW 11 and PW 14. We are therefore of the opinion that the view taken by the High Court is wholly perverse and also contrary to settled principles of law and therefore cannot be sustained.

25. In the result the appeal succeeds and is hereby allowed and the impugned judgment and order of the High Court is set aside and that of the learned Sessions Judge is restored. The accused-respondent shall surrender and undergo the sentence imposed by the learned Sessions Judge. The Chief Judicial Magistrate concerned shall take immediate steps to take the accused-respondent in custody. Shri Ajay Kumar Jain, learned Advocate, who appeared Amicus Curiae has rendered valuable assistance in deciding this case and we are beholden to him."

54. Their lordships of the Hon'ble Supreme Court in the case of ***Vidhya Devi and another vrs. State of Haryana,*** reported in ***(2004) 9 SCC 476,*** have held that when statement is made to a police officer and the doctor is present in person and the deceased is in a fit state of mind to make the statement, the statement was signed by the deceased, the challenge to dying declaration was not sustainable. It has been held as follows:

"5. We have carefully considered the submissions of the learned counsel appearing on either side. In our view, the acquittal of the other accused, except the appellants, on the ground of absence of any direct and substantial evidence against them cannot be relied upon as basis for a claim to project the case for acquittal of the appellants against whom and as to the role played by them there were ample materials as noticed, analysed and ultimately found the appellants guilty. The strained relationship between parties and also the harassment of the deceased for not bringing further dowry and not complying with the demands made on the deceased stood sufficiently substantiated on the basis of the indisputable material in the shape of complaint before the Police therefor as well as the compromise which came to be signed also by Puran Mal, Bimla (the in- laws of the deceased) Krishna, Vidhya Devi as well as by Om Prakash, Jagdamba, Raghbir Singh, Pawan Kumar, Bhupinder Kumar and attested by the Police Officer also. So far as the challenge made to the dying declaration recorded, though no doubt by the Police Officer concerned, the evidence of PW- 3, Dr. Krishan Kumar, who not only opined that the deceased was in a fit state of mind to make the statement but present when the statement was recorded and that the said statement was signed by the deceased Satyawati in token of its correctness adds credibility to the same and consequently involvement of the accused-appellants and the respective role played by them in having the deceased killed, remains firmly established by concrete and sufficient

material and the findings in this regard concurrently arrived at by both the courts below are not shown to suffer from any infirmity whatsoever to call for our interference."

55. Their lordships of the Hon'ble Supreme Court in the case of ***Nallam Veera Stayanandam and ors. vrs. Public Prosecutor, High court of A.P.,*** reported in ***(2004) 10 SCC 769,*** have held that each dying declaration has to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. The Court has to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. It has been held as follows:

> "6. It is for the above purpose, learned counsel for the appellants has strongly relied on the dying declaration Ex. P-28 which according to him, is free from all blemish and is not surrounded by any suspicious circumstances. We are of the opinion that if the contents of Ex. P-28 can be accepted as being true then all other evidence led by the prosecution would not help the prosecution to establish a case under section 304B IPC because of the fact that even a married woman harassed by demand for dowry may meet with an accident and suffer a death which is unrelated to such harassment. Therefore, it is for the defence in this case to satisfy the court that irrespective of the prosecution case in regard to the dowry demand and harassment, the death of the deceased has not occurred because of that and the same resulted from a cause totally alien to such dowry demand or harassment. It is for this purpose the appellants strongly place reliance on the contents of Ex. P-28, therefore, we will have to now scrutinise the circumstances in which Ex. P-28 came into existence and the truthfulness of the contents of the said document. It is the prosecution case itself that on the fateful day at about 3'O clock, the deceased suffered severe burn injuries and she was brought to the Government hospital at Kothapeta. As per the evidence of PW-10 the doctor when she was admitted to the hospital, he sent an intimation to the Police as per Ex. P-21 and also made an endorsement in Ex. P-22, the accident register. In both these documents, he had noted that the deceased suffered accidental burn injuries due to stove burst. It is not the case of the prosecution that this entry was made by the doctor at the instance of any one of the appellants. At least no suggestion in this regard has been put to the doctor when he was in the witness box. As a matter of fact, there is considerable doubt whether any of the appellants was present at the time when the deceased was brought to the hospital and was first seen by the doctor PW-10. On the contrary, according to the doctor, a large number of relatives other than the appellants were present at that point of time when the deceased was brought to the hospital, therefore, it is reasonable to infer that the information recorded by the doctor in Ex. P-21 and 22 is an information given to the doctor either by the victim herself or by one of the relatives present there, who definitely were not the appellants. From the evidence of this doctor, we notice that anticipating the possible death he sent a message to the Munsif Magistrate to record a dying declaration and the said Magistrate PW-13 came to the hospital immediately and after making sure that all the relatives and others were sent out of the ward and after putting appropriate questions to know the capacity of the victim to make a statement and after obtaining necessary medical advice in this regard, he recorded the dying declarations which is in question and answer format. It is in this statement the deceased unequivocally stated that

she suffered the injuries accidentally while preparing tea. There has been no suggestion whatsoever put to this witness when he was in the box to elicit anything which would indicate that this statement of the deceased was either made under influence from any source or was the statement of a person who was not in a proper mental condition to make the statement. From the questions put by the Munsif Magistrate, and from the answers given by the victim to the said questions as recorded by the Munsif Magistrate we are satisfied that there is no reason for us to come to any conclusion other than that this statement is made voluntarily and must be reflecting the true state of facts. The trial court while considering this dying declaration seems to have been carried away by doubting the correctness and genuineness of this document because of other evidence led by the prosecution thus, in our opinion, erroneously rejected this dying declaration which is clear from the following finding of the trial court in regard to Ex. P-28 :

> "Her statement made to the Magistrate which is at Ex.P-28 has been demonstrated to be an incorrect statement of fact and it appears that in the presence of the 3rd appellant, she made the statement that from the burning stove her sari caught fire while she was preparing tea."
>
> We find absolutely no basis for the two reasons given by the trial court for coming to the conclusion that the deceased's statement under Ex. P-28 is an incorrect statement. The court came to the conclusion that this statement must have been made in the presence of the 3rd appellant, a fact quite contrary to the evidence of PWs.10 and 13. On the contrary, the Munsif Magistrate specifically states that he asked everyone present and who were unconnected with the recording of the statement, to leave the room This has not been challenged in the cross- examination. Therefore, in our opinion, this part of the foundation on which the trial court rejected Ex. P-24 is non- existent. It is also seen from the above extracted part of the judgment of the trial court that it held that it "has been demonstrated to be an incorrect statement of fact". For this also, we find no basis. If the trial court was making the second dying declaration as the basis to reject the first dying declaration as incorrect then also in our opinion, the trial court has erred because in the case of multiple dying declarations each dying declaration will have to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there are more than one dying declaration, it is the duty of the court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs."

56. Their lordships of the Hon'ble Supreme Court in the case of ***Muthu Kutty and another vrs. State by Inspector of Police, T.N.,*** reported in ***(2005) 9 SCC 113,*** have held that the Court should be satisfied that deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or product of imagination and dying declaration can be the sole basis of conviction. It has been held as follows:

> "13. At this juncture, it is relevant to take note of Section 32 of the Indian Evidence Act, 1872 (in short 'Evidence Act') which deals with cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. The general rule is that all oral evidence must be direct viz. if it refers to a fact which could be seen it must be the evidence of the witness

who says he saw it, if it refers to a fact which" could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are : firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of "Justice. These aspects have been eloquently stated by Lyre LCR in R. v. Wood Cock, [1789] 1 Leach 500. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain :

> "Have I met hideous death within my view, Retaining but a quantity of life, Which bleeds away even as a form of wax, Resolveth from his figure 'gainst the fire? What is the world should make me now deceive, Since I must lose the use of all deceit? Why should I then be false since it is true That I must die here and live hence by truth?"
>
> (See King John, Act 5, Sect. 4)

The principle on which dying declaration is admitted in evidence is indicated in legal maxim "nemo moriturus proesumitur mentiri - a man will not meet his maker with a lie in his mouth."

14. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a

fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Smt. Panjben v. State of Gujarat, AIR(1992) SC 1817:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja & Anr. v. The State of Madhya Pradesh, [1976] 2 SCR 764)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of Uttar Pradesh v. Ram Sagar Yadav and Ors., AIR (1985) SC 416 and Ramavati Devi v. State of Bihar, AIR (1983) SC 164)

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor, AIR (1976) SC 1994].

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg. v. State of Madhya Pradesh, [1974] 4 SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See Kaka Singh v. State of M.P., AIR (1982) SC 1021].

(vi) A dying declaration with suffers from infirmity cannot form the basis of conviction. (See Ram Manorath and Ors v. State of U.P., [1981] 2 SCC654)

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR (1981) SC 617].

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Oza and Ors v. State of Bihar, AIR (1979) SC 1505].

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanahau Ram and Anr. v. State of Madhya Pradesh, AIR (1988) SC 912].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Medan Mohan and Ors., AIR (1989) SC 1519].

> (xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra, AIR (1982) SC 839]."

57. The Division Bench of the Karnataka High Court in the case of ***State of Karnataka vrs. Smt. Akkamahadevi,*** reported in ***2005 Cri. L.J. 703,*** has held that sedative drugs administered to deceased take some time to have effect of sedation, therefore, it cannot be said that deceased was under sedation when her dying declaration was taken, particularly, when doctor and investigating officer stated that deceased was conscious when she made the statement. It has been held as follows:

> "20. In the present case, as observed, the accused has absolutely no explanation with regard to the facts that have been proved by the prosecution. Therefore, not only the dying declaration which had been made before the Police Officer as per Ex.P.11 is reliable but the dying declaration made by the deceased before P.W. 1, and the circumstances, which have been proved by the prosecution showing that the accused had come out of the house followed by the deceased, who was on fire and the entry (Ex.P.9) in the medico legal register wherein it has been clearly recorded that the injured named the accused as the person who set on fire, all would complete the chain of events to show that it is only the accused, who could have set Saraswathi on fire."

58. Their lordships of the Hon'ble Supreme Court in the case of ***Dashrath alias Champa and others vrs. State of Madhya Pradesh,*** reported in ***(2007) 12 SCC 487,*** have held that when the bed-head ticket of hospital showed that when deceased was brought to hospital, he was conscious and his general condition was satisfactory. The dying declaration was to be relied upon.

59. Their lordships of the Hon'ble Supreme Court in the case of ***Krishan vrs. State of Haryana,*** reported in ***(2013) 3 SCC 280,*** have held that when the doctor stated that both the hands were burnt including fingers and thumbs, as per post mortem report there were superficial to deep burns all over body, except lower parts and no question was put to doctor as to whether extent of burns was such that deceased's thumb impression could not be taken, it was held feasible to take thumb impression of the deceased. It has been held as follows:

> "17. A bare reading of the above paragraphs shows that the Court opined that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated. The Bench further clarified that where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

> 20. In this regard, reference can also be made to a recent judgment of this Court in the case ofBhajju @ Karan Singh v. State of Madhya Pradesh (2012) 4 SCC 327.
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> 24. The learned counsel appearing for the appellant heavily relied upon the answer of the doctor in his cross-examination, where he stated that "it is correct that both hands of Rani were burnt, including fingers and thumb." The deceased is stated to have suffered 75% burns. This answer of the witness in face of his statement in examination-in-chief does not bring any advantage, inasmuch as no specific question was put to the doctor that the extent of burns was such that her thumb impression could not have been taken. No such question was put to this witness. Not even a suggestion was made to the doctor and the Investigating Officer to the effect that it was not possible to take the thumb impression of the deceased in the state of health that she was in. Dr. R.K. Wadhwa, PW14, who performed the autopsy on the dead body of Rani clearly noticed that there were superficial to deep burns all over the body except her lower parts of both thighs, both legs and feet. In other words, it is not only possible but quite feasible that her thumb impression could rightly be taken by the SDJM."

60. Their lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh vrs. Dal Singh and others***, reported in ***(2013) 14 SCC 159,*** have held that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. Their lordships have further held that question of thumb impression depends upon facts, as regards whether skin of thumb that was placed upon dying declaration was also burnt. It is a question of fact whether the skin of the thumb had in fact been completely burnt, and if not, whether ridges and curves had remained intact. It has been held as follows:

> "27. In the dying declaration recorded by P.K. Chaturvedi (PW.12), it is stated that the mother-in-law of Kusumbai had set her on fire by throwing kerosene oil on her, and that her father-in-law had also set her on fire. Her husband Chandrabhan, had closed the door. While she screamed in pain, her uncle Hakam Singh had brought her out by opening the door. While lodging the FIR, it was recorded by R.S. Parmar (PW.14), that her father-in-law Dal Singh had said, 'burn this bitch'. Her father-in-law had then lifted the kuppi of kerosene oil, and had poured the same on her, after which he had told his wife to set her ablaze. Thereafter, her mother-in-law had lit a matchstick and set her on fire. She had started to scream because of pain. Her husband Hallu had then closed the door of the room. After hearing the hue and cry raised by her, a person from the village had informed her family who lived closeby. Her father Nirpat Singh, uncle Hakam Singh and several other persons had come there, and her uncle Hakam Singh, had opened the door and had brought her out. There is thus, some discrepancy in both the dying declarations.
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> 28. Dr. S.K. Jain (PW.8) deposed on 7.4.2003, stating that he had been the medical officer in the district hospital Damoh on 29.11.2002. Kusumbai had been brought for medical examination from the police station in an injured state and he had examined her. According to him, she had on her person, 100% superficial burn injuries, and the smell of kerosene oil had also been present in the body of the victim. She was unconscious at the time, and her pulse and blood pressure had been difficult to detect. She was able to breathe, but with great difficulty. She had died after some time. In his cross-

examination, he has deposed that at the time of examination at the initial stage, Kusumbai had been unconscious, and had been unable to speak. He has further opined that if a person suffers 100% burn injuries, then he may not be able to speak.

29. Burn injuries are normally classified into three degrees. The first is characterised by the reddening and blistering of the skin alone; the second is characterised by the charring and destruction of the full thickness of the skin; and the third is characterized by the charring of tissues beneath skin, e.g. of the fat, muscles and bone. If a burn is of a distinctive shape, a corresponding hot object may be identified as having been applied to the skin, and thus the abrasions will have distinctive patterns.

30. There may also be in a given case, a situation where a part of the body may bear upon it severe burns, but a small part of the body may have none. When burns occur on the scalp, they may cause greater difficulties. They can usually be distinguished from wounds inflicted before the body was burnt by their appearance, their position in areas highly susceptible to burning, and on fleshy areas by the findings recorded after internal examination. Shock suffered due to extensive burns is the usual cause of death, and delayed death may be a result of inflammation of the respiratory tract, caused by the inhalation of smoke. Severe damage to the extent of blistering of the tongue and the upper respiratory tract, can follow due to the inhalation of smoke. (See: Modi's Medical Jurisprudence and Toxicology by Lexis Nexis Butterworths Chapter 20).

31. FIR (Ex. P-17) – It was recorded by Kusum Bai – deceased, on 29.11.2002 at about 2.00 p.m. According to the FIR, the said incident had occurred at 10.00 a.m. and the distance between the police station and place of occurrence is about 10 Kms. The deceased in the FIR, has named all the three accused. The deceased has mentioned that her mother-in-law had not been giving her adequate meals, and continuously harassed her for not working. On that fateful day, her mother-in-law had slapped her 2-3 times and she had started to cry loudly. Thereafter, her father-in-law had asked the other accused, if this bitch should be burnt alive? He had then brought a can of kerosene oil and poured its contents over her. Her mother-in-law lit a matchstick and had thrown its contents on her, setting her ablaze. She had then begun to scream owing to the pain. Her husband had locked the door. Her parents-in-law and husband had set her on fire with the intention of causing her death. She had burns all over her body.There is a thumb impression on the FIR which appears to be normal. It has ridges and curves.

32. Ex.P-14 is the dying declaration recorded by the Executive Magistrate, Jabera. The original reveals that the executive Magistrate had asked the SHO to call a doctor at 2.25 p.m., but there is an endorsement stating that there was no government doctor available at Nohta. What the deceased has said, is that her mother in law had set her on fire. Her father-in-law and husband had also been party to the same. She has also stated that they had never provided her adequate food. She, in anger, had told them not to harass her everyday and to simply kill her (set me ablaze). Her mother-in-law had poured kerosene oil on her and had then set her ablaze, (humari saas ne mitti ka tal dalkar jalaya). Her father-in-law set her on fire (Sasur ne aag lagayi). Her husband bolted the door.There is thumb impression of the

deceased on the FIR also. We have carefully seen the thumb impression of the deceased on the said dying declaration. The same has ridges and curves.

33. It is evident from the record that defence neither put any question in cross-examination to either the Executive Magistrate, or to the doctor who had examined the deceased in the hospital, or to Dr. S.K. Jain (PW.8), who had conducted the autopsy on the body of the deceased with respect to whether the skin of the thumb was also burnt, or whether the same was intact. Nor was any such question put to R.S. Parmar (PW.14), who had recorded the FIR, which can also be treated as a dying declaration.

34. The respondents in their statements under Section 313 Cr.P.C. denied their presence at home at the time of incident, taking the plea that they had been working in their agricultural field. They had rushed to the place of occurrence only after learning about the incident. They further took the defence that Kusumbai had committed suicide by burning herself, and that it was on being tutored by her parents that she had given a dying declaration against them. The trial court however, rejected the suggestion made by Mannu Singh (PW.5), to the effect that Kusumbai had caught fire while preparing food on the ground. Kerosene oil had been found on her body and in her burnt clothes and hair. Evidence has been led by the prosecution witnesses to the extent that she had died within a short span of 10 months of her marriage, and that she had been ill-treated by her parents-in-law as she was not being given proper food etc. She had been harassed and tortured by her in-laws, as she was not good looking, could not cook well, and had been unable to do household work properly. She was considered to have a temperamental nature, and thus had also been slapped. This evidence has not been challenged by the defence.

35. The contradictions raised by the defence in the two dying declarations, as regards who had put the kerosene oil on her, and who had lit the fire have been carefully examined and explained by the trial court. Furthermore, in such a state of mind, one cannot expect that a person in such a physical condition, would be able to give the exact version of the incident. She had been suffering from great mental and physical agony. Upon proper appreciation of the evidence on record, the trial court had found the dying declarations to be entirely believable, and worth placing reliance upon, but the High Court on a rather flimsy ground, without appreciating material facts, has taken a contrary view. In our opinion, as the defence did not put any question either to the executive magistrate, or to the I.O., or to the doctors who had examined her or conducted the post-mortem, with respect to whether any part of the thumb had skin on it or not, as in both the dying declarations, ridges and curves had been clearly found to exist, we do not see any reason to dis-believe the version of events provided by the executive magistrate and the I.O., who had recorded the dying declarations. No suggestion was made to either of them in this regard, nor was any explanation furnished with respect to why these two independent persons who had recorded the dying declarations, would have deposed against the respondents accused. In the event that both of them had found the deceased to be in a fit physical and mental condition to make a statement, there exists no reason to disbelieve the same. In light of such a fact-situation, the concept of placing of a thumb impression, loses its significance altogether."

61. Their lordships in the case of ***Tanua Rabidas Vrs. State of Assam,*** reported in ***AIR 2014 SC 3769,*** have held that smell of kerosene oil in the hair of the deceased sent for chemical examination does not render the dying declaration doubtful and unbelievable when evidence of doctor and nurse of Hospital fully corroborated the evidence of witnesses. It has been held as follows:

> "17. Moreover on careful scrutiny, the Sessions Court was fully satisfied that the evidence of PW-6 Dr. Langkumer is true and there is no evidence to the contrary that any effort was made by anyone to induce the deceased to make the false statement. Further absence of smell of kerosene oil in the hair of the deceased sent for chemical examination does not render the dying declaration doubtful and unbelievable as held by this Court in the case of State of Rajasthan vs. Kishore – (1996) 8 SCC 217."

62. Their lordships of the Hon'ble Supreme Court in the case of ***Prempal vrs. State of Haryana,*** reported in ***AIR 2014 SC 3785,*** have held that in case where the deceased had suffered 95% burn injuries, yet her statement before Tehsildar was clear and cogent, was relied upon. It has been held as follows:

> "17. The defence version is that Anita committed suicide as she was frustrated because she could not conceive a child. The appellant-Prempal in his statement under Section 313 Cr.P.C. stated that on 24.10.2001 he had gone to Narnaund for purchase of domestic articles and returned home at 5.00 p.m. and only then he came to know that his sister-in-law Anita had set herself on fire and his father Jai Singh had taken her to Shanti Hospital for treatment and that deceased Anita used to remain depressed as she did not conceive the child and therefore she committed suicide. The appellant placed reliance upon the statement of his father Jai Singh recorded under Section 313Cr.P.C. and also the burn injuries sustained by Jai Singh. The fact that Jai Singh sustained burn injuries, does not lead to the conclusion that it was a suicide.
>
> 18. In burn injury cases, two possible hypothesis arise in the judicial mind – was it suicide or was it homicide. In cases where the dying declaration projected by the prosecution gets credence, the alternative hypothesis of suicide has to be justifiably eliminated. In the present case, had it been a suicide, Anita who was at the point of death had no reason to falsely implicate her brother-in-law Prempal. We do not find any substance in the defence version of suicide theory.
>
> 19. A perusal of various judgments of this Court, some of which we have referred to above, shows that if a dying declaration is found to be reliable, then there is no need for corroboration by any witness and conviction can be sustained on that basis alone.
>
> 20. In the present case evidence of Tehsildar, the Doctor and other witnesses is cogent and consistent that the deceased was conscious and in a fit state of mind to give dying declaration and courts rightly based the conviction upon the same. When the trial court as well as the High Court have appreciated the entire evidence in its right perspective, we see no reason to interfere and the appeal fails. In the result, the appeal is dismissed."

63. The accused has also taken the plea of *alibi*. According to him, there was exchange of hot words between him and his wife. Thereafter, he left the house. He relied upon the statement of DW-1 Bakshi Ram. DW-1 Bakshi Ram testified that in the month of October, 2008, he was employed by one Hoshiar Singh in the construction of house at

Village Guliana. He knew accused Kishori Lal. He was employed as mason by Hoshiar Singh at village Guliana. On 7.10.2008, he alongwith accused Kishori Lal had come to their homes at District Hamirpur to arrange for labour. Both of them reached at Hamirpur at 4:30 PM. They had made the arrangement of labour and then they left for their houses at Kakru and Brahamani. On the same day on 7.10.2008, accused Kishori Lal came to his house at 9:00 PM in the night. He inquired from him as to why he had come in the night. He told him that he had some heated discussion with his wife. Accused Kishori Lal stayed in his house in the night and then both of them on 8.10.2008 left to the place of work alongwith labour for village Guliana. In his cross-examination, he admitted that he was very close friend of accused Kishori Lal. They stayed in the house of Hoshiar Singh for a month. He did not know the name of labourers who were arranged and hired by them. When the accused came to his house, he had already taken the dinner.

64. DW-2 Hem Ram deposed that accused was his real brother and they used to live in the same house. The room of accused was adjoining to his room on the first floor. He came back from the place of work at 8:30-8:45 PM to his village Brahamani. On the way, at about 8:30/8:45 PM, accused Kishori Lal met him half kilometer behind their village. He enquired from accused as to when he had come. He told him that he was returning to his work. In his cross-examination, he admitted that he and his wife on hearing cries of Veena Devi came out of their rooms. He has not dowsed the fire of Smt. Veena Devi but was dowsed by their younger brother Pawan Kumar.

65. The statements of DW-1 Bakshi Ram and DW-2 Hem Ram do not inspire confidence. The fact of the matter is that accused had exchanged hot words with his wife and thereafter set her ablaze. The plea of *alibi* taken by the accused Kishori Lal has not been proved. His conduct is also abnormal. He would not have left his house merely because there was exchange of hot words with his wife. There was no occasion for him to stay with Bakshi Ram DW-1 and that too after exchanging hot words with his wife.

66. The Division Bench of the Punjab and Haryana High Court in the case of ***Mohinder Singh Nand Singh vrs. State of Punjab,*** reported in ***1971 Cri. L.J. 1764,*** has held that whenever a defence of *alibi* is set up and that defence utterly breaks down, it is a strong inference that if the prisoner was not in fact where he says he was, then in all probability, he was there where the prosecution says. It has been held as follows:

> "11. The appellant had successfully evaded arrest for more than two months. His service and leave records were summoned from the military authorities but it may appear to be a pity that even military personnel accused of such serious crime are screened by the authorities. The summoned records were not sent by the military authorities in spite of two or three attempts made by the Courts. The prosecution evidence had, therefore, to be closed by the Court of Session as the case was getting old. The appellant had overstayed his leave even according to his own showing and if these records were forthcoming, the appellant may have been able to show to the satisfaction of the Court that he had joined duty without any avoidable delay. The appellant's own conduct before and after the crime may appear to be very relevant to establish his guilt. During his examination UnderSection 342 of the Code of Criminal Procedure, he had stated that he had taken ten days leave from the military authorities and that this period of leave was to take effect from 29-4-1969. , He had, however, left the Unit without obtaining any leave certificate and in the absence of his Commanding Officer-Even this period of leave had expired on the date of occurrence or on the date on which

the appellant's brother Joginder Singh was described to have met with an accident while he was going on a motorcycle in a drunken condition.

It may be observed that according to the dying declaration, Exhibit P. H., of: the deceased, the appellant and his brother Joginder Singh were the leaders of the gang who had criminally intimidated the deceased while armed with fire-,arms and other deadly weapons four or five days before the occurrence. It cannot possibly be argued that the appellant had over-stayed the leave in anticipation of the accident in which Joginder Singh was involved on 9-5-1969. The appellant had pleaded alibi but there is nothing in the hospital records to suggest that he was attending on his brother on the night in question. In this connection, the following observations of a Special Full Bench of the Calcutta High Court in Saratt Chandra Dhupi v. Emperor. 35 Cri LJ 1335 : (A.I.R. 1934 Cal 719) (SB), could be reproduced with advantage:

> "Whenever a defence of alibi is set up and that defence utterly breaks down, it is a strong inference that if the prisoner was not in fact where he says he was then in all probability, he was where the prosecution say he was."

67. The accused, in the instant case, has run away from the spot and was apprehended by the police from rain shelter.

68. The Hon'ble Apex Court in the case of ***State of Haryana Vrs. Sher Singh and others,*** reported in ***AIR 1981 SC 1021,*** has held that where a plea of *alibi* is taken, burden to prove it is on the accused pleading it. It has been held as follows:

> "4. When an accused pleads alibi, the burden is on him to prove it under Section 103 of the Evidence Act which provides:
>
> > "103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
> >
> > Illustrations: (a) A prosecutes B for theft, and wishes the court to believe that B admitted the theft to C. A must prove the admission.
> >
> > B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it."
>
> In this case defence did not adduce any evidence to prove the alibi. On the contrary the evidence of P.W. 11, Lila, is that on 21st October, 1973, all the accused were produced by Lalji, the brother of the wife of respondent, Sher Singh in village Nand Karan Majra around 8 a.m., when they were arrested. This was in presence of P.W. 11 and several others. Police had been there the witness says, from October 17 to 20, 1973. This evidence of P.W. 11 remains unrebutted. The plea of the respondents that they had been elsewhere at the time of the occurrence and returned to the place of occurrence by themselves on October 17, when they were arrested by police, is untrue."

69. The Hon'ble Apex Court in the case of ***State of Maharashtra vrs. Narsingrao Gangaram Pimple,*** reported in ***AIR 1984 SC 63,*** has held that it is well settled that plea of *alibi* must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence. It has been held as follows:

> "18. The High Court seems to have devoted a major part of its judgment to the various case diaries produced before the court in order to establish that the accused was not present at the police station either on the 9th or on the 13th of April 1972 when the first two demands were made. According to the High Court this gave a sufficient alibi to the respondent from which it could be safely inferred that if he was not present at the police station, there could be no occasion for him to make any demand for bribe from the complainant. Assuming that the recitals in the said case diaries are admissible (though we have serious doubts about it) yet it does not at all exclude the presence of the respondent at the Ambarnath police station on the 9th and 13th because he was not sent away to a place situated far from Bombay but was in some other police station within a radius of a few miles only. Even if he was deputed to some other place he was in possession of a jeep and he could visit the Ambarnath police station for a few minutes on any of these dates. It is well settled that a plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence. Such, however, is not the case here. Therefore, the discussion of the case diaries, which engaged a substantial portion of the High Court judgment was really an exercise in futility."

70. The Hon'ble Apex Court in the case of ***Binay Kumar Singh vrs. State of Bihar,*** reported in ***AIR 1997 SC 322,*** has held that once the prosecution succeeds in discharging the burden, it is incumbent on the accused, who adopts the plea of *alibi*, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally, the Court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. It has been held as follows:

> "22. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far sway from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi to prove it with absolute certainty So as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that in

such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide Dudh Nath pandey vs state of Utter Pradesh (1981) 2 SCC 166; state of Maharashtra vs Narsingrao Gangaram Pimple AIR 1984 SC 63)."

71. PW-1 Prem Chand was told by his wife PW-5 Krishani Devi that accused No. 2 to 10 have got prepared second dying declaration from Veena Devi to save accused Kishori Lal. PW-5 Krishani Devi has categorically deposed that her daughter told her that Pradhan Saroj Kumari, Ward Panch Bihari Lal and one BDC Member and others had come to her and forcibly taken her statement giving clean chit to accused No. 1 Kishori Lal. The Pradhan and Members had insisted her to make a statement that she herself had poured kerosene oil on her person. However, the prosecution has failed to prove charge against accused No. 1 under Section 498A IPC. There is only statement of PW-1, father of the deceased that accused used to harass his daughter after consuming alcohol.

72. Accordingly, the prosecution has proved the case against the accused No.1 beyond reasonable doubt that it was he who set Veena Devi ablaze, resulting in her death due to asphyxia. Accused No. 2 to 10 have falsely got prepared Ext. PW-21/G (second dying declaration) from deceased Veena Devi to screen accused Kishori Lal from legal punishment.

73. In view of the observations and discussion made hereinabove, the appeal of the State is allowed. The judgment of acquittal dated 22.6.2009 of the learned trial Court is set aside. Accused No. 1 Kishori Lal is convicted under Section 302 IPC and accused Nos. 2 to 10 are convicted under Section 201/34 of IPC. However, the acquittal of accused No. 1 under Section 498 A IPC is upheld. The accused shall be heard on quantum of sentence. The State is directed to produce accused before this Court on 7.8.2015. List on 7.8.2015.

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

Arjanbir Singh Likhari .....Petitioner

Versus

D.W. Negi, and others .....Respondents.

COPC No. 476/2015
Judgment reserved on 28.7.2015.
Date of decision: 4th August, 2015.

Contempt of Courts Act, 1971- Section 12- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A and 406 of IPC- one of the accused was arrested and was granted bail by the Court- another accused was granted pre-arrest bail by the High Court- it was contended that parties were litigating before the Civil Court and the police had violated the directions of the Apex Court- held, that the police had not made any haste in arresting the accused-the accused moved an application seeking pre-arrest bail which was granted hence it cannot be said that the police had violated the judgment of the Apex Court or that the police had committed contempt. (Para-6 to 8)

Case referred:
Arnesh Kumar versus State of Bihar (2014) 8 SCC 273

For the petitioner: Mr.Harsh Khanna, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, Deputy Advocate General.

The following judgment to the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this Contempt Petition, the petitioner has sought drawing of the contempt proceedings against the respondents, who are police officers, on the grounds taken in the memo of the petition.

2. It appears that FIR No. 88 of 2014 was lodged by Ms. Simrat Singh against Arjanbir Singh Likhari, petitioner herein who is husband of complainant Ms. Simrat Singh, J.S. Likhari father-in-law of the complainant and mother-in-law, under Section 498-A, 406 of the Indian Penal Code, in Police Station Chhota Shimla. The alleged accused moved application for the grant of anticipatory bail before the Sessions Judge, Shimla and interim relief was granted to the accused vide order dated 18.7.2014.

3. After hearing the parties, prosecution and also the perusal of the police report, the bail application was dismissed vide order dated 11.9.2014. It is apt to reproduce para 15 of the order herein:

> *"15.In the case in hand, the applicants have invoked the jurisdiction of this Court under Section 498-A of the Indian Penal Code. It is well settled position of law that powers conferred under this Section is of extra ordinary character and is not to be resorted as a matter of course. The power has to be exercised in grave and exceptional cases since it is power of extra ordinary character. Nonetheless discretion under this Section has to be exercised where the facts and circumstances of the case so warrant. Before exercising the powers under Section 438 Cr.P.C., the Court must be satisfied that the applicant invoking the provision has reasons to believe that he is likely to be arrested for non-bailable offence and his belief must be based upon reasonable ground. The Court has also to keep in mind the gravity of the allegations leveled in the F.I.R. Since the case in hand, it is clear from the perusal of the FIR that grave and serious allegations have been leveled against the applicants No. 1 and 3 and conduct the applicant No. 1 during the course of hearing before this Court also not up-to the mark, in as much as, the applicant No. 1 was playing hide and seek with the Court even to make the payment of Rs.8,00.000/- (Eight lacs) which the applicants have earlier agreed to pay so as to put to quietus to all kind of litigations between the parties. It is a matter of common knowledge that at the time of marriage, gifts, traditional dowry items are given by the family of the bride to that of the groom as per their social status. It was not denied even by the learned counsel for the applicants that dowry/traditional items were given at the time of marriage of the applicant No. 1 with the complainant. There is no specific evidence on record to suggest that*

complainant has taken back jewellery and other items with her to Shimla. Simply because, it is mentioned in the order dated 22.1.2014 by Ld. A.D.J. that all disputes have been settled by way of compromise, that would not mean that complainant has taken every thing with her. There is no reason or justification as to why the complainant should level so serious allegations without any rhyme or reason. The court was also apprised that during the course of interrogation, the applicant No. 1 agreed to return the clothes and certain other items belonging to the complainant, but the clothes and other items which were brought by the applicant No. 1 were not in fact belonging to the complainant and no valuable items were brought in the briefcase by the applicants to be handed over to the complainant. In such circumstances, the court is of the view that the applicants are not entitled to the discretionary relief of pre-arrest bail at this stage. Accordingly, the order 18.7.2014 is vacated the application under Section 438 Cr.P.C. is hereby rejected."

4. After noticing the dismissal order of the bail application, made by the learned Sessions Judge, referred to supra, the accused were taken to police station and were not taken into custody on 11.9.2014 but on the next day, i.e. on 12.9.2014, they were arrested in the said FIR, constraining them to file application for the grant of bail which was granted by the Additional Chief Judicial Magistrate Shimla on 15.9.2014. It is apt to reproduce relevant portion of the said order herein:

"Resultantly, the application for the police remand of the accused filed by the prosecution is disallowed, whereas the application for bail moved by the accused is allowed subject to his furnishing personal bonds in the sum of Rs.30,000/- with one surety in the like amount.

Release of the accused however, shall be subject to following conditions"

1. *that he shall not influence the prosecution witnesses in any manner whatsoever nor shall tamper with the prosecution evidence,*
2. *that he shall join the investigation as and when so required,*
3. *that he shall not commit the similar offence of which he is an accused and*
4. *that he shall not leave India without prior permission of the Court."*

5. One of the accused, namely, Simran Likhari approached this Court for the grant of pre-arrest bail which was granted by the learned Single Judge on 16.10.2014. It is apt to reproduce paras 9 and 10 of the said order herein:

"9. Accordingly, this is a fit case where the discretion of grant of bail ought to be exercised and accordingly, the bail petition is allowed and the petitioner is ordered to be released on bail in FIR No. 88/14 dated 19.7.2014, registered at Police Station, East, Shimla, under Sections 498-A, and 406 of the Indian Penal Code on her furnishing personal bonds in the

sum of Rs.25,000/- each with one surety each of the like amount to the satisfaction of the learned Chief Judicial Magistrate, Shimla, subject to the following conditions:

(i) that the petitioners 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 from disclosing such facts to the Court or to any police officer;

(ii) that the petitioners shall not tamper with the prosecution evidence or threaten the witnesses;

(iii) that the petitioners shall make themselves available for interrogation by the police officer as and when required.

(iv) that the petitioners shall not misuse their liberty in any manner.

Learned Chief Judicial Magistrate, Shimla is directed to comply with the directions issued by the High Court, vide communication No.HHC/ VIG./ Misc. Instructions/93-IV.7139, dated 18.03.2013.

10. It is made clear that in case the Investigating Agency wants to interrogate the petitioner, then written Hukamnama to this effect shall be issued to her. It is also made clear that during the investigation the petitioner cannot be unduly harassed. On the other hand, in case the petitioner violates any of the conditions, she will be liable for cancellation of the bail."

6. Precise case of the petitioner is that the FIR was not to be registered in terms of the mandate of the judgment passed by the Supreme Court in ***Arnesh Kumar versus State of Bihar*** reported in ***(2014) 8 SCC 273,*** because the parties were litigating before the Civil Court, in terms of the mandate of the Hindu Marriage Act, 1955. Thus, the police has violated the directions contained in the apex Court judgment, referred to supra.

7. The moot question is whether the lodging of the FIR and thereafter arrest by the police, after dismissal of the bail application, can be said to be a breach of the Supreme Court judgment? The answer is in negative for the following reasons.

8. The police was set in motion on the allegations made by the complainant. Thus, it cannot be said that the police has violated the directions contained in the judgment delivered by the Supreme Court, supra. The police has not made any haste in making the arrest of the accused immediately and they moved application seeking anticipatory bail which was granted as discussed hereinabove and ultimately, the said bail application was dismissed by the Sessions Judge, after noticing and recording that no case for grant of anticipatory bail was made out. Thus, it cannot be said that the action of the police, after noticing the orders, in arresting the accused is in violation of the Supreme Court judgment and is contempt.

9. Having said so, no case for issuance of notice is made out. Hence the Contempt Petition is dismissed in *limine,* alongwith pending applications, if any.

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

Gulshan Kumar .....Petitioner.

Versus

State of H.P. & anr. .....Respondents.

CWP No. 4849 of 2010.
Reserved on: 27.7.2015.
Decided on: 04.8.2015.

Constitution of India, 1950- Article 226- Petitioner was deputed to drive a departmental vehicle from Shimla to Kalka- he reported that when he was returning from Kalka, he got down from the vehicle - he was overpowered by some unknown persons and was drugged by them- He regained consciousness and found himself at his residence- he was brought to his residence by some unknown person - the vehicle had met with an accident on the evening of the same day causing loss of Rs. 59,190/-departmental proceedings were initiated against the petitioner and Inquiry Officer rejected the version of the petitioner- he concluded that the petitioner had driven the vehicle in a negligent manner- he was ordered to be removed from service- held that the version of the petitioner that he was drugged due to which he became unconscious and was taken to his residence is inherently improbable- the name of the person who brought the petitioner to his residence was not revealed- it was also not revealed as to how the witness could have come to know about the residence of the petitioner- speaking order was passed by the authorities– it is not permissible to interfere with the decision of Administrative Authorities unless it is shocking to the conscience of the Court- the order was rightly passed – petition dismissed. (Para-4 to 8)

Cases referred:

Apparel Export Promotion Council vrs. A.K.Chopra, (1999) 1 SCC 759

Chairman and Managing Director, United Commercial Bank and others vrs. P.C.Kakkar and connected matter, (2003) 4 SCC 364

For the petitioner: Mr. Subhash Sharma, Advocate.

For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma and Mr. Vivek S. Attri, Dy. AGs for respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was deputed to drive the departmental vehicle from Shimla to Kalka. According to the petitioner, when he was coming back from Kalka to Shimla, he got down from the vehicle. He was overpowered by some unknown persons. He was drugged by them. Some person dropped him at his residence. He regained consciousness and found himself at his residence on 6.10.2004. The fact of the matter is that the vehicle of the petitioner met with an accident on the evening of same day at Kacchi Ghati, Shimla, causing loss to the tune of Rs. 59,190/-. The petitioner neither reported the matter to the police nor apprised the Department.

2. The disciplinary proceedings were initiated against the petitioner under Rule 14 of CCS(CCA) Rules 1965, vide memorandum dated 2.12.2014. The petitioner filed a detailed reply to the same vide Annexure P-5 dated 10.12.2014. The Inquiry Officer was

appointed. The Inquiry Officer submitted the report to the Disciplinary Authority. The Inquiry Officer gave findings that the delinquent official drove the vehicle in a negligent manner, resulting in the accident on 5.10.2004. The version of the petitioner that some unidentified persons have drugged him and dropped him at his home was not accepted by the Inquiry Officer. The petitioner was permitted to file representation to the inquiry report vide memorandum dated 28.7.2006. The petitioner filed the detailed reply to the memorandum vide Annexure P-11 dated 11.8.2006. Thereafter, the Disciplinary Authority removed the petitioner vide order dated 21.9.2006 by passing a speaking/detailed order. The representation, made by the petitioner against the findings of the Inquiry Officer, was dealt with in detail.

3. The petitioner assailed the removal order dated 21.9.2006 by filing OA No. 3229 of 2006 before the erstwhile H.P. State Administrative Tribunal. It was transferred to this Court and assigned CWP(T) No. 6354 of 2008. Since the petitioner had not filed any statutory appeal against the order of removal, he was permitted to file statutory appeal, while disposing of the petition on 5.4.2010. The petitioner filed statutory appeal and the same was dismissed by the appellate authority vide office order dated 10.6.2010.

4. The accident has taken place on 5.10.2004. The plea of the petitioner that when he came out from the vehicle, he was drugged by some unidentified persons and he was dropped by them at his house, which is at a distance of 15 kms. from Kacchi Ghatti, is unbelievable. It is a concocted story. It is not the case of the petitioner that he was robbed or some physical harm was caused to him. He does not know the name of the persons even who have dropped him at his house at Mehli. How a person, not known to him, should come to know that he is a resident of Mehli ? Even his wife could have made inquiries about the name of the person who had allegedly brought him to his house. The petitioner has caused the accident due to his rash and negligent driving and to avoid the liability, he has made this concocted cock and bull story.

5. The inquiry against the petitioner has been initiated and concluded in accordance with law. He has been permitted to file reply to the memorandum dated 2.12.2004. The Inquiry Officer has given the findings after correct appraisal of the evidence placed on record. The Disciplinary Authority before passing the order of removal has also given the opportunity to the petitioner to make representation against the inquiry report. He has filed detailed representation to the memorandum dated 28.7.2006. The grounds taken by the petitioner in his reply to memorandum dated 28.7.2006, have been duly considered by the Disciplinary Authority, while concurring with the findings of the Inquiry Officer. The order, whereby the penalty of removal has been imposed upon the petitioner on 21.9.2006, is a well reasoned order. Similarly, the appellate authority, while dismissing the appeal on 10.6.2010, has considered the grounds taken by the petitioner in his appeal. The order passed by the appellate Authority cannot be termed as laconic, as argued by Mr. Subhash Sharma, Advocate, for the petitioner. It is again very detailed and self-speaking order. The scope of judicial review in such matters is very limited.

6. Their lordships of the Hon'ble Supreme Court in the case of ***Apparel Export Promotion Council vrs. A.K.Chopra,*** reported in ***(1999) 1 SCC 759,*** have held that it is the settled position that in departmental proceedings, the Disciplinary Authority is the sole Judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power/and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authority. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ Jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally

untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. It has been held as follows:

> "16. The High Court appears to have over-looked the settled position that in departmental proceedings, the Disciplinary Authority is the sole Judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power/and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ Jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an Appellate Authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion and impose some other punishment or penalty. Both the learned Single Judge and the Division Bench of the High Court, it appears, ignored the well-settled principle that even though Judicial Review of administrative action must remain flexible and its dimension not closed, yet the Court in exercise of the power of judicial review is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial Review, it must be remembered, is directed not against the decision, but is confined to the examination of the decision-making process. Lord Haltom in Chief Constable of the North Wales Police v. Evans, (1982) 3 All ER 141, observed :
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> > "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court."

7. Mr. Subhash Sharma, Advocate, for the petitioner has also argued that the penalty imposed upon his client is disproportionate. Their lordships of the Hon'ble Supreme Court in the case of ***Chairman and Managing Director, United Commercial Bank and others vrs. P.C.Kakkar and connected matter,*** reported in ***(2003) 4 SCC 364,*** have held that it is settled position in law that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court. It has been held as follows:

> "11. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral

standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

12. To put difference unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to certain litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed."

8. In the instant case, the penalty of removal imposed upon the petitioner in view of the facts and circumstances of the case cannot be termed as disproportionate.

9. Accordingly, there is no merit in this petition 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.

Krishan Chand .....Petitioner.

Versus

State of H.P. & anr. .....Respondents.

CWP No. 2365 of 2013.
Reserved on: 21.7.2015.
Decided on: 04.8.2015.

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged as a beldar- he was retrenched - he raised an industrial dispute and the matter was referred to the Labour Court – however, the reference was rejected by the Labour Court- petitioner had completed more than 240 days in the year 1997 to 2005- he had worked for 171 days in the year 2006- Government had framed a policy of regularization of the daily waged/ contingent paid workers who had completed 8 years continuous of service with a minimum of 240 days – held, that respondents should have regularized the services of the petitioner instead of retrenching him- retrenchment of the petitioner amounted to unfair labour practices- petition allowed and the services of the petitioner directed to be regularized. (Para- 8 to 15)

Case referred:
Ajaypal Singh vrs. Haryana Warehousing Corporation, (2015) 6 SCC 321

For the petitioner: Mr. Vijay Chaudhary, Advocate.
For the respondents: Mr. Ramesh Thakur, Asstt. AG for respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the award dated 11.12.2012, rendered by the learned Presiding Officer, Labour Court-cum-Industrial Tribunal, Dharamshala, in Reference No. 54 of 2008.

2. "Key facts" necessary for the adjudication of this petition are that the petitioner was engaged as Beldar on 17.5.1996. He was retrenched on 30.6.2006. He raised the industrial dispute. The Labour Commissioner referred the matter to the Labour Court-cum-Industrial Tribunal, Dharamshala, bearing Reference No. 54 of 2008. The petitioner filed claim petition before the learned Labour Court-cum-Industrial Tribunal, Dharamshala. The reply was filed to the same by the respondents. The issues were framed by the Labour Court-cum-Industrial Tribunal, Dharamshala, on 26.12.2008. The Labour Court-cum-Industrial Tribunal, Dharamshala, rejected the reference on 11.12.2012. Hence, this petition.

3. The petitioner has appeared as PW-1. He has led his evidence by filing affidavit Ext. PW-1/A. According to the averments made in the affidavit, he was engaged on 17.5.1996. He worked uninterruptedly, without any break up to 30.6.2006. He was qualified to be regularized as Beldar after completion of 10 years of service. He has made reference to the notification dated 9.6.2006. There was violation of Section 25 N and 25 G of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). In his cross-examination, he denied that he was paid one month's wages amounting to Rs. 13,650/-. He denied the suggestion that he refused to accept the notice. He also denied that the copy of the same was sent to him through Chaman Lal, Beldar, which he has refused to accept. He also denied that the Department sent a draft to him and he refused to accept the same.

4. PW-2 H.R.Rahi, has deposed that earlier the work was available in Government Seed Store and work was still available. Volunteered that now the same was being done by contract labour. He also admitted that after 2006, except Khub Ram and Krishan Chand, no fresh hands were reengaged.

5. Sh. A.R.Sharma, Dy. Director Agriculture, Mandi, has appeared as RW-1. He has led evidence by filing affidavit RW-1/A. Para 2 of the affidavit reads as under:

> "2. That the applicant was engaged in violation of the Govt. Policy at Seed Grading Unit, Bhangrotu as such the services of the petitioner was dispensed with on dated 30.6.2006 in pursuant to the Govt. order."

6. He was cross-examined. He has proved man days chart Ext. RW-1/B, retrenchment order Ext. RW-1/C, endorsement made by the postal authorities Ext. RW-1/D, acknowledgement RW-1/E, notice dated 4.10.2006 Ext. RW-1/G and envelope Ext. RW-1/H. He has admitted that the petitioner has worked for 240 days in each calendar year except for 1996 and 2006. He has also admitted that the Seed Grading Unit at Bhangrotu was still functional.

7. RW-2 Chaman Lal deposed that he has taken the cheques to Khub Ram and Krishan Chand. They have refused to accept the same. He proved his report Ext. RW-1/A.

8. The man days chart of the petitioner is Ext. RW-1/B. It is evident from the man days chart that the petitioner was engaged in the month of May, 1996. He has worked uninterruptedly till 30.6.2006.

9. Mr. Vijay Chaudhary, Advocate, for the petitioner has drawn the attention of the Court to communication Ext. PW-1/B dated 9.6.2006. It is evident from Ext. PW-1/B that daily waged/contingent paid workers who had completed 8 years continuous service (with a minimum of 240 days in a calendar year except where specified otherwise for the tribal areas) as on 31.3.2004, were to be considered for regularization. The terms and conditions for regularization of daily waged/contingent paid workers were to be governed as per Annexure-A.

10. The Court has perused the man days chart. It is evident from man days chart that the petitioner had completed 264 days in the year 1997, 359 days in the year 1998, 362 days in the year 1999, 365 days in the year 2000, 365 days in the year 2001, 365 days in the year 2002 and 334 days in the year 2003. The petitioner had worked for 227 days in the year 1996 and thereafter he had continuously completed more than 240 days in the year 2004 and 2005. He has worked for 171 days in the year 2006. The respondents, instead of terminating his services vide Ext. RW-1/C should have regularized the petitioner taking into consideration the un-interrupted service rendered by him for almost 8 years. There was shortage of only 13 days in computing 240 days in the year 1996. This period should have been condoned to enable the petitioner to be regularized after completion of 8 years w.e.f. 31.3.2004 as per Ext. PW-1/B. The respondents, instead of regularizing the petitioner have retrenched him vide Ext. RW-1/C. The reason assigned for retrenchment of the petitioner is that the work was not available in the Seed Grading Unit, Bhangrotu/SMF Bhangrotu. It is necessary as per Section 25 F of the Act to give one month's notice in writing indicating the reasons for retrenchment. The reason for retrenchment is not that the work was not available in the Seed Grading Unit Bhangrotu but as per the evidence led by RW-1 Sh. A.R.Sharma, the petitioner has been retrenched since he was engaged in violation of the Government Policy at Seed Grading Unit Bhangrotu. Thus, the petitioner has not been retrenched for the non-availability of the work but has been retrenched that he was engaged initially on 17.5.1996, in violation of the Government Policy.

11. Their lordships of the Hon'ble Supreme Court in the case of ***Ajaypal Singh vrs. Haryana Warehousing Corporation,*** reported in ***(2015) 6 SCC 321,*** have held that the services of the appellant was not terminated on the ground that his initial appointment was in violation of Articles 14 & 16 of the Constitution of India and no such reasons were shown in the order of retrenchment nor was such plea raised while reference was made by the appropriate Government for adjudication of the dispute between the employee and the employer. The High Court could not deny the benefit for which the appellant was entitled on the ground that his initial appointment was made in violation of Articles 14 and 16 of the Constitution of India. Their lordships have further held that Industrial Disputes Act, 1947 is a beneficial legislation enacted with an object for settlement of industrial disputes and for certain other purposes as mentioned therein. It prohibits unfair labour practice on the part of the employer in engaging employees as casual or temporary employees for a long period without giving them the status and privileges of permanent employees. Their lordships have held as follows:

> "[5] The Industrial Disputes Act, 1947 is a beneficial legislation enacted with an object for settlement of industrial disputes and for a certain other purpose. Section 2(ka) of the said Act defines industrial establishment or undertaking.
>
> [18] We have noticed that Industrial Disputes Act is made for settlement of industrial disputes and for certain other purposes as mentioned therein. It prohibits unfair labour practice on the part of the employer in engaging employees as casual or temporary employees for a long period without giving them the status and privileges of permanent employees.
>
> [24] In the present case, the services of Appellant was not terminated on the ground that his initial appointment was made in violation of Articles 14 and 16 of the Constitution of India. No such reasons was shown in the order of retrenchment nor was such plea raised while reference was made by appropriate Government for adjudication of the dispute between the employee and the employer. In absence of such ground, we are of the opinion that it was not open for the High Court to deny the benefit for which the

Appellant was entitled on the ground that his initial appointment was made in violation of Articles 14 and 16 of the Constitution of India."

12. In the instant case also, it is not mentioned in the retrenchment order that the services of the petitioner were terminated on the ground that his initial appointment was in violation of Articles 14 & 16 of the Constitution of India or was not in accordance with the policy decision. Even, such plea was not raised when the reference was made by the Labour Commissioner to the Labour Court-cum-Industrial Tribunal. This plea was also not open to the respondent-State after a period of 10 years.

13. Mr. Ramesh Thakur, learned Asstt. Advocate General for the State has vehemently argued that the petitioner was paid one month's wages in lieu of notice along with the compensation under the provisions of Section 25 F of the Act, but he has refused to accept the same. He has relied upon the statement of RW-1 Chaman Lal that the amount was sent to the petitioner but he has refused to accept the same. He also argued that in the endorsement draft was also sent to the petitioner but he refused to accept the same. It is evident from RW-1/H that the petitioner was not found at home. Thus, he has not refused to accept the draft, as argued by Mr. Ramesh Thakur, learned Asstt. Advocate General.

14. The reason assigned for retrenchment of the petitioner as per Ext. RW-1/C, as noticed hereinabove, is that the work was not available in Seed Grading Unit at Bhangrotu. But, the fact of the matter is that the petitioner has been retrenched since his initial engagement was in violation of some decision of the State Government, as per the statement of RW-1 Sh. A.R.Sharma, quoted hereinabove. The copy of the decision has not been placed on record by RW-1. The action of the respondents of terminating the services of the petitioner instead of regularizing him when there was only shortfall of 13 days in completion of 240 days in the year 1996, amounts to unfair labour practices.

15. PW-2 H.R.Rahi has testified that the work was available in the Seed Store but the work was being extracted by engaging contract labour. Thus, the petitioner was to be regularized instead of terminating his services vide Ext. RW-1/C. In view of this Ext. RW-1/C is *void ab initio*.

16. Accordingly, the Writ Petition is allowed. Ext. RW-1/C is declared *void ab initio*. The petitioner would be deemed to be in continuous service. The respondents are directed to regularize the petitioner w.e.f. 31.3.2004, as per Ext. PW-1/B dated 9.6.2006, by condoning shortage of 13 days in the year 1996, with all the consequential benefits. Pending application(s), if any, shall stand disposed of.

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

M/s Cremica Food Industries Ltd., ...Petitioner

Versus

State of H.P & anr. ....Respondents

Cr.MMO No. 118 of 2015
Date of Decision: 04.8.2015

Prevention of Food Adulteration Act, 1954 – Section 20(A) - Sauce was found to be adulterated on analysis- shopkeeper filed an application for impleading the manufacturer which was allowed- held, that impleading the manufacturer without issuing notice to him is

violation of the principles of natural justice- it was mentioned in the annexure that bottles were manufactured by some other manufacturer- hence, impleading the petitioner was bad- order set aside. (Para-2 to 4)

For the petitioner: Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate for the petitioner.

For the Respondents: Mr. Ravinder Singh Thakur, Addl. AG for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Respondent No. 2, despite service, omitted to appear either in person or through counsel. Hence, proceeded against ex parte.

2. The authorized Food Inspector had instituted a complaint under Section 16 (1) (a) (i) read with Section 7 (ii) of the Prevention of Food Adulteration Act, 1954 with an enunciation therein of three sealed packets of sauce 700 grams each bearing label of "Kanoor new Mexican Salsa" having been seized from the premises of accused/respondent No. 2. The sample of the aforesaid seized packets of sauce was sent for analysis to the Public Analyst concerned who on carrying out the requisite tests found the sample to be adulterated in as much as the quantity of Sugar used in the product was not printed/specified on its label whereas specification of the quantum of sugar in the product aforesaid was warranted to be printed on the label of the sample of product "Kanoor new Mexican Salsa" as seized by the authorized Food Inspector from the premises of the accused/respondent No. 2.

3. The counsel for the accused/respondent No. 2 during the course of the recording of evidence by the learned trial Court on the charges for which the accused/respondent No.2 was facing trial before it, instituted an application before the learned Judicial Magistrate aforesaid averring therein that the aforesaid purported adulterated product stood purchased by it from Mrs Bector's Food Specialties Ltd. Besides an averment was made in the application moved by the learned counsel for the accused/respondent No.2 before the learned Judicial Magistrate 1st Class, Court No. 1, Kasauli constituted in Annexure P-6, that the petitioner while being the manufacturer of the purportedly adulterated food item as such its being added in the array of accused was imperative as well as essential. The learned Judicial Magistrate 1st Class, Court No. 1, Kasauli on being seized of the application instituted before him at the instance of the accused/respondent No.2 under Section 20 (A) of the Prevention of Food Adulteration Act for impleading in the array of accused the petitioner herein, proceeded to, even without issuing a notice to the petitioner herein for eliciting from it its response to the application, only after hearing the authorized Food Inspector and the counsel for accused/respondent No. 2, rendered the impugned orders. At the outset itself the rendition of the impugned order by the learned Judicial Magistrate, 1st Class, Court No. 1, Kasauli, whereby it directed the impleadment of the petitioner in the array of accused even without serving or issuing notice to the latter, as such, it in non-conformity with the principles of natural justice mandating that the petitioner herein proposed to be added in the array of accused was legally obliged to be heard before the rendition of the impugned orders by the Judicial Magistrate, 1st Class, Court No. 1, Kasauli, having proceeded to in flagrant non-compliance or non-observance of the principles of natural justice, constituted by the fact of its having proceeded to render the impugned order even without hearing it hence condemned it unheard, vitiates it with the vice of non-conformity with the principles of natural justice.

4. Apart therefrom the arraying of or adding of the petitioner in the array of accused by the learned trial Magistrate in its impugned order besides also suffers from a grave infirmity embedded in the fact that even when as portrayed by Annexure P-3 of Hindustan Unilever Ltd. Mumbai 400020 being the manufacturer of the purportedly adulterated food item seized by the authorized Food Inspector from the premises of the accused/respondent No.2, the learned trial Magistrate untenably discarded the aforesaid portrayal in Annexure P-3, hence unwarrantedly concluded that the petitioner rather was the manufacturer of the purportedly adulterated food item, besides as such erroneously held that its addition in the array of accused was just and imperative for the continuation or progress of the trial of the offences committed by the retailer. Besides the learned trial magistrate having discarded the portrayal in Annexure P-3, the emanation in the cross-examination of the Food Inspector, of the Manufacturer of the purportedly adulterated food item named "Kanoor new Mexican Salsa" seized by him from the premises of respondent No.2/accused being M/s Hindustan Unilever Ltd. Mumbai construed in conjunction with the fact of a pronunciation in Annexure P-9, moved by the counsel for the accused/respondent No.2, of M/s Hindustan Unilever Ltd. Mumbai being the manufacturer of the purportedly adulterated food item adds force and vigor to an apt conclusion that the addition by the learned trial Magistrate in the impugned order of the petitioner herein as an accused was grossly unjust. Concomitantly also the continuation of the trial against the petitioner herein along with the accused/respondent No.2 for the latter having committed offences under Section 16 (1) (a) (i) read with Section 7 (ii) of the Prevention of Food Adulteration Act, 1954 would be highly improper, inexpedient and unjust. Consequently, the impugned order is set aside. In sequel the name of the petitioner herein is ordered to be deleted from the array of accused. In aftermath, the learned trial Judge is directed to drop the proceedings against the petitioner herein.

In view of the above, the petition stands disposed of as also the pending applications, if any.

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

Rupa alias Rup Singh. ...Petitioner.

Versus

Kashmir Singh and others. ...Respondents.

Civil Revision No. 153 of 2007
Reserved on: 27.7.2015
Decided on: 4.8.2015

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree of permanent prohibitory injunction was passed by the Court in favour of plaintiff- an Execution Petition was filed pleading that judgment debtors had disobeyed the decree and had occupied the suit land- it was specifically stated by decree holder that judgment debtors were interfering with the possession in the month of June, 2006- this was corroborated by other witnesses- Judgment debtors also asserted that they were in possession which was contrary to the findings given by the Court holding the plaintiff to be in possession- decree passed against the judgment debtors can be executed against the legal heirs. (Para-10 to 12)

Cases referred:

Kathiyammakutty Umma vs. Thalakkadah Kattil Karappan and others, AIR 1989 Kerala 133

Yashodabai Ganesh Naik Gaunekar vs. Gopi Mukund Naik, AIR 2003 Bombay 77

For the Petitioner: Mr. Nipun Thakur, Advocate.
For the Respondents: Mr. Sunil Mohan Goel, Advocate for respondents No. 1 and 5.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge(oral)**:**

This petition is instituted against the order dated 4.6.2007 rendered by the Civil Judge (Senior Division), Hamirpur in C.M.A. No. 177 of 2000 in Civil Suit No. 264 of 1995.

2. "Key facts" necessary for the adjudication of this petition are that petitioner (hereinafter referred to as the "decree holder" for convenience sake) instituted a suit against the predecessor-interest of respondents-judgment debtors late Sh. Mohar Singh and Sanjeev Kumar for permanent injunction and also suit for damages of Rs. 2,000/- in respect of land comprising Khata No.7, Khatauni No.9, Khasra Nos. 116/2, 118, 120, 121/1 and 125 plots 5 measuring 1 kanal 13 marlas situate in village Bari, Mauza Dhaned, Tehsil and District Hamirpur on the basis of Jamabandi for the year 1993-94. The suit was contested by the defendants, namely, Mohan Singh and Sanjeev Kumar. Issues were framed by the Senior Sub Judge on 26.8.1996. The suit was decreed vide judgment and decree dated 15.3.2000. Senior Sub Judge gave a findings that plaintiff was owner of the land on the basis of partition and the defendants were unnecessarily interfering in his possession. Thus, decree of permanent injunction was passed in favour of the plaintiff vide judgment and decree dated 15.3.2000.

3. Mohar Singh died on 1.12.2000. His legal heirs were brought on record on 8.10.2003. Decree holder filed execution petition under order 21 rule 32 of the Code of Civil Procedure against the predecessor-in-interest of judgments debtors Mohar Singh, Sanjeev Kumar, Vijay Kumar and Rakesh Kumar sons of Amru on the ground that they have virtually occupied the land comprised in Khasra Nos. 118, 120, 121/1 and 125. They have willfully disobeyed the decree passed by the court dated 15.3.2000. Judgment debtors were interfering with the possession of the decree holder.

4. Reply was filed by the judgment debtors. According to the reply filed, judgment debtors were in possession of the suit land and before them, Mohar Singh was in possession of the same.

5. Rejoinder was also filed by the decree holder. The Executing Court dismissed the application on 4.6.2007. Hence, the present petition.

6. I have heard the learned counsel for the parties and have gone through the pleadings carefully.

7. Judgment and decree is dated 15.3.2000. Decree for permanent injunction was passed in favour of the decree holder. Judgment debtors started inferring with the possession of the decree holder. Plaintiff has appeared as PW-1. According to him, decree was passed on 15.3.2000. When he was sowing the maize crop in the month of June, 2000, respondents threw stones in his filed. He requested them to remove the same, but they refused to do so.

8. PW-2 Samsher Singh has deposed that Rajinder, Sohan and Sudershana have thrown the stones. PW-3 Roshan Lal was examined to prove the demarcation. The

demarcation was conducted in the year 2001. According to his version, the encroachment made by the judgment debtors was detected. PW-4 Subhash Chand has also deposed that judgment debtors have thrown the stones in the fields and have also started cutting the grass.

9. Kashmir Singh has appeared as RW-1 and has denied the allegations of violation. RW-2 Sarvjit Singh has also denied the allegations made against them.

10. The Executing Court has brushed aside the statements of PW-1 Rup Singh, PW-2 Samsher Singh and PW-3 Roshan Lal and has come to a wrong conclusion that decree holder has failed to prove that judgment debtors have willfully disobeyed the judgment and decree dated 15.3.2000. PW-3 Roshan Lal has proved that during demarcation, it was found that judgment debtors have encroached upon the suit land. It was not necessary for the judgment debtor to place on record the demarcation report. Decree holder has specifically stated that in the month of June, 2000, judgment debtors have started interfering with his possession. Judgment debtors knew about the judgment and decree dated 15.3.2000. In reply to petition under order 21 rule 32 of the Code of Civil Procedure they have asserted that they are in possession of the suit land. Mohar Singh has died during the pendency of the execution petition and his legal heirs were brought on record. Mohar Singh and Sanjeev Kumar were already party in the civil suit No. 264 of 1995. Judgment debtors have willfully disobeyed the judgment and decree dated 15.3.2000 and the findings recorded by the Executing Court are liable to be set aside. Judgment debtors themselves have admitted that they are in occupation of the suit land, which plea is contrary to the judgment and decree dated 15.3.2000. Judgment debtors have violated the judgment and decree dated 15.3.2000 with impunity/willfully. They had actual and constructive knowledge of the judgment and decree dated 15.3.2000 and despite that they have violated the same.

11. Learned Single Judge in ***Kathiyammakutty Umma*** vs. ***Thalakkadah Kattil Karappan and others***, AIR 1989 Kerala 133 has held that decree for injunction obtained against sole judgment debtor restraining from obstructing the plaintiff in erecting a fence on the boundary of his property can be executed against the legal representatives on the death of original judgment debtor. Learned Single Judge has held as under:

> **"[4] Section 50 of the Code of Civil Procedure (for short 'the Code') enables the holder of a decree to execute the same against legal representatives of the deceased judgment-debtor. In Such execution, the decree holder is subject to a restriction in Sub-section (2) that the execution shall only be to the extent of the property of the deceased which has come to the hands of the legal representative. The limitation imposed by Sub-section (2) applies generally in cases of money decrees. In the case of a decree of injunction, the modes of execution are prescribed in Order 21, Rule 32 of the Code. Sub-rule (1) enables the decree holder to enforce the decree by detention of the judgment-debtor in the civil prison or by attachment of his properties or by both. Sub-rule (5) is an additional mode to be followed in execution of the decree for injunction. There is no inhibition in Rule 32 that the modes of execution prescribed therein cannot be exercised against the legal representatives of the judgment-debtor. In other words, what is permitted in Section 50 of the Code is not denied or even curtailed in Order 21, Rule 32. Section 146 of the Code enables taking of proceedings or making of applications against any one who claims under the person against whom such proceedings or applications could have been taken or made. The right conferred in Section 146 is not in**

any way restricted by Order 21, Rule 32. Hence it is not open to the legal representative of the judgment-debtor in a decree for injunction to contend that he is not liable under the decree. There is no dispute in this case that the judgment-debtors had right over the property which lies near the property in respect of which the decree for injunction was granted. The suit was filed in view of the boundary dispute over the respective properties. The boundary claimed by the plaintiff was upheld in the suit and hence the decree was passed by the trial court. In such a case, law does not impose any inhibition on the decree holder in executing the decree for injunction, after the death of the original judgment debtor against the legal representatives claiming under the said judgment-debtor.

[5] The decision in Jamsetji Manekji Kotval's case ((1908) ILR 32 Bom 181) has not been followed by the Bombay High Court in later decisions. AIR 1931 Bombay volume contains three decisions on this subject which are helpful in deciding the point of dispute in this revision. In Amritlal' v. Kantilal, AIR 1931 Bom 230 a Division Bench held that though a decree for injunction cannot be enforced against the surviving members of a joint family or against a purchaser from a judgment-debtor, such a decree can nevertheless be executed where the sons of the judgment-debtor were brought on record as his legal representatives by virtue of Section 50 of the Code. In Manilal v. Kikabhai, AIR 1931 Bom 482 a single Judge of the Bombay High Court following the aforesaid decision had held that, where a decree for injunction had been obtained against the father, the son not being joined as a party, and if the father died during the pendency of execution proceedings, the decree could be enforced under Section 50 of the Code against the son as his legal representative. In Ganesh v. Narayan, AIR 1931 Bom 484 another Division Bench of the same High Court followed the decision in Amritlal's case (cited supra)."

12. In ***Yashodabai Ganesh Naik Gaunekar*** vs. ***Gopi Mukund Naik***, AIR 2003 Bombay 77, learned Single Judge of Bombay High Court has even directed to proceed against the sons of judgment debtor in properly constituted execution proceedings. Learned Single Judge has held as under:

"[12] With regard to the execution and/or implementation of the decree of permanent injunction is concerned, it appears that the civil imprisonment had no effect on the judgment-debtor. He was detained in civil prison for fifteen days. He suffered the said detention, but did not amend his attitude and ventured to commit successive breaches of the decree of injunction. The effective order against him could be by attachment of his property and in the event of persistent breach and the sale thereof. If no property is available for attachment, and if the judgment-debtor persists in committing deliberate and wilful breach of the permanent injunction, he may again be detained in civil prison, depending upon the gravity of the breach committed by him. Nobody can be allowed to take law in his own hands. Rule of law must prevail. The Executing Court is not helpless to take action against the sons in properly constituted proceeding if the Executing Court finds that the sons of the judgment-debtor are abetting the breach of the decree for permanent injunction. If courts fail to get their orders implemented,

the people will lose faith in the judiciary. The Executing Court is directed to deal with the situation with stern hands and prevent breach of the decree of permanent injunction."

13. Accordingly, in view of the analysis and discussion made hereinabove, the petition is allowed. Order dated 4.6.2007 is set aside. The Executing Court is directed to execute the judgment and decree dated 15.3.2000 strictly in accordance with law. Parties through their counsel are directed to appear before the Civil Judge (Senior Division), Hamirpur on **21.8.2015**. Pending application(s), if any, also stands dismissed. No costs.

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

Cr. Revision No.233 of 2015
and Cr. Revision No.234 of 2015.
Date of Decision : 4th August, 2015.

1. Cr. Revision No.233 of 2015.

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

Versus

Rakesh Kumar alias Raku .....Respondent.

2. **Cr. Revision No.234 of 2015**.

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

Versus

Anil Kumar .....Respondent.

Code of Criminal Procedure, 1973- Section 397- Deceased was driving the vehicle with excessive speed- he lost control over the vehicle due to which vehicle hit the wall and crushed one 'N'- 'N' suffered fatal wounds- a huge mob gathered at the site of the accident- they gave beatings to the driver- driver died due to the injuries sustained by him- postmortem report shows that death had taken place due to the blows of the stick- complainant had not stated that accused had wielded the sticks but had only stated that accused had given kicks and fist blows- bail application filed by the accused was allowed and the revision was preferred against this order- held that prima facie accused are not involved in the commission of offence punishable under Section 302 read with Sections 147 and 149 of IPC and bail was rightly granted to them - petition dismissed.

For the Petitioner(s): Mr. R.S. Thakur, Addl. A.G.

For the Respondents: Mr. N.S. Chandel, Advocate and Mr. Vijay Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Both these petitions are being disposed of by a common order as they are preferred against a common order rendered on 12.11.2014 by the learned Additional Sessions Judge (1), Mandi, District Mandi, whereby the learned Additional Sessions Judge (1), Mandi allowed the bail applications preferred before it by the respondents herein for grant of bail to them.

2. The facts necessary for adjudication of the instant criminal revision petitions are that deceased Rakesh Kumar alias Rinku son of Shri Joginder Pal while driving his car bearing No.HP-33C-8002 purportedly under the influence of drugs/charas besides, at an excessive speed and in a rash and negligent manner sequelling his coming to lose control over the said vehicle, resultantly his vehicle crossed the road struck, against a cement wall and thereafter rolled down and crushed one Nikka Ram who was in the court yard of his house, sequelling his demise. In consequence to his body having been crushed under the car driven by deceased Rakesh Kumar alias Rinku, the aforesaid Nikka Ram suffered fatal wounds/injuries on his person,. A huge mob gathered at the site of accident. The complainant/informant/injured Vijay Kumar in the version qua the incident which begot the demise of the aforesaid Rakesh Kumar has therein attributed to the respondents herein the roles of theirs having delivered fist blows besides having slapped Rakesh Kumar alias Rinku. However, the version qua the incident narrated by the complainant Vijay Kumar does not attribute to them the role of theirs while purportedly wielding dandas having delivered blows with them on the head of the deceased Rakesh Kumar alias Rinku, rather the role of blows of dandas having been delivered on the head of the deceased, stands attributed by the complainant/injured Vijay Kumar to certain unknown persons. With theirs being a manifest segregation in the role attributed to Rakesh Kumar alias Rakku and Anil Kumar alias Nilu by the complainant Vijay Kumar vis-a-vis the role attributed by him to two unknown persons, who while wielding dandas struck blows with them on the head of the deceased sequelling injuries thereon to which injuries he ultimately succumbed. Naturally then with separate roles or segregable roles aforesaid attributed by the complainant/injured Vijay Kumar to the respondents herein vis-a-vis to certain unknown persons whose act of striking the head of the deceased with dandas wielded by them begot his demise. Furthermore, when the version qua the incident spelt out in the FIR omits to divulge therein that the respondents herein struck fist blows and slaps on the head of the deceased so as to sequel the injury/injuries thereon to which he succumbed, rather when the role of delivering of blows of dandas on the head of the deceased has been attributed to certain unknown persons. Concomitantly when the postmortem carried on the person of the deceased attributes/unravels the cause of the demise of the deceased, to the cumulative effect of haemorrhagic and neurogenic shock arising from the injury/injuires sustained by the deceased on his head in sequel to the blows of danda delivered thereon. As a corollary obviously then with certain unnamed persons having thereon delivered injuries with the user of danda by them respectively, fosters a deduction from this Court that the respondents herein while merely having meted out fist blows and slaps on the person of the deceased which hence did not sequel the demise of the deceased, naturally then the said role as attributed by the prosecution to the respondents herein may not constitute prima facie at this stage commission at their instance of an offence under Section 302 of the IPC. Even though, the provisions of Section 147 and 149 of the IPC have been added by the Investigating Officer against the respondents herein to attract against them, their vicarious liability for the act of certain unnamed persons who delivered blows with dandas on the person of the deceased sequelling his demise yet, with the distinct and segregable role of the respondents herein as enunciated hereinabove from the role of certain unnamed/unknown persons whose act of striking of danda blows on the head of the deceased begot his demise, reinforcingly the commission of offence, if any, at the instance of the respondents herein under the aforesaid provisions of law given the segregability of their roles vis-a-vis the roles of certain unnamed/unknown persons, especially when there is inadequate/insufficient evidence on record to show that respondents herein shared along with certain unknown/unnamed persons, whose delivering of blows with dandas on the head of the deceased begot his demise, a common object with them of hence murdering the deceased, is prima facie not made out. Preponderantly, the opening part of the FIR attributes to the

respondents herein a role of theirs having meted slaps and fist blows on the person of the deceased, however, the latter part of the FIR, while underscoring a role of delivery of danda blows on the head of the deceased to certain unnamed/unknown persons yet omits to divulge that at that stage inasmuch as when certain unknown/unnamed persons struck blows of danda on the head of the deceased hence begot his demise, the respondents herein were present along with such unnamed/unknown persons, resultantly, the omission aforesaid prods this Court to conclude that hence the respondents herein prima facie at the stage aforesaid cannot be concluded to be vicariously liable along with those unnamed/unknown persons who delivered blows with dandas on the head of the deceased. Moreover, it cannot also be said that the respondents herein hence allegedly committed offences under Sections 147 and 149 of the IPC, so as to render them amenable along with certain unknown/unnamed persons who by their act of delivering/striking on the head of the deceased blows of dandas wielded by them, committed the murder of the latter.

3. The upshot of the above discussion is that with prima facie at this stage, there being no emanation from the available material on record of the respondents having committed offences under Section 302 read with Sections 147 and 149 of the IPC, in sequel the acceptance of the revision petitions would result in unnecessarily fettering or curtailing their liberty. Consequently, there is no merit in these petitions and the same are dismissed accordingly. It is, however, made clear that the findings recorded hereinabove will have no bearing on the merits of the case. Dasti Copy.

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

Asha Devi .....Petitioner.

Versus

State of H.P & others. ....Respondents.

CWP No. 4138 of 2010
Decided on : 5.8.2015

Constitution of India, 1950- Article 226- Petitioner was appointed as an Anganwari worker pursuant to the decision made by Deputy Commissioner- this decision was affirmed by Divisional Commissioner- appointment of the petitioner was challenged by respondent No. 3 which was accepted- petitioner filed an appeal before Divisional Commissioner which was dismissed- clause 2 of the Scheme provided that an appeal can be preferred within 15 days before Deputy Commissioner and thereafter within 15 days before the Divisional Commissioner from the date of declaration of the result- result was declared on 9.8.2007 and the appeal was filed on 11.4.2008- held that appeal preferred by respondent No. 3 was barred by limitation and appeal could not have been preferred from the date of the appointment of the petitioner in view of express clause of the Scheme. (Para-2)

For the Petitioner: Mr. Sanjeev Bhushan, Advocate.

For the Respondents: Mr. R.S Thakur, Additional Advocate General for respondents No.1 & 2.
Mr. Avinash Jaryal, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The appointment of the petitioner herein as an Anganwari worker in Anganwari Centre, Rihari was made on 2.4.2008 in pursuance to a decision rendered by

the Deputy Commissioner, Shimla comprised in Annexure P-2, whereby the appeal filed by the petitioner herein assailing the selection and appointment of Pushpa Devi as an Aanganwari Worker at Anganwari Centre, Rihari was accepted by him in his decision comprised in Annexure P-2. The decision rendered in Annexure P-2 was affirmed by Divisional Commissioner Shimla in her order comprised in Annexure P-3. The respondent No.3 challenged the appointment of the petitioner herein as an Anganwari Worker at Anganwari centre, Rihari by instituting an appeal before the Deputy Commissioner, Shimla. On 17.6.2008 her appeal under order comprised in Annexure P-6 was accepted. A challenge was laid by the petitioner herein before the Divisional Commissioner, Shimla to the decision rendered by the Deputy Commissioner Shimla comprised in Annexure P-6. However the Divisional Commissioner, Shimla in his order comprised in Annexure P-7 affirmed the decision rendered by the Deputy Commissioner, Shimla. The anvil of the challenge by the respondent No.3 to the appointment of the petitioner as an Anganwari worker in Anganwari Centre, Rihari was grooved in the factum of, though her parentage being Rajput, hence merely on the score of hers marrying a scheduled caste and hers hence obtaining a scheduled caste certificate would not impute any sanctity or legitimacy to the scheduled caste certificate held/possessed by her and produced at her instance before the interviewing committee concerned nor hence the awarding of marks to her by the authorities concerned on the score of hers belonging to the scheduled caste category would be tenable. Under orders comprised in Annexures P-6 and P-7 respectively, the authorities concerned accepted the challenge anchored upon the ground aforesaid made by respondent No.3 to the appointment of the petitioner herein as an Anganwari worker. The learned counsel appearing for the petitioner herein has assailed the findings recorded in both Annexures P-6 and P-7 on the short score that both the authorities who rendered them lacked the jurisdictional competence to do so in as much as the appeal preferred by respondent No.3 herein before the Deputy Commissioner, Shimla challenging the appointment of the petitioner as an Anganwari worker was time barred. In sequel, her appeal was not maintainable so also the order in affirmation thereto rendered by the Divisional Commissioner, Shimla comprised in Annexure P-7 is also nonest. For testing and gauging the vigor of the arguments addressed before this Court by the learned counsel for the petitioner for setting aside the impugned orders, a perusal of the order comprised in Annexure P-6 is imperative. A perusal of the order comprised in Annexure P-6 unravels the fact that the learned Deputy Commissioner while rendering the order aforesaid has abstained from considering the preliminary submission raised by the petitioner herein in her reply of the appeal being time barred and has untenably adjudicated it upon merits whereas it hence necessitated its being rejected on the ground of its being barred by limitation, as such not maintainable. Vigor to the inference aforesaid is lent by an advertence to clause 12 of the scheme for appointment of Anganwari worker/helper, which stands reproduced hereinafter.

> *"Any candidate aggrieved by any order of CDPO appointing Anganwari worker/helper, may file an appeal before the Deputy Commissioner within a period of 15 days of the declaration of the result, who will decide the case within 15 days. Appeal against the order of Deputy Commissioner may be made to Divisional Commissioner within 15 days of the order of the Deputy Commissioner. This will be the final appeal."*

2. A perusal thereof discloses that limitation for preferment of an appeal by an aggrieved before the Deputy Commissioner is a period of 15 days which period is to be computed from the date of declaration of result. Given the fact as emanating on a perusal of the record produced before this Court, of the result of the test held for selecting a

candidate to the post of Anganwari worker in Anganwari Centre, Rihari having been declared on 9.8.2007. Consequently, in consonance with the apposite guidelines an appeal assailing the appointment of Pushpa Devi as an Anganwari worker with the impleadment of the petitioner herein as a party respondent while hers ranking above her was necessitated to be instituted by respondent No.3 before the appellate authority within 15 days thereafter. However, the appeal at the instance of respondent No.3 herein assailing the appointment of the petitioner as an Anganwari worker has been belatedly instituted before the appellate authority on 11.4.2008. Consequently, the appeal was grossly time barred, resultantly the Deputy commissioner Shimla was bound not to render any adjudication on merits in the appeal preferred before him by respondent No.3 assailing the appointment of the petitioner rather was obliged to reject it, as not maintainable. Resultantly also the affirmation of his order by the Divisional commissioner, Shimla too concomitantly begets the vice of jurisdictional incompetence. Even though, the learned counsel for the respondent No. 3 contends that the period of limitation for a challenge to the appointment of the petitioner herein as an Anganwari worker at the instance of respondent No.3 is to be computed from 2.4.2008 on which date she in pursuance to the renditions in Annexure P-2 stood appointed as an Anganwari worker at Anganwari Centre Rihari. However, the aforesaid submission addressed by the learned counsel for the respondent No.3 is misconceived besides legally frail, constituted by the exacting rigor of the mandate of apposite clause 12 of the scheme for appointment of an Anganwari worker/helper which stands extracted hereinabove besides with an inflexible prescription therein of an appeal at the instance of the aggrieved challenging the order of the CDPO appointing the anganwari worker/helper being preferable before the Deputy commissioner within 15 days from the date of declaration of result. Consequently, the rigor of the prescription is unbendable. In sequel, the contention of the learned counsel for the respondent No.3 that the period of limitation of 15 days contemplated besides envisaged in the apposite guidelines which stand extracted hereinabove for the filing an appeal by an aggrieved before the appellate authority for challenging the appointment of an Anganwari worker/helper arises or commences from the date of renditions in Annexures P-6 and P-7 is both unfounded and misconceived. Moreover, the said contention is beyond the rigid and inflexible prescription of apposite clause 12 of the scheme. It was open for the respondent No.3 herein to, at the earliest within 15 days from 9.8.2007 when the authority concerned declared one Pushpa Devi to be the candidate selected for appointment as an Anganwari worker at Anganwari centre, Rihari challenge her appointment. However, the respondent No.3 omitted to do so. Her omission to challenge the appointment of Pushpa Devi at the earliest in as much as within 15 days from 9.8.2007 by preferring an appeal before the Deputy Commissioner, Shimla with the impleadment of the petitioner herein as a party respondent, for hers being debarred while hers being placed above her in the rankings by the authority concerned, to on acceptance of her appeal by the appellate authority to claim appointment, estops the respondent No. 3 to belatedly concert to challenge the appointment of the petitioner. In view of above both the Annexures impugned before this Court are quashed and set aside Dehors the aforesaid, the respondents No. 1 and 2 shall not stand disempowered to in accordance with law initiate an inquiry qua the sanctity of the Scheduled Caste certificate held and produced by the petitioner before the interviewing committee concerned and thereupon determine whether the marks awarded to the petitioner on its strength in the interview/test held for selecting an Anganwari Worker/helper at Anganwari Centre Rihari was tenable or not. The petition stands disposed of as also the pending applications, if any.

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

Fithu Ram alias Pritam Chand. ...Appellant

Versus

Jit Singh and another. ...Respondents

RSA No. 231 of 2004
Reserved on: 4.8.2015
Decided on: 5.8.2015

Indian Succession Act, 1925- Section 63- Defendant pleaded that deceased had executed a Will in his favour due to the services rendered by him- Will was scribed by DW-3 and was attested by 'A' and 'J'- however, neither 'A' nor 'J' was examined to prove the validity of the Will- DW-2 is residing in Delhi and could not have looked after the deceased who was residing in the Village- scribe had not identified the thumb impression of the executant or signatures of the witnesses- testator was suffering from cancer which was at the last stage- held, that the trial Court had rightly ignored the Will. (Para-8 to 14)

For the Appellant : Mr. Rajnish K. Lal, Advocate vice counsel for the appellant.

For the Respondents : Mr. Samir Thakur, Advocate vice Ms. Salochna Kaundal, 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 26.3.2004 by the Additional District Judge, Hamirpur in Civil Appeal No. 75/98 (RBT No. 125/02).

2. "Key facts" necessary for the adjudication of this appeal are that the respondent No.1-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit for declaration and permanent injuncation against the appellant-defendnt (hereinafter referred to as the defendant" for convenience sake) as well as defendant No.2 Smt. Nehra Devi on the averments that the land detailed in the plaint measuring 10 Kanal 10 Malaras to the extent of 1/3rd share, i.e. 3 kanal 10 marlas, as per Jamabandi for the year 1987-88 was shown to be owned and possessed by deceased Bhagat Ram. The Abadi of late Sh. Bhagat Ram was situate in Khata No. 52, Khatauni No. 53, Khasra No. 262 measuring 8 marlas to the extent of ½ share as per Jamabandi for the year 1987-88 situate in Tikka Bardiar, Tappa Saproh, Tehsil Nadaun, District Hamirpur including residential house and cow-shed were situate on the suit land. Plaintiff was entitled to inherit and succeed to the estate of deceased Bhagat Ram to the extent of 1/3rd share in the suit land, house and cattle shed. Bhagat Ram died on 8.7.1991. Last rites were performed by the plaintiff. Bhagat Ram was not in a sound disposing mind and capable of executing any "will". Bhagat Ram has never executed any "will". Defendant claimed that Bhagat Ram has executed "will" in his favour.

3. Suit was contested by defendant Fithu Ram. He has supported mutation No. 195 qua the suit land dated 5.2.1992. Plaintiff was not entitled to inherit 1/3rd share of deceased Bhagat Ram. Last rites were not performed by the plaintiff. These were performed by him. Deceased Bhagat Ram was in sound disposing state of mind and was capable to

execute the "will" Bhagat Ram has executed the "will" in his favour due to the services rendered by him. The "will" was not the result of fraud, misrepresentation and the "will" has been executed in a sound disposing state of mind.

4. Replication was filed by the plaintiff. Issues were framed by the Sub Judge-II, Hamirpur on 24.11.1992. Sub Judge partly decreed the suit for joint possession vide judgment dated 16.2.1998. Defendant preferred an appeal before the Additional District Judge, Hamirpur. He dismissed the same on 26.3.2004. Hence, the present appeal. It was admitted on the following substantial question of law:

> **"Whether the assumption that the scribe could not be an attesting witness in the facts and circumstances of the case is sustainable and the statements of Deep Ram DW-3 and Abhinash Chand DW-4 who had witnessed the execution of the will could be discarded, particularly when the marginal witnesses of the will Amin Chand had died and the other witness Jaishi Ram was won over by the respondent/plaintiff."**

5. Mr. Rajnish K. Lal, learned counsel for the appellant, on the basis of the substantial question of law framed, has vehemently argued that the "will" Ex.DW-3/A was valid. He has relied upon the statements of DW-3 Deep Ram and DW-4 Abhinash Chander.

6. Mr. Samir Thakur, learned counsel for the respondents has supported the judgments and decrees passed by both the courts below.

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

8. The "will" Ex.DW-3/A is dated 1.7.1991. Bhagat Ram has died on 8.7.1991. There is no recital in the "will" Ex.DW-3/A that the same was executed in favour of defendant for the services rendered by him to Sh. Bhagat Ram. PW-1 Jit Singh has categorically deposed that he has taken his father to Delhi. He was suffering from throat cancer. He could not speak for 3-4 months. His last rites were performed at Delhi.

9. PW-2 Mast Ram has deposed that Bhagat Ram was suffering from throat cancer. He could not speak. PW-3 Khyali Ram has also deposed that Bhagat Ram was suffering from cancer. He could not speak for the last 3-4 months. PW-4 Sant Ram has deposed that Bhagat Ram was not fit to execute the "will". He was suffering from cancer and could not speak for the last 6 months. PW-5 Yogesh Sharma has proved map Ex.PW-5/A.

10. The "will" was executed, as noticed hereinabove, on 1.7.1991 and Bhagat Ram died on 8.7.1991. He was not in a position to speak. It has also come in the evidence that cancer was at the last stage. Even DW-2 Pritam Chand has admitted that Bhagat Ram was suffering from throat cancer for the last 6 moths and it was at the last stage.

11. The "will" in question has been scribed by DW-3 Deep Kumar. The attesting witnesses were Amin Chand and Jaishi Ram. Neither Amin Chand nor Jaishi Ram has been examined by the defendant to prove the validity of the will. Mr. Rajnish K. Lal has submitted that in fact Amin Chand has expired. However, no tangible evidence has been placed on record to prove this fact.

12. Mr. Rajnish K. Lal has also argued that his client was looking after Sh. Bhagat Ram. However, fact of the matter is that DW-2 Pritam Chand was residing in Delhi for the last 30 years. Thus, he could not look after him in the village.

13. Mr. Rajnish K. Lal has further argued that it was a registered "will". However, fact of the matter is that neither DW-3 Deep Kumar Scribe of the "will" nor DW-4 Abhinash Chander has deposed that they have also appended their signatures on the "will" after affixing thumb impression by Bhagat Ram and attesting witnesses. DW-3 Deep Kumar has deposed that he has scribed the "will" at the instance of Bhagat Ram, but there is no mention in the "will" Ex.DW-3/A that in fact who identified the executant before the scribe. He has not even identified the thumb impression of the executant on "will" Ex.DW-3/A. He also did not identify the signatures of Jaisi Ram and Amin Chand. Similarly, the Court has already noticed that DW-4 Abhinash Chander has not testified that the executant was personally known to him and he has affixed his thumb impression at the time of registration of the "will" in his presence. The executant was suffering from cancer. The cancer was at the last stage. He was not even able to speak. The marginal witnesses have not been examined. Statements of DW-3 Deep Kumar and DW-4 Abhinash Chander are sketchy. Thus, the will Ex.DW-3/A is surrounded by suspicious circumstances and the defendant has failed to remove the suspicious circumstances.

14. Both the courts below have correctly appreciated the oral as well as documentary evidence and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

15. The substantial question of law is answered accordingly.

16. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Himachal Pradesh State Electricity Board Ltd. ...Appellant

Versus

M/s Ahluwalia Contracts (India) Ltd. and another ...Respondents

Arb. Appeal No. 8 of 2014
Judgment reserved on: 28.7.2015
Date of Decision : August 05, 2015.

Arbitration and Conciliation Act, 1996- Section 9- Respondent No. 1 had entered into a contract with the appellant - appellant had advanced certain amounts to respondent No. 1 and respondent No. 1 had given unconditional bank guarantee(s) issued by respondent No. 2 bank in favour of the appellant- respondent No. 1 had also furnished bank guarantee(s) as Performance Guarantee(s) for the contract- respondent No. 1 filed an application under Section 9 of the Act seeking to restrain the appellant from enforcing the bank guarantee(s) which was allowed and respondents were directed to keep alive the bank guarantees by way of its renewal till the completion of the arbitral proceedings or till the decision of the question of the revocation- held, that Bank Guarantee payable by the guarantor on demand is an unconditional Bank Guarantee- beneficiary is entitled to realize such guarantee irrespective of any pending disputes except in case of fraud or where encashing bank guarantee would result in irretrievable harm or injustice- Court had issued order of

injunction on the ground that respondent No. 1 owes a considerable amount to the appellant and no prejudice would be caused to the appellant which is not a valid reason- respondent No. 1 had failed to show any equity in his favour to prove that irretrievable injury or injustice would be caused to it in case injunction is declined- appeal allowed.

(Para- 8 to 36)

Cases referred:

Hindustan Construction Co. Ltd. vs. State of Bihar and others (1999) 8 SCC 436,
U.P.Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174
U.P.State Sugar Corporation vs. Sumac International Ltd. (1997) 1 SCC 568,
BSES Limited vs. Fenner India Ltd. (2006) 2 SCC 726,
Himadri Chemicals Industries Ltd vs. Coal Tar Refining Co. (2007) 8 SCC 110,
Meghmala and others vs. G. Narasimha Reddy and others (2010) 8 SCC 383

For the Appellant	:	Mr. J.S. Bhogal, Senior Advocate, with Mr. Satish Sharma, Advocate.
For the respondents	:	Mr. S.K. Maniktala & Ms. Shweta Joolka, Advocates, for respondent No.1. Mr. Sanjay Dalmia, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Act') is directed against the judgment passed by learned Single Judge of this Court on 15.9.2014 whereby he allowed the application filed by respondent No.1 under Section 9 of the Act and restrained the appellant from invoking the bank guarantee(s) furnished by respondent No.1.

The facts in brief may be noticed.

2. The respondent No.1 had entered into two contracts with the appellant for the Design Engineering, Manufacturing, Testing of Equipment, Erection, Commissioning alongwith other allied works such as Earthmat and Civil Works on turn key basis of 132/33KV, 1x25/31.5 MVA Sub-station at Maliana near Shimla and separate formal agreements were executed between the parties pursuant to two separate letters of award, both dated 18.01.2011. While one award letter related to the supply portion of the works, the other related to the erection, commissioning and civil works.

3. At the time of start of the works, the appellant had advanced certain amounts to respondent No.1 and for securing such amounts, respondent No.1 had given unconditional bank guarantee(s) issued by respondent No.2 bank in favour of the appellant. In addition, respondent No.1 had also furnished the bank guarantee(s) as Performance Guarantee(s) for the contract. The Performance Guarantee(s) were for the amounts of Rs.72,09,680/- and Rs.28,08,180/- respectively for the works of supply and erection. The guarantees furnished to secure the advance given to respondent No.1 were for the amounts of Rs.42,24,297/- and Rs. 21,99,556/- respectively for the works of supply and erection. Thus, the total amount of the bank guarantees issued by respondent No.2 and furnished by respondent No.1 to the appellant came to Rs.1,64,41,713/-.

4. The respondent No.1 moved an application under Section 9 of the Act in which it sought the following substantive reliefs:

> *"(a) Pass an order staying operation of the letter dated 04.07.2014 bearing No. SE(D)ES/SSD-273/Maliana/2014-2168, of respondent No.1, levying liquidated damages on the petitioner and further restraining respondent No.1 and its agents, employees, servants etc. from giving any effect thereto; and/or taking any coercive action on the basis thereof;*
>
> *(b) pass an order restraining respondent No.1 by itself or through its employees, agents, servants etc. from invoking the Bank Guarantees furnished by respondent No.2 Bank on behalf of the petitioner, and as more specifically detailed in para 6 & 7 above, and further restraining respondent No.2 Bank from encashing the said Bank Guarantees furnished by respondent No.2 to respondent No.1 on behalf of the petitioner;*
>
> *(c) pass ad-interim ex-parte orders in terms of prayers (a) and (b) above, and confirm the same after notice to the respondent s."*

5. The learned Single Judge allowed the application by granting the reliefs (b) and (c) supra and directed the respondents to keep alive the bank guarantees by way of its renewal till the completion of the arbitral proceedings or the issue of revocation thereof is decided by the Arbitrator/Court.

6. It is contended by the appellant that the learned Single Judge has not taken into consideration that there was no exceptional case for grant of injunction made out by respondent No.1. Further, there was no legal ground for restraining the appellant from invoking the bank guarantees especially when admittedly substantial amounts were found due from the respondent No.1 even by the learned Single Judge towards the appellant. It is also contended that a single application for interim relief in respect of two separate arbitration agreements was not maintainable and, therefore, objections ought to have been dismissed on this short score alone.

7. On the other hand, learned counsel for the respondents have supported the order passed by the learned Single Judge.

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

8. The instant dispute relates to the release of the bank guarantees. The nature and purpose of the bank guarantees has been succinctly discussed by the Hon'ble Supreme Court in the case of ***Hindustan Construction Co. Ltd.*** vs. ***State of Bihar and others (1999) 8 SCC 436***, the relevant observations are reproduced as under:-

> "*8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor*

either in the performance of the work or in paying back to the "Government Advance", the Guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the Courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the Guarantor. This was the principle laid down by this Court in various decisions. In U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd., [1988] 1 SCC 174, the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank, [1984] 1 All E.R. 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In Svenska Handelsbanken v. Indian Charge Chrome, [1994] 1 SCC 502; Larsen & Toubro Ltd. v. Maharashtra State Electricity Board, [1995] 6 SCC 68; Hindustan Steel Works Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd., [1995] 6 SCC 76; National Thermal Power Corporation Ltd. v. Flowmeore (P) Ltd., [1995] 4 SCC 515; State of Maharashtra v. National Construction Co., [1996] 1 SCC 735; Hindustan Steel Works Construction Ltd. v. Tarapore & Co., [1996] 5 SCC 34 as also in U.P. State Sugar Corporation v. Sumac International Ltd., [1997] 1 SCC 568, the same principle has been laid down and reiterated.

9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad."

9. Law relating to invocation of Bank Guarantee is by now well settled by catena of decisions of the Hon'ble Supreme Court. The Bank Guarantee which provides that they are payable by the guarantor on demand is considered to be an unconditional Bank Guarantee. So, when in the course of commercial transaction/dealings, an unconditional Bank Guarantee is given or accepted, the beneficiary is entitled to realise such a Bank Guarantee in terms thereof irrespective of any pending disputes.

10. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

11. In the case of ***U.P.Cooperative Federation Ltd.*** vs**.** ***Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174***, which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, the Hon'ble Supreme Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, the Hon'ble Supreme Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984) [1] AER 351 at 352):

> *"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged".*

The Hon'ble Supreme Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

12. In case of ***U.P.State Sugar Corporation*** vs**.** ***Sumac International Ltd. (1997) 1 SCC 568***, the Hon'ble Supreme Court in para 12 observed as under:

> *"The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee."*

13. It is equally well settled in law that Bank Guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance, the bank has given guarantee is immaterial and of no consequence.

14. In case of ***BSES Limited*** vs. ***Fenner India Ltd. (2006) 2 SCC 726***, the Hon'ble Supreme Court in para 10 observed as under:-

> *"10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of nonintervention is when there are special equities in favour of injunction, such as when irretrievable injury or irretrievable injustice would*

occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this court, that in U.P.Sugar Corpn. vs. Sumac International Ltd. (1997) 1 SCC 568 (hereinafter U.P.State Sugar Corpn) this Court, correctly declare that the law was settled."

15. In ***Himadri Chemicals Industries Ltd*** vs**. *Coal Tar Refining Co. (2007) 8 SCC 110***, the Hon'ble Supreme Court summarized the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, in para 14, which reads as under:-

> *"(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.*
>
> *(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.*
>
> *(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.*
>
> *(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.*
>
> *(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.*
>
> *(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."*

Keeping these principles in mind, we shall now proceed to apply the same to the present case.

16. It is evident from the perusal of the impugned judgment that the only reason that weighed with the learned Single Judge in granting the injunction is that after coming to the conclusion that the respondent No.1 owes a considerable amount to the appellant, it proceeded to hold that no prejudice was likely to be caused to the appellant because the performance guarantee and bank guarantee in lieu of mobilization advance would remain in its custody and would be kept alive by the contractor. It was further observed that since the Arbitrator had already been appointed, the parties could approach the Arbitrator for settlement of the issue qua encashment of the bank guarantees during the course of arbitral proceedings.

17. . Now, in case the aforesaid reasons as set out in the impugned judgments are tested in light of the principles as have been laid down by the Hon'ble Supreme Court in the aforesaid decisions, then it can conveniently be held that none of the aforesaid principles have in fact been taken into consideration while passing the impugned judgment.

18. Learned counsel for the respondents would however vehemently argue that the learned Single Judge did not commit any error in granting the injunction, as the appellant's had played fraud.

19. Fraud is defined in Section 17 of the Indian Contract Act in the following terms:

> *"**Fraud defined**.- Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-*
>
> *(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
>
> *(2) the active concealment of a fact by one having knowledge or belief of the fact;*
>
> *(3) a promise made without any intention of performing it;*
>
> *(4) any other act fitted to deceive;*
>
> *(5) any such act or omission as the law specifically declares to be fraudulent.*
>
> *Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech."*

20. The contract of guarantee is defined under Section 126 of the Indian Contract Act in the following terms:

> *"**126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'**- A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."*

21. Bank Guarantee constitutes an agreement between the Banker and the Principal, albeit, at the instance of the promisor. When a contract of guarantee is sought to be invoked, it is primarily for the bank to plead a case of fraud and not for a promisor to set up a case of breach of contract.

22. The expression 'fraud' has been lucidly dealt with and explained in the case of ***Meghmala and others*** vs***. G. Narasimha Reddy and others (2010) 8 SCC 383*** and the Courts have been advised to take the element of fraud seriously and it has held that any act which is tainted by fraud should not be condoned and sustained and it was observed as under:

> *Fraud/Misrepresentation: -*
>
> *28. It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors. AIR 1994 SC 853). In Lazarus Estate Ltd. Vs. Besalay 1956 All. E.R. 349), the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything."*

29. In Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills & Anr. AIR 1994 SC 2151; and State of Maharashtra & Ors. Vs. Prabhu (1994) 2 SCC 481. this Court observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is, also, known to prevent the law from the crafty evasions and sub-letties invented to evade law."

30. In Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers. (1992) 1 SCC 534, it has been held as under: (SCC p. 553, para 20)

> *"20.Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."*

31. In United India Insurance Co. Ltd. Vs. Rajendra Singh & Ors. AIR 2000 SC 1165, this Court observed that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram & Anr. Vs. M. Tripura Sundari Devi (1990) 3 SCC 655; Union of India & Ors. Vs. M. Bhaskaran (1995) Suppl. 4 SCC 100; Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. Vs. Girdharilal Yadav (2004) 6 SCC 325; State of Maharashtra v. Ravi Prakash Babulalsing Parmar (2007) 1 SCC 80; Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company AIR 2007 SC 2798; and Mohammed Ibrahim & Ors. Vs. State of Bihar & Anr. (2009) 8 SCC 751).

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide Vimla (Dr.) v. Delhi Administration AIR 1963 SC 1572, Indian Bank v. Satyam Fibres (India) (P) Ltd. (1996) 5 SCC 550, State of A.P. v. T. Suryachandra Rao (2005) 6 SCC 149, K.D. Sharma v. SAIL (2008) 12 SCC 481 and Central Bank of India v. Madhulika Guruprasad Dahir (2008) 13 SCC 170.]

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide S.P. Changalvaraya Naidu (supra); Gowrishankar & Anr. Vs. Joshi Amba Shankar Family Trust & Ors. AIR 1996 SC 2202; Ram Chandra Singh Vs. Savitri Devi & Ors. (2003) 8 SCC 319; Roshan Deen Vs. Preeti Lal AIR 2002 SC 33; Ram Preeti Yadav Vs. U.P. Board of High School & Intermediate Education AIR 2003

SC 4628; and Ashok Leyland Ltd. Vs. State of Tamil Nadu & Anr. AIR 2004 SC 2836).

35. In kinch Vs. Walcott (1929) AC 482, it has been held that:

"....mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained y perjury."

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est".

23. The respondent No.1 in order to establish its plea of fraud has claimed that the exercise of powers by the appellant are of fraudulent nature and the threatening action of levying compensation is a fraud being played by the appellant. The respondent No.1 has repeatedly averred that the threatened imposition/recovery of damages amounts to gross misrepresentation, suppression and distortion of material facts, which clearly amounts to fraud being perpetrated by the appellant, giving rise to special equities in its favour. But how and in what manner the fraud has been committed is neither forthcoming nor spelled out.

24. Rule 4 of Order 6 CPC reads thus:

"4. ***Particulars to be given where necessary.***- *In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with date and items if necessary) shall be stated in the pleading."*

It is thus clear from the aforesaid provisions that the allegations in regard to fraud must be specifically and explicitly pleaded so as to enable the opposite party to reply thereto effectively.

25. That apart, the fraud in terms of the judgments of the Hon'ble Supreme Court (supra) must be of an egregious nature as to vitiate the entire underlying transaction. Having failed to raise the plea of fraud as envisaged under the law, we find no force in this plea of respondent No.1.

26. Learned counsel for respondent No. 1 would then argue that there were special equities in favour of grant of an injunction or else irretrievable injury or irretrievable injustice would be caused to respondent No.1.

27. Undoubtedly, there is another exception where the Court can grant injunction, which relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases the payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and adverse effect of such an injunction on commercial dealings in the country.

28. The respondent No. 1 has claimed that there were number of hindrances created by the appellant, which resulted in the delay of the execution of the project, such as site not being cleared and earmarked. The control room area where the existing material store was located was not vacated and therefore, the civil work for control room construction could not be done. The continuous stacking of materials/poles/ transformers/isolators in the area was always a hindrance and respondent No.1 had to demobilize on several occasions with notice to the appellant. The retaining wall design was submitted by respondent No. 1 to the appellant on 9.5.2011. However, the matter remained unresolved till as late as December, 2011. Similarly the appellant took as long as five months (19.3.2011 to 23.8.2011) to finalise the bench levels and as a result thereof the work could not be executed during the period.

29. It is further contended that though the contract specified that the time was the essence of the contract but the conduct, attitude and approach of the appellant in the matter of discharge of its reciprocal obligations left no room for any doubt that it was not ready with all that was required of it under the contract and get the work executed within the stipulated contract period. It is also contended that there were huge quantity variations and in terms of the contract stipulation, respondent No.1 was entitled to be paid for such deviations/variations, but the same was not paid.

30. We have considered these submissions of the learned counsel for respondent No.1 and are of the considered opinion that all the aforesaid contentions are matters which are required to be determined by the Arbitrator in the proceedings which are already pending before it and the same do not create any special equities in favour of respondent No. 1 entitling it to the grant of injunction.

31. As cautioned by the Hon'ble Supreme Court, the dispute between the beneficiary and the party at whose instance the bank has given guarantee, is an independent contract between the bank and the beneficiary thereof and the beneficiary is entitled to realise such a bank guarantee irrespective of any pending disputes relating to the terms of the contract. The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

32. The respondent No.1 has failed to show any special equities in its favour whereby it could be proved that irretrievable injury or irretrievable injustice would be caused to it in case the injunction is not granted. As already observed earlier, these are the dispute, which are yet to be established and determined and the matter is already pending adjudication before the Arbitrator.

33. That apart, it would be seen that even as per the case of respondent No.1, there are two separate letters of awards made in its favour vide letter dated 18.1.2011, while one award relating to the supply portion of the works, the other relating to erection, commissioning and civil works. If that be so, then the appellant is right in contending that a single application for interim relief for two separate arbitration agreements was not maintainable.

34. The respondent No. 1 has sought to justify the maintainability of the objections by invoking the provisions of Order 2 Rule 3 CPC which reads as under:

> *"**3. Joinder of causes of action**.- (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendant jointly may unite such causes of action in the same suit.*

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit."

35. We are at a lose to understand as to how the aforesaid provisions would be applicable to the facts of the instant case, more particularly, when it is not disputed even by respondent No.1 that two separate and distinct awards had been made in its favour. The mere fact that the parties are common to both the awards, would not entitle respondent No.1 in uniting the claim in one application as the cause of action in both the claims is separate and distinct. Violation or breach of one award would not essentially mean the breach or violation of the other. Moreover, the right to relief does not arise out of the same act or transaction but arises out of two separate and distinct awards. Therefore, the respondent No.1 cannot be permitted to unite in one application several causes of action by taking protection of the provisions of Rule 3 of Order 2 CPC and consequently the application preferred by respondent No.1 under Section 9 of the Act itself was not maintainable.

36. In view of the aforesaid discussion, we find merit in this appeal and the same is accordingly allowed, consequently the judgment passed by learned Single Judge on 15.9.2014 is set-aside. Pending application(s), if any, stands disposed of. Parties are left to bear their own costs.

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

Shri Karan Singh .....Appellant

Versus

Smt. Shakuntala Devi & others ....Respondents

LPA No. 51 of 2007
Decided on: 05.08.2015.

Constitution of India, 1950- Article 226- A partition application was filed, which was allowed- final partition was to be carried out in accordance with the approved mode of partition- Divisional Commissioner observed that Assistant Collector 1st Grade had prepared three khatas and had created a new path in violation of sanctioned mode of partition- it was necessary for the Assistant Collector 1st Grade to seek necessary approval of the Competent Authority to review mode of partition - he made a recommendation to Financial Commissioner (Appeals) for passing a fresh order- this recommendation was rejected by Financial Commissioner (Appeals) and the revision preferred by the appellant was allowed- Financial Commissioner (Appeals) directed to consider the recommendation of the Divisional Commissioner as well as the grounds taken in the Revision Petition and hear the parties afresh and to pass an appropriate order. (Para-2 to 10)

For the Appellant : Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.

For the Respondents : Ms. Archana Dutt, Advocate, for respondent No. 1.

Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Additional Advocate General and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 2.

Respondents No. 3 to 6 ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This Letters Patent Appeal is directed against the judgment dated 22nd June, 2007, passed by the learned Single Judge in CWP No. 807 of 2006, titled **Smt. Shakuntala Devi versus Karan Singh and others**, whereby the order dated 20.06.2006, made by the Financial Commissioner (Appeals) in Revision Petition No. 27 of 2004 came to be set aside, for short 'the impugned judgment'.

Brief Facts:

2. By the medium of the writ petition, writ petitioner-respondent herein has questioned the order dated 20th June, 2006 made by the Financial Commissioner (Appeals), Himachal Pradesh, Shimla, in Revision Petition No. 27 of 2004, on the grounds taken in the memo of the writ petition.

3. The writ petition came to be allowed vide impugned judgment dated 22.06.2007. It is apt to reproduce the operative portion of the impugned judgment herein:-

> "*It is evident from order dated 4.1.1999 that the partition was to be carried out in the manner prescribed therein. The order dated 23.3.2002 was not in conformity with order dated 4.1.1999. A specific ground had been taken before the Collector that vide order dated 23.3.2002 the partition was effected against the sanctioned mode of partition. The appellate authorities had over looked the order dated 4.1.1999 on the basis of which the partition was to be effected. The learned Divisional Commissioner had come to the just conclusion that while sanctioning the final partition, the learned Assistant Collector Ist Grade had prepared three khatas and also created a new path for the respondent through Khasra No. 1214/3 in violation of sanctioned mode of partition as well as against the report of the Local Commissioner was not agreed to. It was incumbent upon the Assistant Collector Ist Grade to seek necessary approval of the competent authority to review the mode of partition. The Financial Commissioner (Appeals) was required to look into the recommendations made by the Divisional Commissioner. The mode of partition sanctioned vide order dated 4.1.1999 could not be deviated by the Assistant Collector Ist Grade without seeking the approval for its review. The finding recorded by the Financial Commissioner (Appeals) that the plea of the petitioner was mere technicality is not based on any reasoning. The learned Financial Commissioner (Appeals) was required to go into the entire gamut of the matter instead of abruptly coming to the conclusion that litigation should come to an end.*
>
> *Accordingly, the writ petition is allowed. The order dated 20.6.2006 is quashed and set aside. The order passed by the Divisional Commissioner recommending the case of the Financial Commissioner (Appeals) dated 18.3.12004 is upheld. It is further directed that the partition be carried out on the basis of the instrument of partition drawn on 4.1.1999 within a period of six weeks from today. There shall however, no order as to costs."*

4. The parties had initiated partition proceedings before the Revenue Courts.

5. The Divisional Commissioner, Kangra Division at Dharamshala passed order dated 18.3.2004 in Revision Petition No. 349 of 2003, titled **Smt. Sudarshana Devi versus**

Shri Karan Singh and made recommendation to the Financial Commissioner (Appeals). It is apt to reproduce relevant portion of para 7 and para-8 of the order, *supra,* herein:

> *"7.....It was all the more important that total land of the parties should have been partitioned as applied for so as to avoid such occurrences in future. Therefore, the orders passed by both the courts below suffer from grave irregularity and manifest illegality which cannot stand in the eyes of law. Both the orders deserve to be set aside and the case remanded back to the Ld. A.C. Ist Grade, Dehra for de novo proceedings as per sanctioned Mode of Partition.*
>
> *8. In view of the above discussions, the case is recommended to the Financial Commissioner (Appeals) Himachal Pradesh for passing such orders as he may deem fit. The file of this court alongwith the cord of the lower courts be also sent with this order."*

6. The Divisional Commissioner had made recommendations for setting aside the orders made by both the Courts, subordinate to it, and directed the learned Assistant Collector 1st Grade, Dehra to initiate fresh partition proceedings, as per the sanctioned Mode of Partition.

7. The Financial Commissioner (Appeals) passed order dated 20th June, 2006 in Revision Petition No. 27 of 2004, whereby the recommendations made by the Divisional Commissioner vide order dated 18.03.2004 were rejected and Revision Petition No. 30/2004 filed by appellant Shri Karan Singh was allowed.

8. Feeling aggrieved, the writ petitioner, by the medium of the writ petition, has questioned the order dated 20.06.2006, made by the Financial Commissioner (Appeals) in Revision Petition No. 27 of 2004 and sought the following reliefs:

> *"It is therefore, respectfully prayed that this petition may kindly be allowed and the impugned order dated 20.6.2006 passed in Revision Petition No. 27/2004 by the learned Financial Commissioner (Appeals) Himachal Pradesh may kindly be quashed and set aside in the interest of justice."*

9. The writ petitioner has also sought for quashing the order passed by the Financial Commissioner (Appeals). At the best, the Writ Court, after quashing the order passed by the Financial Commissioner (Appeals), had to pass appropriate orders.

10. Having glance of the aforesaid discussion, we deem it proper to modify the impugned judgment and dispose of this appeal by directing the Financial Commissioner (Appeals) to consider the recommendations made by the Divisional Commissioner alongwith the grounds taken in the Revision Petition, hear the parties afresh and pass appropriate order, as warranted under law. Ordered accordingly.

11. The Financial Commissioner (Appeals) is directed to determine the said proceedings within eight weeks from today. The parties are directed to appear before the said Authority on **17th August, 2015**. Till then, the parties are directed to maintain status quo.

12. Copy of this order be kept on the writ file and a copy of this order be sent to the Financial Commissioner (Appeals) for information and compliance.

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

Oriental Insurance Co. Ltd. .....Appellant.

Versus

Nisha Devi and ors. .....Respondents.

FAO No. 51 of 2008.
Reserved on: 4.8.2015.
Decided on: 5.8.2015.

Workmen Compensation Act, 1923- Section 5- Deceased was employed as a conductor and died when he was travelling in the vehicle– insurance company contended that deceased was not a workmen and there was no relationship of employer and employee- it was duly proved on the record that the deceased was employed by respondent no. 4- he was getting wages of Rs. 2,200/- per month and Rs. 60-70 as daily allowances – the owner of the vehicle also admitted that he used to pay Rs. 2,200/- per month and Rs. 60/- as daily allowances to the deceased- it was not provided in the contract of insurance that Insurance Company will not be liable to pay the interest-held, that in these circumstances the insurer was rightly held liable to pay the compensation and interest. (Para 12 to 15)

Cases referred:

Rani Kour and others vs. Jagtar Singh and another, 2012 ACJ 2072

Manju Sarkar and others vs. Mabish Miah and others, (2014) 14 SCC 21

For the appellant: Mr. Deepak Bhasin, Advocate.

For the respondents: Mr. Anoop Rattan, Advocate, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J

This appeal is instituted against the award dated 22.10.2007, rendered by the learned Workmen's Commissioner, Dharamshala, Distt. Kangra, H.P. in Case No. 5 of 2005.

2. Key facts, necessary for the adjudication of this appeal are that Rakesh Kumar son of Prem Chand was employed by respondent No. 4 as Conductor on truck bearing registration No. HP-39A-0555. Rakesh Kumar died at 6:45 PM on 25.4.2005 when he was travelling in the truck. The truck was going from Shahpur to Kotla on 25.4.2005. FIR was registered against respondent No. 3, driver of the vehicle. The post mortem was got conducted vide PMR No. 47/2005 at Dr. R.P.M. college, Dharamshala. The deceased was earning Rs. 4500/- per month.

3. Respondent No. 3-driver, contested the petition. According to him, the accident has not taken place due his rash and negligent driving. The rest of the contents of the petition were admitted.

4. The appellant-Insurance Company also contested the petition. According to the Insurance Company, the deceased was not a "workman". The factum of the accident dated 25.4.2005 was denied.

5. The learned Commissioner, Workmen's Compensation, allowed the petition and awarded compensation amount to the tune of Rs. 3,37,436/-. The appellant-Insurance Company was directed to deposit the amount within 30 days from the date of the award. Hence, this appeal.

6. Mr. Deepak Bhasin, Advocate, for the appellant has vehemently argued that there was no employer-employee relationship in the present case. The Commissioner, Workmen Compensation, was not justified in imposing interest upon the Insurance Company. On the other hand, Mr. Anoop Rattan, Advocate, has supported the award dated 22.10.2007.

7. I have heard learned counsel for the parties at length and gone through the records and award very carefully.

8. PW-1 Smt. Nisha Devi has deposed that the deceased was her son. He was 18 years old. He was going towards Pathankot on 25.4.2005. He was working as Conductor on the truck. He met with an accident. His son died on the spot. He was earning Rs. 2500/- as wages and Rs. 60-70/- as daily allowance. PW-2 Madan Lal deposed that the accident has taken place in his presence. The deceased died on the spot. The accident had taken place due to rash and negligent driving of the driver. PW-3 Kishori Lal also deposed that the deceased met with an accident and died on the spot and the accident has taken place due to rash and negligent driving of the driver.

9. The owner of the vehicle, Vijay Kumar has appeared as RW-1. He has admitted that he was owner of truck No. HP-39A-0555. He proved route permit Ext. RW-1/A, DL Ext. RW-1/B, registration certificate Ext. RW-1/C, copy of insurance Mark "A". According to him, the accident has taken place due to failure of break of the vehicle. The Conductor Rakesh Kumar died on the spot. He used to pay him Rs. 2200/- per month. In his cross-examination, he admitted that the deceased was employed by him.

10. The driver Harbans Lal has appeared as RW-2. He admitted that he was deployed as driver of the truck. He denied the suggestion that Smt. Swarna Devi was owner of the truck. The owner was Sh. Vijay Kumar. Swarna Devi has never purchased the truck. In his cross-examination, he admitted that the vehicle was involved in the accident which resulted in the death of conductor Rakesh Kumar. He admitted that Rakesh Kumar was paid Rs. 2200/- as salary and Rs. 60/- as daily allowance.

11. RW-3 Smt. Swarna Devi has also deposed that she has never purchased any truck from Vijay Kumar. RW-5 HC Kuldeep Kumar has also admitted in his cross-examination that the owner of the truck was Sh. Vijay Kumar.

12. It is conclusively proved that the deceased Rakesh Kumar was employed by respondent No. 4 by Vijay Kumar. The accident has taken place on 25.4.2005. The truck was being driven by respondent No. 3 in a rash and negligent manner. According to PW-1 Nisha Devi, her son was getting wages of Rs. 2200/- per month and Rs. 60-70/- as daily allowance. RW-1 Vijay Kumar, has also admitted that he used to pay Rakesh Kumar Rs. 2200/- per month and Rs. 60/- as daily allowance. The learned Commissioner, Workmen's Compensation, has correctly assessed the wages of the workman deceased to Rs. 2282/- per month. The date of birth of deceased was 24.1.1988. He was 17 years of age. The learned Commissioner, Workmen's Compensation, has rightly applied the relevant factor of 227.49 and has rightly awarded interest @ 12%.

13. Mr. Deepak Bhasin, Advocate, for the appellant has failed to show any clause whereby the interest was not payable by the Insurance Company. The learned Single Judge

of Madhya Pradesh High Court (Indore Bench) in ***Rani Kour and others*** vs. ***Jagtar Singh and another***, 2012 ACJ 2072 has held that where Insurance Company has not expressly stipulated non-liability for payment of interest in the policy, it is liable to pay the interest on the amount of compensation. Learned Single Judge has held as under:

> "[14] Learned Advocate Mr. Sandip Shah appearing for respondent No. 1-original plaintiff in all the appeals referred to the documentary evidences as well as the pleadings in detail and submitted that the operations were performed on the left eye by defendant No. 3 and thereafter the operation was performed for removal of the left eye-ball by defendant No. 5 and again for cataract in the right eye the operation was performed by defendant No. 5. He submitted that if the chronology of events and the dates are considered, it is evident that there was sepsis in his left eye when the operation was performed. He submitted that with the same condition the operation could not have been performed. The submission with regard to endogenous infection in some other part of the body is misconceived as the pathological reports clearly state that the plaintiff was normal. He submitted that, thus, at the time of treating the patient when there was an injury and the blood had clotted, both defendant Nos. 3 and 4 tried to hush up, played mischief keeping the respondent-plaintiff in the dark which led to deterioration in not only the left eye but also affected his right eye. Learned Advocate Mr. Sandip Shah, therefore, submitted that if the pleadings in the form of written statement as well as the depositions are considered, it clearly suggests negligence in performance of the duty by all concerned including defendant Nos. 3 and 5. The Civil Hospital would be liable vicariously for the act of negligence by defendant No. 3.
>
> [15] He, therefore, submitted that when the person has lost vision of both the eyes because of any such carelessness or negligence, it cannot be a ground for further scrutiny on any technical grounds raised on the medical opinion. He submitted that the evidence on record as discussed at length in the impugned judgment clearly suggests that there was negligence on the part of original defendant No. 3-Dr. Bhikubhai Patel as well as defendant No. 5-Dr. Jagdishbhai Shah and both the doctors have failed in discharge of their duty exhibiting reasonable care and standard expected of a person in the medical profession. He, therefore, submitted that the appeals may be dismissed."

14. Their Lordships of the Hon'ble Supreme Court in ***Manju Sarkar and others*** vs. ***Mabish Miah and others***, (2014) 14 SCC 21 have held that in the absence of clause of contract of insurance excluding provision for interest, the insurance of company is liable to pay interest. Their Lordships have held as under:

> "13. A contention was raised by the learned counsel for the Respondent No.3 Insurance Company that they are not liable to pay the interest component and reliance was placed on the decision of New India Assurances Co. Ltd. Vs. Harshad Bhai Amrut Bhai Modhiya and another [(2006) 5 SCC 192] In the facts of the case on which the said decision arose, the contract of insurance entered into between the parties contained a proviso that the insurance granted is not extended to include any interest. In the present case there is

nothing on record to show that respondent No.3 Insurance Company either pleaded about existence of such a clause in the contract of insurance or led any evidence to the said effect and hence the said decision will not help respondent No.3 in any way and the contention raised is devoid of merit."

15. The driver was possessing valid driving licence vide Ext. RW-1/B. The route permit is Ext. RW-1/A, insurance of the vehicle is Mark RY-A. The RC is Ext. RW-1/C. The RC was in the name of Vijay Kumar as per the statement of RW-5 Kuldeep Kumar. The vehicle in question was duly ensured with the Insurance Company. Thus, the Insurance Company has rightly been held liable to pay interest. The substantial questions are answered accordingly.

16. Consequently, there is no merit in this appeal and the same is dismissed.

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

Premu and others ……Appellants.
Versus
Krishnu & ors. …….Respondents.

RSA No. 360 of 2005.
Reserved on: 04.08.2015.
Decided on: 05.08.2015.

Code of Civil Procedure, 1908- Order 2 Rule 2- Plaintiffs had earlier filed a suit regarding 14 kanals 13 marlas, which was decreed- matter was carried to the Hon'ble High Court and was ultimately decided by High Court- plaintiffs were in possession of 57 kanals 13 marlas - they claimed that area was reduced to 14 kanals 13 marlas in 1951-52- this was not challenged by them in earlier suit- held, that it was not permissible for them to file a suit for the remaining land due to the bar created by the principles of res-judicata read with Order 2 Rule 2 of C.P.C. (Para-13 to 17)

Cases referred:
Syed Mohd. Salie Labbai (Dead) by LRs and others vrs. Mohd. Hanifa (Dead) by LRs and others., AIR 1976 SC 1569
Satyadhan Ghosal and others vrs. Smt. Deorajin Debi and another, AIR 1960 SC 941
M. Nagabhushana vrs. State of Karnataka and others, (2011) 3 SCC 408,

For the appellant(s): Mr. Rajnish K. Lall, Advocate.
For the respondents: Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, (FTC) Hamirpur, H.P., dated 19.4.2005, passed in Civil Appeal No.98 of 1999/109 of 2004.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs) instituted a suit for declaration to the effect that they were tenants over the land measuring 43 kanals out of the land comprised in Khata No. 46, Khtoni No. 53, 54, Khasra Nos. 382 min, 382 min plots 2 measuring 111 kanals 12 marlas, situated in Tika Tilla, Mouza Hathol, Tehsil Nadaun, Distt. Hamirpur, H.P., as per jamabandi for the year 1989-90 and in the alternative decree for possession. According to the plaintiffs, one Sh. Nihalu son of Bhajnu grandfather of the plaintiffs was tenant at will on payment of rent under the predecessor-in-interest of the respondents-defendants (hereinafter referred to as the defendants) over the suit land comprised in Khata No. 11 min, Khatoni No. 22, Khasra Nos. 230 min, measuring 57 kanals, 13 marlas, situated in Tika Tilla, Mouza Hathol, Tehsil Nadaun, Distt. Hamirpur, H.P., as per jamabandi for the year 1915-16. The plaintiffs are successors-in-interest of late Nihalu son of Bhajnu. It was further averred that even later on late Sh. Nihalu, grandfather of the plaintiffs was shown as a tenant on payment of rent under the ancestors of defendants, namely, Shankar etc. as per jamabandi for the year 1923-24. The plaintiffs had earlier filed a suit titled as Santu versus Dharmu regarding 14 kanals 13 marlas. According to the plaintiffs, the suit land now remains only 43 kanals 13 marlas. The suit was decided by the learned Sub Judge, Hamirpur on 7.11.1978. The appeal was decided by the learned District Judge, Hamirpur on 5.5.1982 and the Regular Second Appeal preferred against the judgment and decree dated 5.5.1982 was decided alongwith the Cross Objections on 20.8.1992 vide Ext. DA. The defendants in collusion with the revenue staff got reduced the tenancy land and only 18 kanals 13 marlas of land in suit was shown under the tenancy of ancestors of the plaintiffs though the plaintiffs and their ancestors continued to cultivate the same as tenants on payment of rent and the reduction of area under the tenancy of the plaintiffs and their ancestors from 57 kanals 13 marlas to 18 kanals 13 marlas was illegal, null and void. It is further averred that again in 1951-52, the area under the tenancy of ancestors of plaintiffs was reduced to 14 kanals 13 marlas without any lawful order from any authority.

3. The suit was contested by the defendants. According to them, the suit was barred by principles of *res judicata*. No replication was filed by the plaintiffs. The following issues were framed on the pleadings of the parties by the learned Sr. Sub Judge, Hamirpur on 5.8.1994:

> "1. Whether the suit is barred by the principles of *res judicata ? OPD.*
>
> 2. Whether this Court has the jurisdiction to try this suit ? OPP.
>
> 3. Relief."

4. The learned Senior Sub Judge, Hamirpur, dismissed the suit on 16.8.1999. The plaintiffs, feeling aggrieved, preferred an appeal before the learned District Judge, Hamirpur, H.P. The learned District Judge, Hamirpur, dismissed the same on 19.4.2005. Hence this Regular Second Appeal.

5. The RSA was admitted on the following substantial questions of law on 20.7.2005:

> "1. Whether the assumptions of the court below that the suit was barred by principles of res-judicata and order 2 rule 2 is sustainable in law when neither the pleadings of the previous suit nor the issues framed therein nor the judgment and decree had been placed on record?
>
> 2. Whether in view of admitted tenancy of the plaintiff and their not being ejected in accordance with law and in view of the provisions of the Punjab Security of Land Tenure Act, 1953 and the provisions of the H.P.

Land Tenancy Act, the plaintiff/appellant had become owners of the land and the suit was liable to be decreed ?"

6. Mr. Rajnish K. Lall, Advocate, appearing vice for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that both the Courts below have come to the wrong conclusion that the suit was barred by principles of res-judicata. He then contended that his clients have become owners of the land as per the provisions of the Punjab Security of Land Tenure Act, 1953 and the provisions of the H.P. Land Tenancy Act. On the other hand, Ms. Devyani Sharma, Advocate, for the defendants has supported the judgments and decrees passed by both the Courts below.

7. Since the substantial questions of law are interconnected, they are being discussed together to avoid repetition of discussion of evidence.

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

9. PW-1 Premu has testified that the land in suit is 43 kanals which they have been cultivating from the time of their ancestors. Their ancestors were tenant at will. The defendants never came in possession of the suit land nor they have ever ejected them from the suit land. Their ancestors used to give half produce to the owners as rent and now they have sown wheat over the same. They have never received any notice for correction of the entries nor their statements were ever recorded and about two years ago, the defendants picked up a quarrel in order to take possession and then only they came to know about the wrong entries.

10. PW-2 Bhagwan Singh and PW-3 Bidhi Chand have corroborated the statement of the plaintiff. The plaintiffs have also proved on record the copy of jamabandi for the year 1989-90 Ext. P-1, copy of jamabandi for the year 1915-16 Ext. P-2, copy of jamabandi for the year 1923-24 Ext. P-3, copy of jamabandi for the year 1939-40 Ext. P-4, copy of jamabandi for the year 1951-52, Ext. P-5, copy of jamabandi for the year 1965-66 Ext. P-6 and copy of rapat rojnamcha dated 30.3.1965 Ext. P-7 in order to show that they have been coming in possession as tenant at will from the time of their ancestors.

11. DW-1 Dharmu has deposed that they are three brothers, having 111 kanals 12 marlas of land in this Tikka and the land measuring 14 kanals 13 marlas remained under the tenancy of three tenants Santu, Palu and Premu. They filed suit for ejectment of tenants. They became the owners of the land in suit in 1955-56. The three tenants were ejected on 30.3.1965. They took the possession of the land in suit in 1966-67. They were cultivating the suit land.

12. DW-2 Ram Dass deposed that the defendant Dharmu is in the possession of the suit land. The defendants have proved copy of judgment of this High Court dated 20.8.1992 Ext. DA, copy of rapat rojnamcha dated 2.10.1967 Ext. D-1, copy of order of registrar K-1 of Collector, Hamirpur Ext. D-2, copy of application for ejectment Ext. D-3 and Ext. D-4 copy of judgment of the Sub Judge, Hamirpur dated 7.11.1978 Ext. D-5 to prove that the plaintiffs and their ancestors were tenants over the 14 kanals 13 marlas land and not over 57 kanals 13 marlas.

13. The plaintiffs have categorically averred in para 4 & 5 of the plaint that they have earlier filed suit titled as Santu Vrs. Dharmu qua 14 kanals 13 marlas. The litigation has come up to this Court. The learned Sub Judge, Hamirpur, passed the judgment and decree dated 7.11.1978. The appeal preferred before the learned District Judge was decided on 5.5.1982 and thereafter, the RSA was decided by this Court from the judgment and

decree dated 5.5.1982 on 20.8.1992. The plaintiffs have also admitted in para 7 of the plaint that later on in 1951-52, the area under the tenancy of ancestors of plaintiffs has been reduced to 14 kanals 13 marlas without any lawful orders. The earlier suit was filed qua 14 kanals 13 marlas. In case they were in possession of 57 kanals 13 marlas, as claimed by them, they would have filed suit qua 57 kanals 13 marlas. It is reiterated that the plaintiffs have specifically stated in para 7 that the area was reduced to 14 kanals 13 marlas in 1951-52. This was challenged by them in the suit which has attained finality up to this Court. In view of this, the plaintiffs could not file the suit for remaining land of 43 kanals on the principles of res judicata read with order 2 Rule 2 CPC. The earlier suit bearing No. 205 of 1978 was between the same parties qua the same subject matter of the suit land which found the subject matter of Civil Suit No. 98 of 1993.

14. Their lordships of the Hon'ble Supreme Court in the case of ***Syed Mohd. Salie Labbai (Dead) by LRs and others vrs. Mohd. Hanifa (Dead) by LRs and others.,*** reported in ***AIR 1976 SC 1569,*** have held that before the plea of res judicata can be given effect to, the following conditions must be proved:

(1) That the litigating parties must be the same;

(2) That the subject matter of the suit also must be identical;

(3) That the matter must be finally decided between the parties, and

(4) that the suit must be decided by a Court of competent jurisdiction.

8. In the instant case according to the plaintiffs / respondents, the identity of the subject-matter in the present suit is quite different from the one which was adjudicated upon in the suits which formed the basis of the previous litigation. In our opinion the best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata. Unfortunately however in this case the pleadings of the suits instituted by the parties have not at all been filed and we have to rely upon the facts as mentioned in the judgments themselves. It is well settled that pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment. We would also like to note what the High Court has said on the question of res judicata. The High Court found that although the litigation between the parties lasted for a pretty long time it was never decided whether all or any of the suit properties constituted a public trust. Both the parties appear to have taken extreme stands but even despite the fact that the previous judgments contained an incidental finding that the mosque was a public property and so was the burial ground, the effect of these findings was nullified in 1939 when the High Court held that even if the properties in dispute were the exclusive properties of the Labbais, this expression was not meant to indicate that they were their private properties. This, in our opinion, clearly shows that the public charcter of the wakf or of the mosque was never in issue. The High Court on this point found as follows:

> "We are, therefore, of the view, that the issue as to whether the properties constituted a public trust having been never raised and decided between the parties in any of the prior suits, O.S. No. 9 of 1956 on that question was not barred by res judicata. The finding of the Court below in this regard is affirmed."

The Trial Court had also negatived the plea of res judicata taken by the defendants."

15. In the present case, the litigating parties are the same, the subject matter of the suit was identical and the matter had been finally decided between the parties by the court of competent jurisdiction. The issue involved in the subsequent suit was directly and substantially involved in the earlier suit bearing No. 205 of 1978. The cause of the action was also the same. Mr. Rajnish K. Lall, Advocate, for the plaintiffs could not satisfy the Court as to why the whole claim was not included in the earlier suit bearing No. 205 of 1978. The plaintiffs were bound to include the whole claim while filing Civil Suit No. 205 of 1978 and in case he has not included the same, it would be deemed to have been relinquished and this afterwards he could not sue in respect of the portion so omitted and relinquished.

16. In the case of ***Satyadhan Ghosal and others vrs. Smt. Deorajin Debi and another,*** reported in ***AIR 1960 SC 941,*** their lordships of the Hon'ble Supreme Court have held that the principle of res judicata is based on the need of giving a finality to judicial decisions. When a matter, whether on a question of fact or on a question of law, has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. It has been held as follows:

> "7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or on a question of law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> 8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again ?"

17. Their lordships of the Hon'ble Supreme Court in the case of ***M. Nagabhushana vrs. State of Karnataka and others,*** reported in ***(2011) 3 SCC 408,*** have held that it is a fundamental principle sustaining the rule of law in ensuring finality of litigation. It prevents the approaching of courts for re-agitating same issues which have already been finally decided between the parties. In the absence of such principles great oppression might be caused in pretext of law and there would be no end to litigation. Rich and malicious litigant will succeed in vexing his opponent by repetitive suits and actions resulting in weaker party to relinquish his rights. It has been held as follows:

12. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, `interest *reipublicae ut sit finis litium'* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *`nemo debet bis vexari, si constat curiae quod sit pro una et eademn cause'* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties.

17. It may be noted in this context that while applying the principles of Res Judicata the Court should not be hampered by any technical rules of interpretation. It has been very categorically opined by Sir Lawrence Jenkins that "the application of the rule by Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law". [See Sheoparsan Singh Vs. Rammanandan Prasad Singh, (1916) 1 I.L.R. 43 Cal. 694 at page 706 (P.C.)]."

18. Now, as far as the plea of tenancy under the Punjab Security of land and Tenure Act, 1953 and H.P. Land Tenancy Act is concerned, neither there are pleadings to this effect nor evidence has been led. The substantial questions of law are answered accordingly.

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

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

CWPs No. 2220, 2221, 2222 and 2225 of 2015
Judgment Reserved on 27.7.2015
Date of decision: 05.08.2015

1. *CWP No. 2220 of 2015*

Sh. Satish Singh. ...Petitioner

Versus

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

2. *CWP No. 2221 of 2015*
Sh. Vijay Kumar. ...Petitioner
Versus
The State of H.P. and others. ...Respondents
3. *CWP No. 2222 of 2015*
Sh. Surinder Singh. ...Petitioner
Versus
The State of H.P. and others. ...Respondents
4. *CWP No. 2225 of 2015*
Smt. Champa Devi. ...Petitioner
Versus
The State of H.P. and others. ...Respondents

Constitution of India, 1950- Article 226- Liquor vend licence was granted to the petitioner for the year 2014-2015- State Government decided to renew the old licences to the same vendors provided they were ready to pay 15% hike in the licence fee- petitioner pleaded that respondents had unilaterally clubbed the units and were wrongly putting the clubbed units to auction by lottery system- respondents pleaded that units were regrouped for the purpose of revenue- held, that there is no fundamental right to do trade or business in intoxicants- however, State cannot act arbitrarily - it must comply with the quality while granting right or privilege of manufacturing or selling liquor- Court should not interfere with the policy decision, unless the policy suffers from malafide, unreasonableness, arbitrariness or unfairness- State is within its right to club the units and to allot them- a person does not acquire any right to get the allotment on deposit of money required from the allotment- a public notice was issued to every person and the petitioner had right to file fresh application for clubbing the units- petition dismissed. (Para-7 to 19)

Cases referred:
M/s Rishi Pal& Co. Vs. State of Himachal Pradesh and others, AIR 1999 SC 541
Hem Raj Vs. State of H.P. & Others 2015(1) Him.L.R 561

For the Petitioner(s): Mr.Onkar Jairath & Mr.Narender Reddy, Advocates.
For the Respondents: Mr.Sharwan Dogra, Advocate General with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General for respondents No.1 to 4 in CWP Nos. 2220, 2221 and 2222 of 2015 and also for respondent No. 5 in CWP No.2225 of 2015.
Mr. Arvind Sharma, Advocate, for respondent No. 5 in CWP Nos. 2220, 2221 and 2222 of 2015.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

Since common question of law arises for consideration in all these petitions, therefore, they are taken up together for disposal.

2. The petitioners were all granted liquor vends license L-14 for the year 2014-15. As per the policy/instructions regulating the renewal of liquor license, the State Government decided to renew the old licenses to the same vendors in case they were ready

to pay 15% hike in the license fee. It is also not in dispute that the petitioners after completion of codal formalities had sought renewal of the licenses.

3. The grievance of the petitioners in CWP Nos.2220, 2221 and 2222 of 2015 is that instead of renewing licenses, the respondents without intimating the petitioners unilaterally decided to issue their units No. 100, 102 and 103 by lottery system. It is further averred that the respondents have illegally clubbed the units with the other units and then put their vends to auction by lottery system.

4. The respondents in their reply have sought to justify their action by claiming that the entire exercise undertaken by them was in the interest of revenue and the process of allotment by clubbing the vends had to be resorted to because no application for unit No. 105 had been received and it had become almost impossible to allot this unit and the revenue loss to the State exchequer appeared to be inevitable. Consequently, alternative modes of allotment became imperative to save the Government revenue. It became essential to resort to special provisions of Conditions No. 1.1 and 1.2 of Chapter-I of Announcements of Excise Allotments for the year 2015-16 and Rule 34 of the Himachal Pradesh Liquor License Rules, 1986, as amended from time to time. It is only after considering the various factors of viability of the pending Unit No. 105 and the possibility of its allotment in combination with other units/vends that it was clubbed with Unit Nos. 91, 100, 102 and 103. Therefore, in short the reply filed on behalf of the respondents is the allotment by regrouping and reforming the units and non-conformation of the renewal applications etc. has been done exclusively in revenue interest and the same is, therefore, valid.

5. The petitioner in CWP No. 2225 of 2015 was running unit No. 63 and he too had applied for the renewal of the same after depositing the requisite fee. The grievance is that, this unit has not been allotted to him, but the same was clubbed with unit No. 25 and has not been allotted so far.

6. The respondents in their reply have contended that since there was no offer for unit No. 25, having a license fee of Rs.71,74,064/-, consequently the same was clubbed with unit No. 63 in the interest of revenue.

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

7. It is more than settled that there is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants-its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.

8. Once the State Government has framed rules for granting of privilege of sale of liquor and announced policies from time to time, the State cannot act arbitrarily and discriminately and it must comply with the quality clause while granting exclusive right or privilege of manufacturing or selling liquor.

9. It also cannot be disputed that in exercise of its powers of judicial review, this Court would ordinarily not interfere with the policy decisions of the executive, unless the policy can be faulted on the ground of malafide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and malafide will render the policy unconstitutional. However, if the policy cannot be touched on any of these grounds,

the mere fact that it may affect business interests of a party does not justify invalidating the policy.

10. It has repeatedly been pointed out by the Hon'ble Apex Court that in tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The Courts are not expected to express their opinion as to whether at a particular point of time in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State.

11. It is not in dispute that as per condition No. 1.3 of Chapter-I of the Announcements of Excise Allotments for the year 2015-16, the allotment and renewal of licenses of the vends/units have been made subject to the confirmation of the Excise & Taxation Commissioner-cum-Financial Commissioner (Excise), Himachal Pradesh and the said clause reads as follows:-

> *"1.3 All the allotments of the vends/units or renewal of licenses of the vends/units shall be subject to confirmation by the Excise & Taxation Commissioner-cum-Financial Commissioner (Excise), Himachal Pradesh, who reserves the right to reject any allotment/renewal without assigning any reason for doing so."*

It is while exercising the powers under this clause the respondents did not confirm the applications for renewal of the liquor licenses, despite payment of 15% hike in the license fee.

12. Therefore, in such circumstances, the further question which arises for consideration is as to whether the grouping of vends in order to save guard the government revenue is legal and valid.

13. In ***M/s Rishi Pal& Co. Vs. State of Himachal Pradesh and others, AIR 1999 SC 541,*** the Hon'ble Supreme Court considered the issue of grouping of vends to save guard the government revenue and also considered the powers of the Financial Commissioner to do so and it was held:-

> *"5……The Rules entitled the Financial Commissioner to grant licenses by the modes of auction, negotiations, private contract, allotment, tenders and any other arrangement or mode which he considers expedient. It also entitles the Financial Commissioner, by order in writing, to change the mode of granting the license prior to its grant for a financial year. We do not find in this Rule, or anywhere else, any restriction in regard to the regrouping of vends. If, for any reason, the bids at an auction cannot be accepted, the Financial Commissioner can decide to resort to negotiations instead. He can do so provided the bids at the auction have not been confirmed. The Financial Commissioner would then be entitled to negotiate for one vend or two vends combined, the objective being to get the maximum revenue for the State. A clause that relates to auctions and permits the Presiding Officer thereat to regroup vends does not imply that the power to do so does not exist in the Financial Commissioner.*
>
> *"6……All those who had participated in the auction on that date had been given notice of the negotiations that were proposed for 25th March, 1995. It is true that those negotiations were originally proposed for Shimla-1 and II unit but it became clear during the proceedings that the revenue of the State would be greater if the Rampur Bushair unit was combined with the Shimla-I and II unit. Therefore, the participants in the negotiations were told to return in the afternoon. When informed about the decision in this*

behalf they asked for some time, which was given, and it was thereafter that the highest amount offered by the other party (respondent No. 6) was accepted. There is irrefutable evidence in the form of a photostat copy of the record of the persons present at the negotiations that the Contractor was represented throughout. The Contractor was the highest bidder at the auction for the Rampur Bushair unit and its bid had not been accepted. It was given notice, in the circumstances, the authorities cannot be faulted at its instance for lack of adequate publicity, considering also the fact that the new financial year when the period of the license would commence was fast approaching."

14. Similar issue came up for consideration before this Court in ***CWP No. 473 of 2008*** titled as ***Narender Pal Vs. State of H.P. & others*** and it was held as under:-

"…. The decision of respondent No.2 not to confirm the renewal of licence in favour of the petitioners cannot be faulted with. The power of non-confirming the renewal of licence by respondent No.2 is easily traceable to the conditions of the Announcements Excise Allotment/Renewal 2008-2009. It is clearly stipulated in sub-para (ii) of para 1 of the Announcements Excise Allotment/Renewal 2008-2009 that it is always open to respondent No.2 to sell all or any of the licenses by taking following steps:

a. by allotment;

b. by auction or by private contract;

c. by calling tenders or by negotiations;

d. by draw of lots or by renewal;

e. by any other arrangement (including combination of the foregoing modes.

This para is to be read with the note appended to para 4 which specifically provides for the re-formation of vends to fetch maximum revenue to the State. Respondent No.2 is also authorized to change the mode of grant of the licences whenever necessary before the actual grant of the licence. The petitioners had no vested right to get the licences renewed merely by submitting applications and depositing requisite fee. The ultimate renewal was to be confirmed by respondent No. 2 on the basis of the provisions stated hereinabove in extenso. The petitioners had no legitimate expectations to get the licences renewed. In view of the observations made hereinabove there is neither any irregularity, irrationality or procedural impropriety in the allotment process adopted by respondents No. 1 to 3."

15. Identical issue came up recently before a coordinate Bench of this Court in ***Hem Raj Vs. State of H.P. & Others 2015(1) Him.L.R 561***, wherein like the present case, the unit of the petitioner therein had been clubbed and not re-allotted to him, despite he having deposited the enhanced license fee. This Court held that the mere factum of deposited license fee would not bestow or invest upon the petitioner right to obtain renewal of the license, unless, until the action of the respondents could be termed as malafide or ultra vires to rules, the Court would not interfere. It is apt to reproduce paras 4 and 5 of the judgment, which reads thus:-

"4. Both the submissions aforesaid are bereft of legal tenacity or sinew. The mere factum of the petitioner having deposited license fee before the authority concerned as divulged by

Annexure P-4 does not perse bestow or invest in him a right to obtain renewal of hitherto Unit No. 23 especially when Unit No. 23 has faded into extinction on its alongwith units No. 20, 25, 27 and 44 having come to be realigned, reconstituted and regrouped, unless it was demonstrated that the re-alignment of units aforesaid alongwith Unit No.23 qua which a liquor license was initially issued in favour of the petitioner under Annexure P-1 smacks of malafidies or is ultra vires the rules. Besides it was entailed upon the counsel for the petitioner to substantiate that such regrouping has been constituted or such regrouping/realigning is generated by exercise of extra constitutional power by the respondents or is prodded by whimsicality or caprice arising from no authority or power vesting in the authority concerned to create a new group by amalgamation or regrouping. In the aforesaid scenario the nonrenewal of license qua Unit No. 23 in favour of the petitioner would be ridden with the vice of arbitrariness and concomitant illegality. However, an incisive perusal of the record demonstrates that the authority concerned is vested by empowerment contained in Rule 13 and 34 of the Himachal Pradesh Liquor License Rules, 1986 read with Conditions No. 1.2, 1.3 and 3.18 of the Excise Allotment/Renewal Announcements for the year 2014-15 to carry out regrouping/realignment of liquor Units/Vends and concomitantly to amalgamate Units. In fact an un-circumscribed/unfettered power is vested in the Financial Commissioner to carry out regrouping of liquor units. The plenitude of powers vested in the Financial Commissioner to carry out realignment of liquor units and on such regrouping reconstitute and assign them a new unit number has been upheld in a decision reported in M/s Rishi Pal and Co. vs. State of H.P. and others, 1998(5) SCC 333. Besides vires thereof has been upheld in a decision rendered by this Court in Civil Writ Petition No. 473 of 2008 decided on 25.09.2008. In face thereof the act of the respondents to render extinct Unit No. 23 qua which a liquor license was initially issued in favour of the petitioner under Annexure P-1 by its tenable act of on its regrouping/realignment with other Units bearing No. 20, 25, 27 and 44 ascribe to it a new unit No. 45 cannot obviously bestow any right in the petitioner herein to on merger of Unit No. 23 with other Units aforesaid claim a vested or entrenched right merely on the anvil of his having deposited the revenue fees qua one of the Units forming a part of newly constituted Unit No. 45 for the latter renewal in his favour. Moreso, when the license initially issued under Annexure P-1 qua one of the Units forming part of newly constituted unit No. 45 has faded into extinction. In other words, when Unit No. 23 no longer exists or has faded into oblivion, no vested/subsisted rights endure in the petitioner to claim renewal of license qua a part of reconstituted unit number in his favour. He though does have a right to participate in the process for allotment or issuance of license qua newly constituted Unit No. 45 and in case he was interdicted or forbidden to participate in the

process for allotment /issuance of license qua newly constituted Unit No. 45 on its coming into being on regrouping/realignment of units aforesaid then he could tenably agitate before this Court that such interdiction imposed upon him by executive fiat acquires the taint of bias and is liable to be interfered with by this Court in the exercise of writ jurisdiction for facilitating the cherished constitutional tenet of equality. However, when as apparent on an incisive rummaging of the record that the petitioner was advised by the respondents to file an application before the authority concerned, before 12.00 noon on 26.3.2014 for his being considered for issuance of license or his being allotted on completion of codal formalities newly constituted Unit No. 45, yet his having omitted to participate renders him ill-equipped to agitate that in the process undertaken by the respondents to allot newly constituted Unit No. 45 he has been denied an opportunity compatible with other bidders seeking allotment/issuance of license qua it, besides estops him from contending that the process initiated by the respondents for allotment of the newly constituted Unit No. 45 by omitting elicitation of his participation is ridden with arbitrariness.

5. The discussion aforesaid unfolds the factum that the authority concerned in taking to obliterate Unit No. 23 by resorting to a tenable or legally ordained act of regrouping/realignment had not committed any illegality nor had indulged in any act smacking of arbitrariness. Besides when the rule of promissory estoppel as sought to be invoked by the petitioner on the strength of his having deposited license fee for the since obliterated Unit No. 23 by a tenable act of regrouping by the respondents, hence, stands effacement, obviously it cannot surge forth to the rescue of the petitioner for his claiming renewal of liquor license qua Unit No. 23."

16. Faced with this situation, the learned counsel for the petitioners would then seek to invoke the plea of estoppel on the ground of having deposited the 15% hike in the license fee. To our mind, even this submission is equally without any force and has been squarely answered in Hem Raj's case (supra), wherein it was further held as under:-

"6. For reiteration, In the face of Unit No. 23 standing obliteration it would be an abuse of the equitable principle of promissory estoppels to stretch it to a scenario as in the instant case when with the unit qua which it is canvassed to be purportedly generated has faded into oblivion by a tenable act of the respondents. In other words, it would be a travesty of the rules permitting exercise of un-circumscribed powers embedded in the authority concerned to create/constitute new units by regrouping of hitherto units in case merely on the strength of deposit of license fees by the petitioner herein for renewal of an extinct liquor vend/unit, the equitable principle of promissory estoppel is permitted to sprout. The latter rule is a rule of equity and is unavailable to be drawn, when rules as in the instant case governing the issuance of liquor license to the aspirants exist. Even otherwise, the act of the respondents in rendering extinct Unit No. 23 by resorting to by its tenable act of regrouping create a

new unit no. 45 is buoyed or fostered by a profiteering motive of the Government. Annexures P-9 and P-10 portray that since no application for renewal of license in respect of four units namely Kunihar, Darlamore, Bhararighat and Dumehar having a license fee of Rs.4.23 crores were received, as such, for want of receipt of application for renewal of units aforesaid which application if received would have reared a revenue of Rs.4.23 crores to the State exchequer the legally authorized step of the respondent to regroup of the units aforesaid with Unit No. 23 and thereby create/constitute newly ascribed unit No. 45 is to be presumed to be a legally warranted step prodded by statistical data. The petitioner has omitted to display any material portraying that no statistical data loses of revenue to the respondents existed before they proceeded to obliterate units aforesaid and on regrouping/realigning thereof theirs having constituted a new Unit No. 45 in which the participation of the petitioner herein too was elicited. For lack of adduction on record of the aforesaid material an invincible conclusion which ensues is that the respondents in resorting to the act of regrouping/realigning of Units and on such regrouping, ascribing a new unit number had carried out a stretched and thoughtful exercise. Preponderantly then, when the said exercise is not imaginative or conjectural rather is obviously to buor revenue or obviate loss to the exchequer in the sum of Rs.4.23 Crores, it cannot be construed to be smacking of any malafides or arbitrariness."

17. The petitioners would then contend that no notice had been given to them before regrouping the vends. This submission too is without any force, because a public notice dated 26.3.2015 in CWP Nos. 2220, 2221 and 2222 of 2015 was issued by the respondents for inviting applications for allotment of remaining licenses of liquor (L-2) and for manufacturing and retail sale of country fermented liquor (L-20B) for the year 2015-16. Unit No. 105 was clubbed with Unit Nos. 91, 100, 102 and 103. In all, 38 applications were received for allotment of the clubbed units and by a draw of lots it was respondent No. 5, who was declared the successful allottee. Therefore, in view of the above, it can safely be concluded that the entire process has been carried out by the respondents in a just and legal manner and no undue advantage has thereby been conferred upon respondent No. 5 in the aforesaid writ petitions.

18. Similarly, no undue advantage has been conferred upon respondent No. 6 in CWP No. 2225 of 2015, whereby the units No. 25 and 63 were clubbed and put to auction, more particularly in light of the fact that even the petitioner was given an opportunity to file fresh application for this clubbed unit i.e. 25 and 63.

19. There is no provision in either the policy or the Rules which may stipulate automatic or deemed confirmation of any application for renewal and the same have been made subject to confirmation by the Financial Commissioner and this provision as noticed above has already been upheld by the Hon'ble Supreme Court in Rishi Pal's case supra. Having said so, we find no merit in these petitions and the same are accordingly dismissed, leaving the parties to bear their costs.

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

Shambhu Nath S/o Sh. Shiv Ram ....Petitioner
Versus
Gurpiara Singh S/o Sh. Julfi Ram. ....Non-Petitioner.

CMPMO No. 43 of 2015
Order reserved on 10.7.2015
Date of Order: 05.08.2015

Code of Civil Procedure, 1908- Order 39 Rule 7- Suit for possession decreed by trial court—appeal by defendant-application under Order 39 Rule 7 for appointment of L.C by the defendant in first appeal rejected – held, that application was not maintainable in the absence of main application under order 39 C.P.C - suits and appeals are governed by different provisions of C.P.C - application dismissed and liberty reserved to the applicant to file an application under Order 41 Rule 27 C.P.C. (Para 6 to 9)

For petitioner : Mr. N.K. Thakur, Sr. Advocate with Mr. Rahul Verma, Advocate.
For Non-Petitioner: Mr. B.N. Mehta, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Article 227 of the Constitution of India against interim order dated 2.1.2015 upon application under Order 39 Rule 7 Code of Civil Procedure passed by learned Additional District Judge Una in CMA No. 745 of 2014 filed in Civil Appeal No. 196 of 2014.

Brief facts of the case:

2. Sh. Gurpiara Singh filed Civil Suit RBT No. 36/14/03 titled Gurpiara Singh vs. Shambu Nath for possession and permanent prohibitory injunction. Learned trial Court passed decree of possession of land comprised in khasra No. 1463/1 specifically depicted in demarcation report Ext. P-1 and field map Ext. P-2. Learned trial Court further granted decree of prohibitory injunction restraining Sh. Shambu Nath and others from interfering over the suit land. Learned trial Court further directed the defendants namely Sh. Shambu Nath and others to handover the vacant possession of land in favour of plaintiff Gurpiara Singh. Learned trial Court further held that demarcation report Ext. P-1 and field map Ext. P-2 shall form part and parcel of the decree sheet.

3. Feeling aggrieved against judgment and decree passed by learned trial Court Shambu Nath filed civil appeal titled Shambu Nath vs. Gurpiara Singh and others.

4. During the pendency of civil appeal before learned first appellate Court Sh. Shambu Nath filed CMA No. 745 of 2014 under Order 39 Rule 7 read with Section 151 CPC for appointment of Local Commissioner to visit the spot and to report about existing factual position with regard to demolition of boundary wall comprising in khasra No. 1459. Learned first appellate Court dismissed the application holding that if the application is allowed same would tantamount to help Sh. Shambhu Nath to create additional evidence in his favour in civil appeal.

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

6. General principle is that appellate Court should not travel outside record of learned trial Court. Trial Courts are governed as per provisions relating to suits in Code of Civil Procedure 1908 and appellate Courts are governed as per the provisions mentioned under Order XLI and part-VII Sections 96 to 112 Code of Civil Procedure 1908. Court is of the opinion that there are different procedures for trial Courts and appellate Courts as per Code of Civil Procedure 1908. It is held that appeals are governed under the procedure of Order XLI of Code of Civil Procedure 1908 and as per procedure mentioned in Part-VII from Section 96 to 112 of CPC. It is held that there is specific provision for adducing additional evidence before the learned appellate Courts under Order XLI Rule 27 CPC. Order XLI Rule 27 CPC is quoted:-

7. "**Production of additional evidence in Appellate Court.-** (1) The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the appellate Court except

(a) That Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted

[(aa) That party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence such evidence was not within his knowledge or could not after the exercise of due diligence be produced by him at the time when the decree appealed against was passed]

(b) That appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause

Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason for its admission."

8. As per Order XLI Rule 27 party would not be allowed to produce any additional evidence whether oral or documentary in the appellate Court except as per the provisions mentioned under Order XLI Rule 27 CPC. It is held that for recording oral as well as documentary evidence before appellate Court provisions of Order XLI Rule 27 CPC would be attracted before the appellate Court. Sh. Shambu Nath did not file any application under Order XLI Rule 27 CPC before the learned first appellate Court. On the contrary Sh. Shambu Nath filed application under Order XXXIX Rule 7 CPC before first appellate Court directly without pendency of any application under Order XXXIX CPC before first appellate Court. It is well settled law that application under Order XXXIX Rule 7 CPC is filed where main interim application is pending under Order XXXIX CPC before competent Court of law for disposal. No interim application under any provision of XXXIX CPC was pending before learned first appellate Court in the present case. In view of the fact that Sh. Shambu Nath did not file any application under Order XLI Rule 27 before learned first appellate Court and in view of the fact that no application for interim order under Order XXXIX was pending before learned first appellate Court it is held that it is not expedient in the ends of justice to interfere in the order of learned first appellate Court.

9. In view of the above stated facts petition filed under Article 227 of the Constitution of India is dismissed. Order of learned first appellate Court passed in CMA No. 745 of 2014 dated 2.1.2015 is affirmed. However petitioner Sh. Shambu Nath will be at

liberty to file application under Order XLI Rule 27 CPC 1908 as per exigency of the circumstances before learned first appellate Court for appointment of local commissioner in accordance with law. File of learned trial Court along with certify copy of order be transmitted forthwith. Parties are directed to appear before learned trial Court on date 28.08.2015. Petition filed under Article 227 of the Constitution of India is disposed of. Pending applications if any also disposed of. No order as to costs.

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

State of HP and others .....Appellants
Versus
Ramji Dass .....Respondent.

LPA No. 245 of 2010
Date of decision: 5th August, 2015.

Constitution of India, 1950- Article 226- Writ Court had quashed the order and had granted the liberty to the appellants to conduct a fresh inquiry- appellants apprehended that writ petitioner had retired and that fact may not come in their way while conducting fresh inquiry- held, that inquiry initiated prior to the retirement of the employee can be continued even after his retirement. (Para-1 to 3)

For the appellants: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Addl. AGs, and Mr. J.K. Verma, Deputy Advocate General.
For the respondent: Mr.P.P. Chauhan, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment dated 17.5.2010, made by the learned Single Judge of this Court in CWP(T) No.2568/2008, titled *Sh.Ramji Dass versus State of H.P. and others,* whereby the writ petition came to be allowed and order dated 20th April, 2003 was quashed and the liberty was granted to the appellants herein to conduct fresh inquiry in terms of para 8 of the judgment, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. The only apprehension of the appellants is that the writ petitioner-respondent herein has retired and that may not come in their way in conducting fresh inquiry against him.

3. It is settled law that inquiry initiated before the retirement of an employee, cannot be a ground to quash the proceedings or to drop the same after his retirement.

4. With these observations, the impugned judgment is upheld and the LPA is dismissed as such, alongwith pending applications, if any.

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

Vijay Kumar Son of Sh Balak Ram ....Petitioner.
Versus
State of H.P. ....Non-petitioner.

Cr.MP(M) No. 878 of 2015.
Order reserved on: 31.7.2015.
Date of Order: August 5, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302, 452, 323, 504, 506 and 34 of IPC- it is not permissible for the Court granting the bail to appreciate the testimony of witnesses when the prosecution evidence is being led – petitioner cannot claim to be released on bail on the ground that another female accused has been released on bail as the female accused is covered by a special provision - while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- petitioner is facing heinous and grave criminal charges of murder- evidence is being recorded and in case of release on bail, trial would be adversely effected- petition dismissed. (Para- 6 to 10)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the petitioner: Mr. N.S.Chandel, Advocate.
For non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following order 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 bail relating to FIR No.64 of 2014 dated 8.5.2014 registered under Sections 302, 452, 323, 504, 506 and 34 of the Indian Penal Code at Police Station Barmana District Bilaspur HP.

2. It is pleaded that petitioner is innocent and petitioner has been falsely implicated in the present case. It is pleaded that there is no direct or indirect evidence connecting the petitioner with alleged commission of crime. It is further pleaded that investigation of case is completed and investigating agency did not require personal custody of the petitioner. It is further pleaded that petitioner is only bread earning member of his family. It is further pleaded that brother of petitioner and deceased were married without consent of the parents and they were disowned by the family. It is further pleaded that petitioner was involved in unnecessary criminal litigation without any evidence against the petitioner. It is further pleaded that deceased had herself placed on fire. It is further pleaded by petitioner that most of material witnesses already stood examined by prosecution. It is further pleaded by petitioner that other female co-accused already enlarged on bail and

petitioner is also entitled to be released on bail on the concept of parity. Prayer for acceptance of bail petition filed under Section 439 Cr.P.C sought.

3. Per contra police report filed. There is recital in the police report that deceased Anjana Kumari wife of Kamal Kumar was teacher in Oxford School Barmana and she was preparing herself for going to school between 8.00 to 8.45 a.m. on dated 8.5.2014. There is further recital in the police report that deceased and her husband Kamal Kumar used to reside separately from accused persons. There is further recital in the police report that mother-in-law Smt. Ram Pyari father-in-law Sh. Balak Ram and brother-in-law Sh. Vijay Kumar who are residing in the upper portion of the house came down and started abusing to deceased Anjana Kumari and her husband Kamal Kumar. There is further recital in the police report that Balak Ram father-in-law of the deceased Anjana Kumari threw gallon of kerosene oil upon the body of deceased Anjana Kumari and other co-accused namely Vijay Kumar and Ram Pyari caught hold husband of deceased so that husband of deceased could not save his deceased wife Anjana Kumari from burnt injuries. There is further recital in the police report that after pouring the entire gallon of kerosene oil upon the body of deceased Anjana Kumari co-accused Balak Ram lit fire with match box upon body of deceased Anjana Kumari. There is further recital in the police report that deceased Anjana Kumari sustained 90% burnt injuries and there is further recital in the police report that husband of deceased Sh. Kamal Kumar also sustained injuries. There is further recital in the police report that after registration of case site plan was prepared and burnt clothes of deceased were took into possession vide seizure memo. There is further recital in the police report that co-accused Balak Ram retired from Police Department and he also tried to cause disappearance of evidence. There is further recital in the police report that deceased was referred to IGMC Hospital Shimla. There is further recital in the police report that on dated 24.6.2014 deceased died. There is further recital in the police report that as per post mortem report deceased died as a result of septicemic shock 72% thermal injury case. There is further recital in the police report that relations between deceased and accused were not cordial because deceased married with Kamal Kumar against the consent of parents of Kamal Kumar. There is further recital in the police report that eye witness of the instant case is Kamal Kumar and statement of Kamal Kumar was recorded under Section 164 Cr.P.C. There is further recital in the police report that co-accused Ram Pyari and co-accused Vijay Kumar caught hold Kamal Kumar when co-accused Balak Ram threw kerosene oil upon the body of deceased and when co-accused Balak Ram lit fire with match box upon body of deceased. There is further recital in the police report that co-accused Ram Pyari already stood released on bail by the High Court of Himachal Pradesh and there is further recital in the police report that challan already stood filed in the Court on dated 31.7.2014. There is further recital in the police report that if the applicant is released on bail then applicant will induce and threaten prosecution witnesses. There is further recital in the police report that if the applicant is released on bail trial of the case will be adversely affected. There is further recital in police report that evidence of prosecution witnesses are under process. Prayer for rejection of bail petition sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused entire records carefully.

5. Following points arise for determination in the present bail petition:

(1) Whether petitioner is entitled to be released on bail 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 on the basis of testimony of PW1 Shashi Pal Sharma, PW2 Rajiv Kumar, PW3 Smt.Satya Devi and PW4 Kamal Kumar bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that it is not expedient in the ends of justice to give finding upon the testimony of PW1 to PW4 at this stage. Court is of the opinion that if any findings are given upon the testimony of PW1 to PW4 the same would effect regular trial of the case. Court is of the opinion that it is not expedient in the ends of justice to appreciate the testimony of PW1 to PW4 on merits in bail petition when prosecution evidence is under process before learned trial Court.

8. Another submission of learned Advocate appearing on behalf of petitioner that co-accused Ram Pyari female already stood released on bail and on the concept of parity Vijay Kumar petitioner be also released on bail is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that there is special provision of bail to minors, female, sick and old age persons. It is held that petitioner Vijay Kumar who is a male cannot seek bail on the ground of parity because special provision of bail in heinous criminal offence is not available to male. There is prima facie evidence on record that deceased Anjana Kumari aged 27 years was set on fire when deceased Anjana Kumari was in her matrimonial house.

9. Another submission of learned Advocate appearing on behalf of petitioner that deceased Anjana Kumari herself set on fire when she was in her matrimonial house cannot be decided at this stage and the same fact will be decided by learned trial Court when entire evidence of prosecution will be concluded and when learned trial Court will dispose of the case upon merits.

10. Another submission of learned Advocate appearing on behalf of petitioner that petitioner is only bread earning member of his family and on this ground bail petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that petitioner is facing heinous and grave criminal charges of murder under Section 302 IPC. It is well settled law that criminal Court should not be guided by the sentiments but the criminal Court are under legal obligation to dispose of the criminal cases strictly in accordance with law and strictly in accordance with proof facts placed on record. It is well settled law that at the time of granting bail following factors are to 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) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It is held that keeping in view the gravity of criminal offence punishable under Section 302 IPC and keeping in view the fact that examination of prosecution witnesses are under process before learned trial Court it is not expedient in the ends of justice to release the petitioner on bail at this stage of the case. Court is of the opinion that if petitioner is released on bail at this stage then trial of the case

will be adversely effected. Court is of the opinion that if petitioner is released on bail at this stage of case then interest of State and general public will be adversely effected.

11. Another submission of learned Additional Advocate General appearing on behalf of non-petitioner that if the petitioner is released on bail at this stage of the case then petitioner will induce or threat the prosecution witnesses is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of Court that if the petitioner is released on bail at this stage then petitioner will induce or threat prosecution witnesses. In view of above stated facts it is not expedient in the ends of justice to release petitioner on bail at this stage of case. Bail petition of the petitioner already stood rejected by Hon'ble High Court of HP on dated 31.12.2014 in Cr.MP(M) No.1324 of 2014 and there is no changed circumstance in the present case after rejection of bail petition by Hon'ble High Court. Hence point No.1 is answered in negative.

Point No.2(Final Order).

12. In view of the above stated facts bail petition filed under Section 439 of the Code of Criminal Procedure 1973 is rejected. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of the case in any manner. As the petitioner is in judicial custody learned trial Court will dispose of the case expeditiously in accordance with law. Bail petition is disposed of. All pending application(s) if any are also disposed of.

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

Ajay Kumar ....Appellant
Versus
Anita Devi ....Respondent

FAO(HMA) No. 61/2008
Reserved on: 5.8.2015
Decided on. 6.8.2015

Hindu Marriage Act, 1955- Section 13- Husband sought divorce against his wife on the ground of cruelty and desertion alleging that his wife was hot tampered lady – she used to misbehave with him and his parents and also used to desert him by leaving him without any reason -wife alleged cruelty in reply and proved cruelty, dowry demands and harassment in evidence - son of the parties appeared in the witnesses-box and supported the mother- evidence led by the wife proved that she was subjected to cruelty by her husband and compelled to leave the conjugal home- the husband cannot take the advantage of his own wrong-not entitled to the decree- petition rightly dismissed by the trial court-appeal also dismissed. (Para 10 & 11)

Cases referred:

Shobha Rani v. Madhukar Reddi AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476
Pankaj Mahajan vs. Dimple Alias Kajal (2011) 12 SCC 1
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288

Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Lachman Utamchand Kirpalani versus Meena alias Mota, AIR 1964 SC 40
Rohini Kumari versus Narendra Singh, AIR 1972 SC 459

For the Appellant : Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.
For the Respondent : None

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 29.10.2007 rendered by learned Additional District Judge, Sirmaur District at Nahan in HMA Petition No. 6-N/3 of 2003.

2. "Key facts" necessary for the adjudication of the present appeal are that appellant has filed a divorce petition under Section 13 of the Hindu Marriage Act, for dissolution of marriage. Marriage was solemnised between the parties in the year 1985 at Naha as per Hindu rites and customs. Relations between the parties remained cordial till October, 1988. However, after October, 1988, respondent subject him with cruelty. In December, 1988, appellant started living separately from the parents. In the year 1990, respondent left the house of the appellant. Thereafter, respondent left the house of the appellant on 8.2.2001 without his consent. Respondent deserted the appellant for a continuous period of about more than two years without any reason and cause. Petition was contested by the respondent factum of marriage is admitted. According to the respondent, appellant wanted to get rid of her. She was not able to conceive a child and hence, appellant intended to solemnise second marriage. She used to look after the parents of the appellant. Appellant used to misbehave with her being habitual drunkard. He used to give her beatings. She was ready and willing to join the company of the appellant but appellant was not allowing her to do so with a view to get divorce.

3. Learned Additional District Judge framed issues on 19.8.2004. He dismissed the petition on 29.10.2007. Hence, this appeal.

4. Mr. Bhupender Gupta, learned Senior Advocate has argued that the respondent used to subject appellant to cruelty and she has also deserted him.

5. I have heard the learned senior counsel for the appellant and also gone through the record carefully.

6. Appellant has appeared as PW-1. According to him, marriage was solemnised in the year 1985. Relations between the parties remained cordial till October, 1988. After that respondent started picking up quarrels with him. She used to pressurize him to live separately from his parents. He conceded to her request. They started living separately. However, behaviour of respondent did not change. she left his house without his consent in October, 1990. She went to her parental house. Appellant went to bring her back. However, on 8.2.2001, respondent again left the house and thereafter she has never returned.

7. PW-2 Rattan Singh deposed that respondent treated appellant with cruelty. She deserted him. In his cross-examination, he deposed that relations between the parties remained cordial. However, they used to pick up quarrel. Cause was not known to him.

8. No other witness has been examined by the appellant.

9. Respondent has appeared as RW-1. According to her, appellant used to pick up quarrels with her after taking liquor. He used to give her beatings. Appellant used to throw her out of his house. She was forced to live in the house of her parents. Her parents used to send her back after making her understand and she used to come back to the house of appellant, where appellant used to ask her to leave the house. He intended to solemnise second marriage.

10. Statement of respondent is corroborated by her father S.S. Thakur. He also deposed that initially relations between the parties remained cordial. However, after some time, dispute arose between the parties for inability of respondent to conceive a child.

11. Appellant has failed to prove that he has been subjected to cruelty by the respondent. It was for the appellant to prove cruelty. The instances given by him of cruelty are too vague and general in nature. It has come on record that appellant used to misbehave with the respondent. He used to throw her out of matrimonial house and she was forced to live with her parents. According to her, since she failed to conceive child, appellant used to proclaim that he would contract second marriage. Appellant can not be permitted to take advantage of his own wrongs. He created an atmosphere which has led respondent to leave his company. There is no tangible evidence to prove that appellant made sincere efforts to pursue respondent to come back rather it has come in the statement of respondent as RW-1 that she was ready and willing live with him but he has refused to accept her. Appellant, in his cross-examination, has admitted that respondent was ready and willing to join the company of appellant but he was not allowing her to join his company. Thus, the plea of the appellant that respondent deserted him, can not be believed. He has not allowed respondent to join her matrimonial house despite her willingness and readiness. It is appellant, who has deserted the respondent and forced her to live with her parents. Appellant has miserably failed to prove that respondent was treating him with cruelty and she was guilty of deserting him.

12. Their Lordships of the Hon'ble Supreme Court in case **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term “cruelty” as under:

> **“4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty"has not been defined. Indeed it could not have been defined. It has been used in elation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.**

5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

13. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent

or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

14. Their Lordships of the Hon'ble Supreme Court have held in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

15. Their Lordships of the Hon'ble Supreme Court have held in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> **".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."**

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> **"5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."**

16. Their Lordships of the Hon'ble Supreme Court have held in **Pankaj Mahajan vs. Dimple Alias Kajal** reported in (2011) 12 SCC 1, as under

> **"36. From the pleadings and evidence, the following instances of cruelty are specifically pleaded and stated. They are:**
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> > **i. Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace.**

ii. Pushing the appellant from the staircase resulting into fracture of his right forearm.

iii. Slapping the appellant and assaulting him. iv. Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him.

v. Not attending to household chores and not even making food for the appellant, leaving him to fend for himself.

vi. Not taking care of the baby.

vii. Insulting the parents of the appellant and misbehaving with them.

viii. Forcing the appellant to live separately from his parents.

ix. Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises.

x. Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant.

xi. Always quarreling with the appellant and abusing him.

xii. Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant.

17. Their Lordships of the Hon'ble Supreme Court have held in **Vishwanath Agrawal vs. Sarla Vishwanath Agrawal** reported in **(2012) 7 SCC 288** as under:

> **"22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.**
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> **28. In Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582 it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."**

18. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships

have held that desertion is a matter of interference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> “What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-
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> "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".
>
> The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-
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> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.
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> The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".
>
> Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act,

the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

19. Their Lordships of the Hon'ble Supreme Court in ***Lachman Utamchand Kirpalani*** *versus* ***Meena alias Mota***, AIR 1964 SC 40 have held that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. Their Lordships have further held that the burden of proving desertion - the 'factum' as well as the 'animus deserendi' is on the petitioner and

he or she has to establish beyond reasonable doubt to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. Their Lordships have held as under:

> “The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal for Bombay where the Court had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act, 1947 whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhavati, 1956 SCR 838; ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.) Vol. 12 was cited with approval :
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> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the order without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases." The position was thus further explained by this Court. "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently the cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of bring cohabitation permanently to an end (animus deserndi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.. . . . . Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time." Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled Law that the burden of proving desertion -
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> the "factum" as well as the "animus deserendi" - is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the

Court that the desertion was without just cause. As Dunning, L. observed : (Dunn v. Dunn (1948) 2 All ER 822 at p. 823) :

"The burden he (Counsel for the husband) said was on her to prove just cause (for living apart). The argumentcontains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional, burden raised by the state of the evidence . . . . . The legal burden throughout this case is on the husband, as petitioner, to prove that this wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the Court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

20. Their Lordships of the Hon'ble Supreme Court in ***Smt. Rohini Kumari versus Narendra Singh***, AIR 1972 SC 459 have explained the expression 'desertion' to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage.

"Under Section 10 (1) (a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955 under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn. Page 223 with regard to the elements of desertion According to that statement for the

offence of desertion there must be two elements present on the side of the deserting spouse namely, the factum, i.e. physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him."

21. In view of the discussion and analysis made herein above, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

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

Court on its own motion Ref:- Krishan Chand ...Petitioner.

Versus

The State of H.P. & others ...Respondents.

CWPIL No. 17 of 2014
Date of Order: 06.08.2015

Constitution of India, 1950- Article 226- Directions were issued by the High Court on which a Committee was convened and it was decided that auction will be the only viable method to fulfill the directions issued by the High Court- Divisional Forest Officers were directed to conduct the auction and to monitor the exercise- State prayed that it should be permitted to carry out the auction – State directed to conduct videography of the apple trees, other fruit bearing trees and the crops standing on the encroached land and also of the auction proceedings- State directed to proceed with FIR registered against the encroacher.

(Para-2 to 6)

Present: Mr. J.L. Bhardwaj, Advocate, as Amicus Curiae.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 8.

Mr. Satyen Vaidya, Advocate, for respondent No. 9.

The following order of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Respondents No. 1 and 2 have filed the affidavit. It is apt to reproduce relevant portion of para 2 of the said affidavit herein:

> *"2. That in order to comply the Hon'ble Court directions a meeting was held under the Chairmanship of Shri P. Mitra, Chief Secretary, Government of Himachal Pradesh on 29.7.2015 regarding the implementation of the aforesaid orders of this Hon'ble Court. Additional Chief Secretary (Forests) to the Government of Himachal Pradesh and the Director General of Police also attended this meeting and following decisions have been taken to comply with the aforesaid orders of this Hon'ble Court in letter and spirit. The copy of the minutes is enclosed as Annexure-I.*
>
> *(i) It was noted that the Hon'ble High Court has directed the plucking and sale of apples. It was felt that auction of the fruits will be the only viable method to achieve the directions of the Hon'ble High Court. Therefore, it was decided that the concerned Range Forest Officers shall conduct on the spot auction of apples and other fruits bearing orchards on encroached forest land immediately without further loss of time, since these crops are about to reach the ripening stage and any delay in the process shall only cause these crops to perish. Publicity regarding this should be made in the authorised market yards. The Divisional Forest Officers concerned shall ensure that these auctions are carried out in a time bound manner. The concerned CCFs/CFs (Territorial & Wildlife) shall monitor the entire exercise and ensure the compliance of the aforesaid orders of Hon'ble High Court in letter and spirit."*

2. Learned Advocate General prayed that the State-respondents be permitted to conduct the auction of the apples, other fruits and crops.

3. At this stage, learned Amicus Curiae stated at the Bar that the videography of the auction be conducted in the presence of the Tehsildar and the Range Forest Officer concerned.

4. The respondents have not filed the details of the encroachers and the total description of the land encroached upon. It is also not known as to what is the number of fruit bearing trees standing on the encroached forest land in the entire State.

5. It is apt to record herein that respondents No. 2, 4 and 6 have filed the status report in compliance to order, dated 06.04.2015 and, in paras 8 and 9 of the said affidavit, have given number of the cases, which have been lodged against the defaulters/ encroachers. It is apt to reproduce paras 8 and 9 of the said status report herein:

"8. That upto 30.06.2015, in the State of H.P. 2509 FIRs against 2527 cases of more than 10 bighas of encroached forest land were registered with Police. It is humbly submitted that in Para-3 of the Status report filed in this Hon'ble Court during this Month, total number of FIRs were shown 2513 inadvertently instead of 2509. Out of 2527 cases, demarcation in 2520 cases have been completed and 2515 cases have been challaned in the judicial courts. Only 7 cases (i.e. 6 cases of Shimla and 1 of Kinnaur District) are pending for demarcation.

9. That upto 30.06.2015, in the State of H.P. out of 9735 cases of less than 10 bighas of encroached forest land, proceedings in 7244 cases have been completed by the Divisional Forest Officers-cum-Collectors under the H.P. Public Premises (Eviction & Rent Recovery) Act, 1971 and 2491 cases are in the process of completion of proceedings. Out of 7244 cases in 3893 cases of encroached forest land has been vacated from the illegal possession of the encroachers."

6. In the given circumstances, we deem it proper to pass following directions:

(i) The State-respondents are directed to make videography of the apple trees, other fruit bearing trees and the crops standing on the encroached forest land and also of the auction proceedings.

(ii) Lodging of FIRs does not mean that the encroachment proceedings have come to an end, are to be kept under eclipse. FIR relates to trespass and other offences punishable under the applicable penal laws, but the apple trees, other fruit bearing trees, crops and other encroachments made on the forest land are to be removed in terms of the mandate of law read with the orders passed by this Court from time to time and the fruits/crops are to be dealt with in terms of the said orders.

(iii) Encroachment on one inch or on thousand inches, is an encroachment and the encroachers are liable to be evicted and dealt with under law.

7. Respondents are directed to file fresh status reports/compliance reports in terms of order, dated 27.07.2015 read with the orders already passed, within four weeks.

8. List on **28th September, 2015.** Copy **dasti.**

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

Imran Khan ...Petitioner.

Versus

State of H.P. & others ...Respondents.

CWP No. 980 of 2007
Order Reserved on: 04.08.2015
Date of Order: 06.08.2015

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition for directing the State and Wakf Authority to evict unauthorized person and to remove encroachment made in the mosques at Shimla- Wakf authorities had arrived at a settlement with the occupants of the hall which shows that their possession was permissive- the authorities directed to take action in the matter and to decide the matter as early as possible preferably in four weeks. (Para-5 to 10)

Present: Ms. Anjana Khan, Advocate, for the petitioner.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1, 4 and 5.
Mr. B.S. Attri, Advocate, for respondents No. 2 and 3.
Mr. Hamender Chandel, Advocate, for respondent No. 6.

The following order of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The writ petitioner has invoked the jurisdiction of this Court by the medium of public interest litigation for commanding the respondents, i.e. the State and the Wakf authorities, to evict the unauthorized persons and remove the encroachments made in the mosques in Shimla.

2. Orders have been made from time to time. It is apt to reproduce order, dated 08.07.2014, made by this Court herein:

> *"It pains us to record herein that neither the Wakf Board nor the SDM concerned are doing the needful in terms of the orders passed by this Court and are evading the process of law. In terms of the status report filed by the State, it appears that they had to take all steps by 30th May, 2014 and were under legal obligation to file status thereafter, which has not been done.*
>
> *2. Mr. J.K. Verma, learned Deputy Advocate General, stated at the Bar that physical verification was made in presence of one of the officers of the Wakf Board and it was found that some persons, who were evicted earlier, have re-entered and some other persons have also taken over illegal possession and the Wakf Authorities have been asked to pass appropriate orders. His statement is taken on record. But, no such status report is on the file.*

> *3. In the given circumstances, we deem it proper to direct respondent No. 3 to pass appropriate orders warranted under law, enabling respondents No. 1, 4 and 5 to execute the eviction orders.*
>
> *4. At this stage, Mr. B.S. Attri, learned counsel for respondent No. 3, stated at the Bar that some persons have filed suits before the Civil Court/Wakf Tribunal. All the Civil Courts in Shimla are directed to decide these cases as early as possible, preferably within one month. Wakf Board is directed to examine the issue and pass orders within the same period and also to examine the recent judgment of the Apex Court in* ***Faseela M. versus Munnerul Islam Madrasa Committee and another,*** *reported i****n 2014 AIR SCW 2503,*** *whether the Wakf Board has power, jurisdiction and competence to hear such cases.*
>
> *5. All the authorities are directed to submit reports within four weeks. List on 12th August, 2014."*

3. Respondents have filed status reports. This Court, after taking into consideration the reports, directed the respondents-authorities to take steps, as required under law, for evicting the unauthorized occupants and removing the encroachments.

4. Mr. G.D. Verma, learned Senior Counsel, appeared on behalf of the Wakf authorities and brought into the notice of the Court that the Wakf authorities have settled the dispute with the occupants of the hall of the Jama Masjid Mosque and sought time to place the same on record, has placed the said documents on record alongwith compliance report, dated 11.05.2015.

5. We have gone through the compliance report filed on behalf of respondents No. 2 and 3, i.e. the Wakf authorities, and the settlement arrived at between the Chairman of the Wakf Board and the occupants of the hall of Jama Masjid.

6. It is apt to reproduce relevant portion of the said document herein:

> *".....*
>
> *(iii) The request for reservation of space in hall would be made in writing 2 days in advance and in no case permit for more than 15 days will be issued at one stretch without the prior approval of Chief Executive Officer, HP Wakf Board. Maintenance charges @Rs. 20/- per day or as may be decided by the H.P. Wakf Board from time to time will be charged from time to time from the applicant before issuance of the permit.*
>
> *(iv) Only the permit holders in whose name the permit is issued or reservation is made would be allowed to stay in the Hall. Any occupant staying without permit/ permission of the H.P. Wakf Board will be liable to pay @ Rs. 1000/- per day for use of space and will also be liable to be prosecuted under the law.*
>
> *....."*

7. Thus, the said persons cannot be said to be unauthorized occupants, but are in permissive possession. The said document is made part of the file.

8. The compliance report filed by the Wakf authorities also deals with the encroachments made in Boileauganj Mosque and Kutub Masjid and it is stated that some cases are pending before this Court, the Wakf Tribunal and other Wakf authorities, particulars of which have been given in paras 4 (ii) and (iii) of the compliance report.

9. The authorities are directed to decide the matters pending before them as early as possible, preferably within four weeks.

10. Registrar (Judicial) is directed to list the case(s) pending before this Court before the Bench(es), having the Roster, in the next week if date(s) is/are not fixed and if date(s) is/are fixed, then on the date(s) fixed, before the Bench, which has made the order or which is having the Roster. Request is made to the Hon'ble Judge(s), hearing the case(s) to decide the said case(s) as early as possible, preferably within four weeks.

11. The Wakf authorities are directed to furnish details of the other eviction proceedings drawn against the encroachers, which are yet to be taken to its logical end.

12. We also deem it proper to direct the Secretary (Revenue) to the Government of Himachal Pradesh and the Chairman of the Himachal Pradesh Wakf Board to furnish details of the Wakf property(ies) encroached upon in the entire State of Himachal Pradesh, particulars of the persons, who have encroached upon the same, the action/ proceedings drawn and the output of the said action/proceedings, by or before the next date.

13. List on **7th September, 2015.** Copy **dasti.**

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

Jagdev Singh and another ...Petitioners

Versus

Subhash Chand and another ...Respondents

CMPMO No. 265 of 2015
Reserved on: 4.8.2015
Decided on: 6.8.2015

Code of Civil Procedure, 1908- Section 151- An order of status quo was passed by the trial Court- defendants put in appearance but continued with the construction- held, that all the Courts possess inherent power to do right and undo wrong- police help can be granted to ensure effective implementation of temporary injunction- application allowed and S.P. Kangra directed to provide police help for execution of the order.

Cases referred:

The State of Bihar Vs. Usha Devi and another, AIR 1956 Patna 455

Rayapati Audemma Vs. Pothineni Narasimham, AIR 1971 Andhra Pradesh 53

Jaishi Ram and others Vs. Salig Ram, 1981 Sim. L.C. 156

P. Shanker Rao vs. Smt. B. Susheela, AIR 2000 Andhra Pradesh 214

N. Karpagam and others vs. P. Deivanaiammal alias Deivathal alais Deivathayee Ammal, AIR 2003 Madras 219

Sk. Yousuf and others vs. Shaik Madhar Saheb, AIR 2003 Andhra Pradesh 44
Satnam Singh vs. Dr. Triloki Nath Chugh and others, AIR 2004 Punjab and Haryana 373
Nirabai J. Patil vs. Narayan D. Patil and others, AIR 2004 Bombay 225

For the Petitioners : Mr. Ajay Sharma, Advocate.
For the Respondents : Rajnish K. Lal, Advocate

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge

This petition is instituted against the order dated 1.5.2015 passed by the Civil Judge (Junior Division), Dehra, District Kangra in CMA No. 187/2015 in Civil Suit No. 75/2012.

2. "Key facts" necessary for the adjudication of this appeal are that petitioners-plaintiffs (herein after referred to as the 'plaintiffs' for convenience sake) have filed a suit for permanent prohibitory injunction thereby seeking restraint orders against the respondents-defendants (hereinafter referred to as the defendants" for convenience sake) from changing nature of the suit land in any manner whatsoever and from removing/felling trees from the suit land till the partition and in the alternative mandatory injunction seeking direction to the defendants to restore the original position by demolition of any structure raised. Alongwith the suit, plaintiffs have also moved an application under order 39 rule 1 and 2 of the Code of Civil Procedure for interim injunction.

3. Learned Civil Judge (Junior Division), Dehra vide order dated 9.4.2015 directed the defendants to show cause why the application be not allowed and in the meanwhile the parties were directed to maintain status quo qua raising any construction, cutting, felling or removing the trees and changing the nature of the suit land till further orders. Civil Judge (Senior Division) also appointed Local Commissioner vide order dated 20.4.2015. The report submitted by the Local Commissioner is dated 21.4.2015 (Annexure P-2). However, fact of the matter is that though the defendants put in appearance on 18.4.2015 but have resumed the construction work on 19.4.2015. It is in these circumstances plaintiffs moved an application under section 151 of the Code of Civil Procedure seeking police assistance.

4. The application was contested by the defendants. Trial court dismissed the application on 1.5.2015 on the ground that the relief of police assistance was not available even in the event of success of the application under order 39 rule 2-A of the Code of Civil Procedure.

5. The orders passed by the Courts must be complied with in letter and spirit in order to maintain rule of law. The trial Court can not show helplessness in getting its orders executed. The Court has immense power to undo the wrong in the course of administration of justice.

6. All Courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their Constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alique, concedit, conceditur et id sine quo res ipsa esse non potest* (when the law gives a person anything, it gives him that also without which the thing itself cannot exist).

7. The learned Single Judge in AIR 1956 Patna 455 titled as **The State of Bihar** Vs. **Usha Devi and another** has held that if a Court comes to the conclusion that an order passed under Order 39 Rules 1 or 2 has been disobeyed and by a contravention of that order the other party in the suit has done something for its own advantage to the prejudice of the other party, it is open to the Court under inherent jurisdiction to bring back the party to a position where it originally stood as if the order passed by the Court has not been contravened. The learned Single Judge has held as under:

> *"3. Mr. Shahi, appearing for the State of Bihar, has contended that the order is without jurisdiction. According to his contention, the State of Bihar had already taken possession of the land in dispute long before the institution of the suit on 6-3-1954, and, therefore, the overt act, if any, which had been committed by the State of Bihar had not been committed after the passing of the interim injunction. In that view of the matter, the learned Munsif, it has been argued, was not justified to pass the order to re-deliver possession. Whatever may be the allegations or counter-allegations of the parties in respect to the present position of the parties relating to the land, this much, however, is obviously clear that the State of Bihar had not come in possession of that land till 26-10-1953, when a notice was issued by the Revenue Sub-divisional Officer, Giridih, calling upon the Raja of Jharia to give possession of the Bhandar to the State of Bihar. The dispute, therefore, if any, as to possession of the land, between the parties must have begun sometime thereafter. And in the course of that, it is not denied that the contractor of the State of Bihar had either forcibly or in some other way succeeded in dismantling some portion of the eastern room of that Bhandar. It was at this stage that the suit giving rise to this application was instituted on 6-3-1954, and also an order of interim injunction was passed against the State of Bihar restraining them from dismantling it any further and from dispossessing the plaintiff from that Bhandar. It, therefore, cannot be said with certainty that at the time when the order for injunction was passed, the State of Bihar had in fact completely taken possession of the land in dispute, though they might have succeeded in dismantling some portion of it here and there. This is to some extent clear also from the concession made by the Govt. Pleader in the court below in the course of the hearing of the application for interim injunction. The learned Munsif in his order has stated:"the learned pleader for the defendants submitted that the defendants have made alterations during the pendency of the suit but if the defendants have done so they have done so at their own risk knowing full well that the plaintiff had already prayed for an order of injunction and the matter was subjudice". This statement of fact by the learned Munsif shows that the entire position of the parties in respect of the land in dispute at that point of time was in a fluid condition. On one side the State of Bihar was trying to dismantle the whole thing and on the other the plaintiff was trying to save the property from their possession as far as possible. That being so, it cannot be said that the State of Bihar had in fact come into complete possession of the property at about point of time. Subsequent thereto, it is not denied that the State of Bihar, had been restrained from further demolishing that house and thereby interfering with the possession of the plaintiff. The order of interim injunction as to possession passed by the learned*

Munsif has been finally confirmed by the Court of appeal, and on the face of that order it is not open now to the State of Bihar either to demolish the Bhandar any further or to interfere with the possession of the plaintiff in any other form or manner. The allegation of the plaintiff at the time when the order under revision was passed was that her possession over the Bhandar was interfered with subsequent to the passing of the interim injunction against the State of Bihar. That contention, as it appears from the order of the learned Munsif, was accepted and on the footing of that finding the learned Munsif passed an order on 5-5-1955, for redelivery of the possession of the property to her. I am informed that a separate proceeding for disobeying the interim order is also pending against the State of Bihar. It is, therefore, not advisable to give findings on facts which are connected with that proceeding for that may prejudice the position of the parties in that proceeding. Prima facie, it appears to me that the order passed by the learned Munsif on the facts of this case cannot be said to be one without jurisdiction. If a court comes to the conclusion that an order passed under Order 39 Rule 1 or 2 have been disobeyed and by a contravention of (supra) order the other party in the suit has done (supra) ing for its own advantage to the prejudice (supra) other party, it is open to the Court under inherent jurisdiction to bring back the party to a position where it originally stood as if the order passed by the court has not been contravened. The exercise of this inherent power vested in the court is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the Court."

8. In AIR 1971 Andhra Pradesh 53 titled as **Rayapati Audemma** Vs. **Pothineni Narasimham,** the Division Bench has held that though there being no express provision in the Code for the purpose, Court can grant police aid under its inherent powers. The Division Bench has held as under:

"6. In the Allahabad case also, the learned Judges merely observed that the civil court had no jurisdiction to order the police to interfere in the matter of execution of a decree. The inherent powers execrable by the civil court under Section 151, Civil P. C. were not referred to. Their Lordships also proceeded on the footing that because the disobedience of the order of the court was punishable with penalties mentioned in Order XXI, Rule 32, Civil P. C. the Court could not give any direction to the police with respect to the execution of the decree. The provision for penalty is entirely different from the enforcement of the order itself as we have mentioned earlier. Such a provision would not and cannot preclude the court from exercising its inherent power under Section 151, Civil P. C. in order to do justice or to prevent abuse of the process of court. But the actual decision given therein with respect to the direction given to the Superintendent of Police may be correct inasmuch as the form in which the direction was given to the police authorities, does not appear to be proper or correct.

9. If the police authorities are under a legal duty to enforce the law and the Public or the citizens are entitled to seek directions under Article 226 of the Constitution for discharge of such duties by the Police Authorities we feel that the civil courts can also

give appropriate directions under Section 151 Civil P. C. to render aid to the aggrieved parties for the due and proper implementation of the orders of Court. It cannot be said that in such a case the exercise of the inherent power under Section 151, Civil P. C. is devoid of jurisdiction. There is no express provision in the Code prohibiting the exercise of such a power and the Court can give appropriate directions at the instance of the aggrieved parties to the police authorities to render its aid for enforcement of the Court's order in a lawful manner.

9. In 1981 Sim. L.C. 156 titled as **Jaishi Ram and other**s Vs. **Salig Ram**, the learned Single Judge has held that if the circumstances of a case are such that assistance of police for the enforcement of an order is necessary, an order to this effect can be passed. The learned Single Judge has held as under:

"3. I have perused the order passed by the Sub-Judge. He has based his judgment on a decision in Ravapati Audemma V. Pothineni Narasimham, AIR 1971 A.P. 53. This is a Division Bench judgment of that High Court. In the said judgment the point involved was the same as in the presence case. The learned Judges have discussed the case-law on the point. They have not agreed with certain prior decisions. The relevant observations may be reproduced:

"The observations in the aforesaid decision no doubt support the contention of the learned counsel for the petitioner. The learned Judge Bhima Sankaram, J., referred to Section 151, C.P.C. but took the view that because an order of injunction is capable of enforcement by punishing its disobedience in the manner provided by Order 39 Rule 2(3), C.P.C., it is not open to the Civil Courts to enforce the same with the aid of the police. With great respect we are unable to agree with this reasoning. It has to be noticed that Order 30, Rule 2(3), CPC., provides only for punishment by attachment of the property or by detention in civil prison of the person who committed breach. But it does not further provide for implementation of the order of injunction itself. Order 39, Rule 2(3) cannot be said to be an express provision with respect to implementation of the order of injunction, but is only a provision which provides penalty for disobedience of the order. In such a case there being no other express provisions in the Code for enforcement of the order, it is not only proper but also necessary that the courts should render all aid to the aggrieved party to derive full benefits of the order. Though the order of injunction under Order 39, C.P.C. is only interim in nature, still it clothes the person who obtained the order with certain rights and he is entitled to enforce the aforesaid right against the party who is bound by the order. No doubt in such a case, the aggrieved party himself could approach the police authorities to prevent obstruction to the enforcement of the order or to the exercise of the right which he derives under the order or to the exercise of such right which he derives under the order of Court. But we do not see why when the same person brings to the notice of the Court that enforcement of the order is sought to be prevented or obstructed, the Court should not exercise its inherent power under Section 151, C.P.C. and direct the police authorities to render all aid to the aggrieved party in the implementation of the Court's order.

In our opinion the exercise of such power is necessary for the ends of justice or to prevent abuse of the process and the civil court has ample jurisdiction to pass such order under Section 151, C.P.C. The learned Judge's observation "that the police are not bound to obey and directions of the court in the absence of any statutory obligation to do so and a civil court would be stultifying itself by giving directions which may not be complied with", with great respect, cannot be said to be correct. Inasmuch as we are of the opinion that such a direction to be police authorities could be given under the inherent powers of the Court under Section 151, C.P.C. the police are bound to obey such directions."

The learned Judges have also referred to some decisions on the point, including the observations in Padam Sen Vs. State of U.P. (AIR 1961 SC 218). It is desirable to reproduce the same:

"The following observations in AIR 1961 e also apposite in this context:

> *"The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purpose mentioned in Sec. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature.'*

In view of these clear observations of their Lordships with regard to the scope and ambit of the inherent powers of the Court under Section 151, C.P.C., we are clearly of the opinion that in order to do justice between the parties or to prevent the abuse of process of the Court, the Civil courts have ample jurisdiction to give directions to the police authorities to render aid to the aggrieved parties with regard to the implementation of the orders of Court or the exercise of the rights created under orders of Court. That the police authorities owe a legal duty to the public to enforce the law is clear from a decision of the Court of Appeal, reported in R.V. Metropolitan Police Commr., (1968) 1 All DR 763, where Lord Denning, M.R. observed at page 769 as follows:

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable to enforce the law of the land.....but in all these things he is not the servant of anyone, save of the law itself. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

The same view was expressed by the other learned Judges. We may also refer to the judgment of the Madras High Court, in Varadachariar V. Commr. Of Police (1969) 2 Mad. LJ 1, where the learned Judge, Kailasam, J., after referring to the English case cited above held that the Commissioner of Police should proceed and act in accordance with the directions indicated in the aforesaid judgment."

10. In ***P. Shanker Rao*** vs. ***Smt. B. Susheela***, AIR 2000 Andhra Pradesh 214, learned Single Judge of Andhra Pradesh has held that the court in its inherent powers

under section 151 of the Code of Civil Procedure can grant police aid to ensure effective implementation of temporary injunction pending suit for perpetual injunction and procedure under order 39 rule 2-A of the Code of Civil Procedure need not be followed. Learned Single Judge has held as under:

> *"[3] The observations, in my considered view should be confined to the facts of that particular case. In that case, the defendant sought police protection on the ground that the plaintiff was interfering with his possession despite the fact that the temporary injunction granted earlier in favour of the plaintiff was vacated. Thus, it is not a case where the order to extend police aid was granted in order to ensure compliance with an order of injunction in force pending the suit. The mere fact that the action could be taken against either party for flouting the injunction under Order XXXIX Rule 2-A or under the Contempt of Courts Act does not come in the way of the Court taking all necessary steps for ensuring obedience of the injunction order. The Court need not wait till the injunction is breached. In a fit case, the Court can undoubtedly direct police aid as a preventive measure. This power though not expressly conferred, is a power incidental or ancillary to the exercise of the power to grant injunction pending the suit. With great respect, I am not in a position to record my concurrence with the broad observations made by the learned Judge that the civil Court cannot direct police aid for execution of its order - interlocutory or final and that the party should only have recourse to the procedure laid down under Order XXI, Rule 32 or the Contempt of Courts Act. The observations are in the nature of obiter and therefore not binding on me. It is therefore unnecessary to refer the matter to the Division Bench, more so in view of the decision of this Court relied upon by the trial Court. I would however like to point out that the police aid should not be granted for mere asking. The Court has to be satisfied, prima facie, that there is an imminent threat of violation of interim order, if police does not intervene and that there is no other way of ensuring effective compliance. If however an alternative could be found such as, deploying an Officer of the Court to oversee the implementation of the order, the Court can avoid granting order for police aid.*

11. In ***N. Karpagam and others*** vs. ***P. Deivanaiammal alias Deivathal alais Deivathayee Ammal***, AIR 2003 Madras 219, learned Single Judge of Madras High Court has held that civil court has power to issue suitable directions to police for implementation of injunction order. Learned Single Judge has held as under:

> *"[7] In the light of the Division Bench decision holding that Civil Court has power to issue suitable directions to police to implement the orders, and in the light of the fact that injunction was in force from 26-3-2002 and the same was made absolute on 29-11-2002 and in view of the apprehension raised by the petitioner/respondent herein, I am satisfied that the learned Subordinate Judge was perfectly right in ordering police aid. In the light of the said factual details, the petitioners cannot have any valid defence to oppose the said application. I do not find any error or infirmity in the order impugned; consequently, the Civil Revision Petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed."*

12. In ***Sk. Yousuf and others*** vs. ***Shaik Madhar Saheb***, AIR 2003 Andhra Pradesh 44, learned Single Judge has held that it is always open to the parties to seek police protection to see that interim injunction order is properly implemented. Learned Single

Judge has further held that it cannot be said that court is not competent to provide police protection in exercise of inherent powers. Learned Single Judge has held as under:

> *"[4] It is true that Order 39, Rule 2A of the Code deals with consequences of disobedience or breach of injunction. But, it does not mean that the Court below is not competent to provide police protection in exercise of its inherent powers under Section 151 of the Code. When once an injunction order is not carried out it is always open for the parties to seek police protection to see that the said order is properly implemented. Therefore, I do not find any error in the order of the learned Principal Junior Civil Judge."*

13. In ***Satnam Singh*** vs. ***Dr. Triloki Nath Chugh and others***, AIR 2004 Punjab and Haryana 373, learned Single Judge of Punjab and Haryana has held that specific remedy available under section 145 Cr.P.C. does not exclude inherent jurisdiction of civil court to get its injunction order implemented. Learned Single Judge has held as under:

> *"[3] After hearing the learned counsel, I am of the considered view that this petition is without merit and is, thus, liable to be dismissed. It is well settled that under Section 145 Cr.P.C., preventive measures in respect of disputes concerning possession of immovable property could be undertaken in the absence of any direction by the civil Court. Once the civil Court has passed an interim order of injunction restraining interference in peaceful possession of plaintiff-respondent 1, then no proceedings under Section 145 Cr.P.C. would be competent as has been held by the Supreme Court in the case of Ram Sumer Puri Maharit v. State of U.P., (1985) 1 SCC 427 : (AIR 1985 SC 472). .....By no stretch of imagination it could be argued that the so called specific remedy available under Section 145 Cr.P.C. would exclude the inherent jurisdiction of the civil Court to get its order dated 1-12-2003 implemented. Moreover, no dispute can be raised with regard to order dated 1-12-2003 which has attained finality. ..... at this stage, because it would result into modifying/displacing the aforementioned order which is impermissible. The general principle of law as submitted by the learned counsel that specific provision will exclude the general provision would not be available and the argument is absolutely misplaced. Therefore, there is no merit in the instant petition and the same is liable to be dismissed."*

14. In ***Smt. Nirabai J. Patil*** vs. ***Narayan D. Patil and others***, AIR 2004 Bombay 225, learned Single Judge of Bombay High Court has held that in case of grave emergency, police aid though an extreme step can be granted by Court in exercise of powers under section 151 of the Code of Civil Procedure. Learned Single Judge has held as under:

> *"[7] The aforesaid observations made by the learned single Judge of this Court are very relevant for the present case. If Civil court which has passed the order of temporary injunction takes a view that there is no power vested in the court to direct the police to grant assistance for enforcing or for implementation of the order of temporary injunction, the very purpose of granting order of temporary injunction may be frustrated in a given case. It is the duty of every police Officer to enforce the law of the land. The duties of Police Officers are reflected in section 64 and Section 66 of the Bombay police Act, 1951. In my opinion, the view taken by the learned trial Judge that there is no provision for police aid for execution of interim order, is totally incorrect. The learned Judge failed to appreciate that he has a power under Section 151 of the said code to pass the order directing that police help should be made available provided facts of the case warrant passing of such order."*

15. Accordingly order dated 1.5.2015 is set aside. The Superintendent of Police, Kangra at Dharamshala is directed to render police assistance to the plaintiffs towards execution of order dated 9.4.2015 rendered by the Civil Judge (Junior Division), Dehra, District Kangra in CMA No. 121 of 2015 in Civil Suit No. 75/2012, within a period of one week from today.

16. In view of this, the present petition is disposed of, so also the pending applications, if any. No costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Mangal Chand ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWP No. 3301 of 2015
Date of Order: 06.08.2015

Constitution of India, 1950- Article 226- 16 years old son of the petitioner had died- held, that it is the duty of the Court to make such interim order which are required in the facts and circumstances of the case- interim compensation can be awarded in the writ petition- hence, interim compensation of Rs.1 lac awarded in favour of the petitioner. (Para-2 to 15)

Case referred:
Chief Engineer & Ors. versus Mst. Zeba, reported in II (2005) ACC 705.

Present: Mr. B.S. Attri, Advocate, for the petitioner.
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. Satyen Vaidya, Senior Advocate, with Mr. Rohan Chauhan, Advocate, for respondents No. 2 to 4.

The following order of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Issue notice. Mr. J.K. Verma, learned Deputy Advocate General, and Mr. Rohan Chauhan, Advocate, waive notice on behalf of respondent No. 1 and respondents No. 2 to 4, respectively. Reply be filed within six weeks.

2. The writ petitioner has not filed application for grant of interim compensation, however, keeping in view the fact that the parents have lost their 16 years' old budding son, which is so painful and cannot be redressed by any relief, rather no substitute is available, we deem it proper to exercise inherent powers to grant interim relief to the unfortunate parents, who are hapless, helpless, are broken and shaken. They are on thorns and the said incident is pricking them every second. We are conscious that money is not a substitute, but may be just to ameliorate their pains and sufferings.

3. The cases relating to liability to pay compensation is the realm of Common Law based on proof of negligence.

4. The question is – whether the interim compensation can be granted in writ proceedings, while exercising powers under Article 226 of the Constitution of India? The answer is in the affirmative for the following reasons:

5. The introduction of the concept of grant of interim compensation based on no fault liability is outcome of the pronouncements of judgments made by the Apex Court. The purpose is to offer prompt financial relief to the sufferers. The niceties of law and facts have no role to play.

6. It is the duty of the Courts to make such interim orders which are required at the relevant point of time in view of the facts and circumstances of the case read with development of law from time to time.

7. In order to achieve the purpose of grant of interim or final relief promptly and spurn any attempt at procrastination in view of the facts and circumstances of the case, which are crying for the same, the Courts should not succumb to niceties, technicalities and mystic maybe's.

8. We are of the considered view that the Writ Court can exercise powers in terms of the mandate of the Constitution read with the inherent powers and can grant interim relief, even though it is not specifically provided for.

9. Our this view is fortified by the judgment rendered by the Apex Court in **Civil Appeal No. 11466 of 2014,** titled as **Raman versus Uttar Haryana Bijli Vitran Nigam Ltd. & Ors.,** decided on 17.12.2014, wherein the Apex Court has laid down guidelines how to assess and grant compensation in such like cases. One of us (Justice Mansoor Ahmad Mir, Chief Justice), the then Judge of Jammu and Kashmir High Court, has also dealt with such an issue in a case titled as **Chief Engineer & Ors. versus Mst. Zeba,** reported in **II (2005) ACC 705.**

10. This Court has also dealt with the similar issue in a public interest litigation, being **CWPIL No.7 of 2014,** titled as **Court on its own motion vs. State of Himachal Pradesh and others,** wherein interim compensation to the tune of Rs.5.00 lacs, to each of the victims, was granted. It is apt to reproduce paragraphs 20 to 22 of the order, dated 25.06.2014, herein:

> "20. In order to achieve the purpose of grant of interim or final relief promptly and spurn any attempt at procrastination in view of the facts and circumstances of the case, which are crying for the same, the Courts should not succumb to niceties, technicalities and mystic maybe's.
>
> 21. We are of the considered view that the Writ Court can exercise powers in terms of the mandate of the Constitution read with the inherent powers and can grant interim relief, even though it is not specifically provided for.
>
> 22. We have laid our hands on a judgment which is delivered by one of us (Justice Mansoor Ahmad Mir, Chief Justice) as a Judge of Jammu and Kashmir High Court, wherein interim compensation was granted in a First Civil Appeal, titled as Chief Engineer & Ors. versus

Mst. Zeba, reported in II (2005) ACC 705. It is apt to reproduce paras 10 to 17 of the said judgment herein:

"10. While going through the provisions of Section 151, C.P.C., this Court can exercise inherent powers in order to do justice in between the parties and can pass such orders which are warranted in the interests of justice.

11. Section 140 of Motor Vehicles Act mandates how to grant interim compensation. This remedy stands introduced in terms of the recommendations made by the Apex Court in the judgments reported in 1977 ACJ 134 (SC), 1980 ACJ 435 (SC) and 1981 ACJ 507 (SC). In terms of the said judgments the legislation was made. The aim and object of the said provision is to save the victims/sufferers from starvation, destitution and from other social evils. It is just to ameliorate the sufferings of the victims.

12. The Apex Court has passed a judgment reported in AIR 1996 SC 922, titled Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, wherein Their Lordships have granted interim compensation to the victims of a rape case. In terms of the said judgment the Court is not powerless to come to the rescue of victims and save them from social evils as discussed above. It is profitable to reproduce para-18 of the said judgment herein:

> *"18. This decision recognizes the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender subject to the finalization of scheme by the Central Government. If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the scheme. On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women's Forum, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life."*

13. The Apex Court has also held in the judgment reported in AIR 1986 SC 984, Smt. Savitri v. Govind Singh Rawat, that the Courts can grant interim maintenance in the proceedings under Section 488 (Section 125, Cr.P.C.), Cr.P.C. It is profitable to reproduce relevant portion of para-6 herein:

".....if a Civil Court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to the pending final disposal of the application. In taking this view we have also taken note of the provisions of Section 7(2)(a) of the Family Courts Act, 1984 (Act No. 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by Magistrates under Section 125 of the Code to the Family Court constituted under the said Act."

14. While going through the said provisions of law and while keeping in view of the above discussion, I am of the considered view that Civil Court can exercise inherent powers and can grant interim compensation at any stage even though not provided by any other provision of law. It is profitable to reproduce relevant portion of para-4 of the judgment of Apex Court reported in AIR 1995 SC 350, State of Maharashtra and others v. Admane Anita Moti and Others.

".....Interim orders are granted by the Court as they are necessary to protect the interest of the petitioner till the rights are finally adjudicated upon. Even where it is not provided in the statute this Court has held that the Courts have inherent power to grant it....."

15. It is also profitable to reproduce paras 9 & 10 of the Apex Court judgment reported in AIR 2004 SC 3992, Vareed Jacob v. Sosamma Geevarghese and Others, herein:

"9. In the case of M/s. Ram Chand and Sons Sugar Mills Pvt. Ltd. v. Kanhayalal Bhargava, reported in AIR 1966 SC 1899, it has been held by this Court that the inherent power of the Court under Section 151 C.P.C. is in addition to and complimentary to

the powers expressly conferred under C.P.C., but that power will not be exercised in conflict with any of the powers expressly or by implication conferred by other provisions of C.P.C. If there is express provision covering a particular topic, then Section 151, C.P.C. cannot be applied. Therefore, Section 151, C.P.C. recognizes inherent power of the Court by virtue of its duty to do justice and which inherent power is in addition to and complimentary to powers conferred under C.P.C. expressly or by implication.

10. In the case of Jagjit Singh Khanna v. Rakhal Das Mullick, reported in AIR 1988 Cal. 95, it has been held that temporary injunction may be granted under Section 94(c) only if a case satisfies Order 39 Rule 1 and Rule 2. It is not correct to say that the Court has two powers, one to grant temporary injunction under Section 94 (c) and the other under Order 39 Rule 1 and Rule 2. That Section 94 (C), C.P.C. shows that the Court may grant a temporary injunction thereunder only if it is so prescribed by Rule 1 and Rule 2 of Order 39. The Court can also grant temporary injunction in exercise of its inherent powers under Section 151, but in that case, it does not grant temporary injunction under any of the powers conferred by C.P.C. but under powers inherent in the constitution of the Court, which is saved by Section 151, C.P.C."

16. In terms of the said judgments, the Civil Court can exercise inherent powers and grant interim compensation in order to do justice, save victims from social evils and just to ameliorate their sufferings.

17. Thus, I am of the considered view that Civil Court can grant interim compensation in the cases, where the claimants/plaintiffs have lost their bread earner, son or daughter due to the negligence of the defendant/s and even in the cases where the plaintiff has sustained injuries due to the negligence of the defendant/s which has rendered the plaintiff permanently disabled."

11. This Court, in **CWP No. 318 of 2015,** titled as **Roshni Devi and others versus Himachal Pradesh State Electricity Board Ltd. and others,** has also awarded interim compensation to the tune of Rs.1.50 lacs in favour of the petitioners therein.

12. Keeping in view the discussions made hereinabove, we are of the considered view that the petitioner has carved out a case for grant of interim compensation. Accordingly, interim compensation to the tune of Rs.1,00,000/- is awarded in favour of the petitioner. Respondents No. 2 to 4 are directed to deposit the amount of Rs.1,00,000/- within a period of six weeks from today.

13. List on **24th September, 2015.** Copy **dasti.**

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

Raj Kumar .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 44 of 2013
Reserved on: August 05, 2015.
Decided on: August 06, 2015.

Indian Penal Code, 1860- Sections 302, 307, 325 and 323 IPC and **Indian Arms Act, 1959-**Section 27- PW-5 was sitting in his courtyard when the accused fired at him- he fell down and was taken inside- accused also fired at 'J' and 'R'- injured were taken to hospital- 'R' died on the way to IGMC, Shimla- Medical Officer opined that injury sustained by the injured and deceased could have been caused by gunshot- deceased had died from firearm injury leading to rupture of vital organs along with hemorrhage- merely because, witnesses are closely related to the deceased is not sufficient to discard their testimonies- the reason for firing at deceased and the injured is the litigation going on between the parties- more particularly, accused had lost his case before S.D.M., accused had knowledge that shooting from a firearm from the close range may result in the death of the person- held, that accused was rightly convicted by the trial Court.

Cases referred:
Balak Ram and another vrs. State of U.P., AIR 1974 SC 2165
State of Punjab vrs. Ramji Das, AIR 1977 SC 1085
Arjun and others vrs. State of Rajasthan, AIR 1994 SC 2507
Anil Rai Vrs. State of Bihar, 2001 Cri. L.J. 3969
State of U.P. vrs. Jagdeo and others, (2003) 1 SCC 456
State of Maharashtra vrs. Kashirao and others, (2003) 10 SCC 434
Sucha Singh and another vrs. State of Punjab, AIR 2003 SC 3617
Rajinder and others vrs. State of Haryana and another, AIR 2004 SC 4352
Kallu alias Masih & ors. vrs. The State of Madhya Pradesh, AIR 2006 SC 831
S. Sudershan Reddy and others vrs. State of A.P., (2006) 10 SCC 163
State of Maharashtra vrs. Tulshiram Bhanudas Kamble and ors, (2007) 14 SCC 627
Dinesh Kumar vrs. State of Rajasthan, (2008) 8 SCC 270
Rajesh Kumar vrs. State of H.P., AIR 2009 SC 1
Arumugam vrs. State, AIR 2009 SC 331
Sonelal vrs. State of M.P, AIR 2009 SC 760
Rajender Singh and anr. vrs. State of Haryana, AIR 2009 SC 1734

For the appellant: Mr. Anup Chitkara, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG with Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 16/19.01.2013, rendered by the learned Addl. Sessions Judge, Ghumarwin, Distt. Bilaspur, (Camp at Bilaspur), H.P. in Sessions Trial No. 4-7 of 2011, whereby the appellant-accused (hereinafter

referred to as accused), who was charged with and tried for offences punishable under Sections 302, 307, 325 and 323 IPC and Sections 27, 54 and 59 of the Arms Act, has been convicted and sentenced to undergo rigorous imprisonment for life under Section 302 IPC and to pay a fine of Rs. 5,000/-. The accused was further sentenced to undergo rigorous imprisonment for a term of five years and to pay a fine of Rs. 3,000/- for offence punishable under Section 307 IPC. He was also sentenced to undergo rigorous imprisonment for a term of three years and one year alongwith fine of Rs. 2,000/- and Rs. 1,000/-, respectively for the offences punishable under Sections 325 and 323 IPC. He was further sentenced to undergo rigorous imprisonment for three years and fine of Rs. 2000/- for the offence punishable under Sections 25, 54 and 59 of the Arms Act. In lieu of default of payment of fine, he was ordered to undergo rigorous imprisonment for a term of six months, three months, two months, one month and two months, respectively under the aforesaid counts.

2. The case of the prosecution, in a nut shell, is that Nand Lal (PW-5) on 14.10.2010 at about 4:30-5:00 PM, at Kandrour was sitting in his courtyard on a chair and accused fired at him on his back side from his gun which hit him on his right arm and right side of his back. He fell down from the chair. Sita Devi (PW-7), wife of Nand Lal, was sitting in the room and Biasan Devi (PW-6), daughter-in-law of Nand Lal was at the water tap at a distance of 8-10 feet in front of Nand Lal. Accused was wearing a belt on his shoulder around his waist having cartridges. Nand Lal was taken inside the kitchen by Sita Devi and Smt. Biasan Devi. Accused came towards window of kitchen and the door of the window was closed and thereafter, accused ran towards the road. Jai Nand (PW-3) was sitting in his courtyard. His wife Urmila Devi (PW-4) was serving tea to him and Mamta Devi, wife of his brother was also sitting at a distance of 6-7 feet. Accused came towards Jai Nand in the courtyard with a gun and fired at him. Due to fire, pellet hit him on his right foot and calf. He fell down. Pallets also hit on Urmila Devi and Mamta Devi. On the same day, Soma Devi (PW-8) was working at a distance of 5-7 feet from her son, namely, Ramesh, who was working near the wall of his house. Accused fired at Ramesh also on his right chest. Rakesh Kumar (PW-9), came at the spot and accused started running towards road and fell down. He was caught hold off by the people, who had gathered at the spot. Rakesh Kumar snatched the gun from the accused and gave it to Sita Devi and belt containing cartridges was kept by the side of the road. Injured Jai Nand, Nand Lal and Ramesh were taken to RH Bilaspur for treatment. Accused was detained at the spot by the police. Dr. Poonam Jaswal, PW-1 medically examined Ramesh, Nand Lal, Mamta, Urmila Devi and Jai Nand and issued MLCs Ext. PW-1/A, PW-1/C, PW-1/E, PW-1/F and Ext. PW-1/G, respectively. Accused was also medically examined vide MLC Ext. PW-1/I. Ramesh Kumar died on the way to IGMC, Shimla. His post mortem was conducted by Dr. Rishi Tandon, PW-12 and Dr. Ankur Dharmani, on 15.10.2011 vide report Ext. PW-12/B. The opinion given by doctor was that the cause of death was fire arm injury probable with gunshot from near range, leading to rupture of vital organs i.e. liver and right lung alongwith hemorrhage, leading to shock and death. The probable time that had elapsed between injury and death was 2 to 10 hours and between death and post mortem was 12 to 18 hours. The statement of Jai Nand Ext. PW-3/A was registered in the Hospital, on the basis of which FIR Ext. PW-10/A was recorded. The case property was sent for chemical examination. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 19 witnesses. The accused was also examined under Section 313 Cr.P.C. He denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Anup Chitkara, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 16/19.1.2013.

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

6. PW-1 Dr. Poojan Jaswal, has conducted the medical examination of Sh. Ramesh Kumar, Nand Lal, Mamta, Urmila Devi and Jai Nand and issued MLCs Ext. PW-1/A, PW-1/C, PW-1/E, PW-1/F and Ext. PW-1/G, respectively. Accused was also medically examined vide MLC Ext. PW-1/I.

7. PW-3 Jai Nand deposed that on 14.10.2010, he was sitting in his courtyard. His wife was serving tea to him. Mamta Devi, wife of his brother was also sitting in the courtyard at a distance of 6-7 feet from him. The accused Raj Kumar came towards the courtyard with a gun and fired at him. Due to the fire by the accused, the pallet hit him on his right foot and right calf. He fell down on the ground and accused Raj Kumar ran away towards the road. The accused was carrying a belt of cartridges on his shoulder across the waist. He was brought inside the house by his wife and some villagers, who had come to the spot on hearing the gun shot and cries of his wife. He was brought to RH Bilaspur in a private car. After some time, he came to know in the hospital that Nand Lal and Ramesh were also fired at by accused Raj Kumar with his gun. His statement was recorded by the police under Section 154 Cr.P.C. vide Ext. PW-3/A. He identified gun Ext. P-1. In his cross-examination, he admitted that his family and the family of the accused were having inimical terms since very long regarding landed property. He also admitted that the disputed land was situated near the Petrol Pump at Kandrour.

8. PW-4 Urmila Devi has corroborated the statement of PW-3 Jai Nand. She testified that on 14.10.2010, her husband was sitting in the courtyard at about 5:00 PM. Mamta Devi was also sitting in their courtyard. She was serving tea to her husband. In the meantime, a loud noise was heard from the house of Ramesh Kumar. Accused Raj Kumar came from the side of house of Ramesh Kumar with a gun in his hand and fired at her husband. Her husband fell down on the ground. He got gunshot injuries on his right foot and right calf. Mamta Devi also received pallet injury on her back and she received a pallet injury on her left foot. The accused ran towards the road side. She alongwith the other persons brought her husband to RH Bilaspur. Two empty cartridges were also lying near their house at the place from where the accused had fired on her husband. After some time the police reached the spot. She was also medically examined. In her cross-examination, she deposed that the police had come on the spot after 20 minutes.

9. PW-5 Nand Lal is another material witness. He deposed that on 14.10.2010, he was at his home sitting on a chair in the courtyard. The chair was made of plastic. At about 4:30-5:00 PM, when he was sitting in the courtyard, he was fired upon on the back side, which hit him on his right arm and the right side of his back. Due to the gunshot, he fell down from the chair. When he fell down, he saw accused Raj Kumar coming towards him with the rifle in his hand and wearing a belt on his shoulder around the waist with cartridges. His wife Sita Devi was sitting inside the room and his daughter-in-law Biasan Devi was near the water tap at a distance of 8-10 feet in front. He fell down. He was taken inside the kitchen to save him from the accused. Accused Raj Kumar ran towards the road. He was taken to RH Bilaspur. In his cross-examination, he admitted that he had a dispute regarding landed property which was decided by the SDM in their favour. He identified Kurta Ext. P-2 having marks of pallets and payzama Ext. P-3. He also identified bathroom

chappal Ext. P-4 and chair Ext. P-5. In his cross-examination, he also reiterated that all the PWs from PW-1 to PW-9, as per list of witnesses, were from the same family and have a dispute with the accused over a piece of land.

10. PW-6 Biasan Devi has also corroborated the statement of PW-5 Nand Lal. She also narrated the manner in which her father-in-law was fired at by the accused. She has seen accused at some distance from her father-in-law carrying rifle in his hand. She saw accused coming towards her father-in-law. She alongwith her mother-in-law took her father-in-law to the kitchen. Accused Raj Kumar went towards the road.

11. PW-7 Sita Devi is the wife of PW-5 Nand Lal. She deposed that her husband was sitting in the courtyard. Her daughter-in-law Biasan Devi was at water tap. She heard noise of gunshot. She came out of the room. She saw that her husband felling down from the chair. Her daughter-in-law reached near her husband. Accused Raj Kumar was standing at some distance with gun in his hand. The accused again pointed the rifle towards her husband. They lifted her husband and took him to kitchen and closed the door. Rifle was snatched by Rakesh Kumar from the hands of accused Raj Kumar on the road and was given to her. After some time, police also came on the spot. It was taken into possession by the police vide memo Ext. PW-7/A. She identified gun Ext. P-1.

12. PW-8 Smt. Soma Devi, deposed that her son Ramesh was working near the wall of the house. She was also working at a distance of 5-7 feet from Ramesh near their house. When she heard the noise of gunshot fire, she came to her son as he was crying. She took him in her lap. He was having a bullet injury on his right side chest below the nipple. She saw accused Raj Kumar standing at some distance from Ramesh. He was holding a gun in his hand. He was wearing a belt of cartridges on his shoulder across the waist. The accused thereafter went towards the house of Jai Nand. Thereafter, she raised noise and police came to the spot.

13. PW-9 Rakesh Kumar deposed that he received telephonic message on behalf of Nand Lal that Raj Kumar accused had fired a gun shot on Nand Lal and asked him to send a vehicle. He took the vehicle with a driver up to the gate of the school where Nand Lal was brought by his wife Sita Devi and daughter-in-law Biasan Devi. They took Nand Lal to RH Bilaspur. In the meantime, some noise was heard at some distance from school at Kandrour below the road from the house of Ramesh and Pohlo Ram. Accused Raj Kumar came running towards the road and fell down. He was caught by the people who had gathered there and was made to sit on the road. He was having belt of cartridges on his shoulder across the waist. He snatched the gun from him and gave it to Sita Devi wife of Nand Lal. The police also came to the spot. The gun was handed over to the police. He identified the gun Ext. P-1. The empty cartridges were found lying near the house of Jai Nand on the path leading to road. Those two empty cartridges were also made into a cloth parcel and were sealed with seal-K. These were taken into possession vide seizure memo Ext. PW-9/D. He identified the cartridges Ext. P-7 and P-8. The blood stained soil and grass was also taken into possession from the spot. The police took into possession the belt containing 17 live cartridges and made into a cloth parcel and the parcel was sealed with seal bearing impression “K”. Out of the 17 cartridges, 15 were of one Company and remaining two were of another Company. He identified cartridges Ext. P-11 to Ext. P-22, which out of 17 cartridges were found on the road and were taken into possession by the police. The accused had shown the spot near the house of Ramesh saying that he had thrown an empty cartridge and got the said empty cartridge recovered which was sealed by the police in a cloth parcel with seal bearing impression “T” and taken into possession vide seizure memo Ext. P-9/F. He identified empty cartridges Ext. P-24. Thereafter, kurta and paizama of Nand Lal was produced by his wife to the police which was also sealed into a

cloth parcel and sealed with seal impression "T". He identified kurta Ext. P-2 and paizama Ext. P-3. Thereafter, the police inspected the courtyard of Nand Lal and found nine pallets near the water tap. The nine pallets were taken into possession. He identified 9 pallets vide memo Ext. P-25. Thereafter, the police came to the house of Jai Nand and inspected the courtyard. 11 pallets were found in the courtyard and were taken into possession. He identified the same.

14. PW-10 HC Dev Raj has proved the disclosure statement made by the accused, on the basis of which, recoveries were effected. He also made deposition that the case property was handed over to him and nobody has tampered with the same, till it was in his possession.

15. PW-12 Dr. Rishi Tandon has conducted the post mortem examination of the deceased. He issued report Ext. PW-12/B. According to him, the cause of death was fire arm injury probably with gunshot from near range leading to rupture of vital organs i.e. liner and right lung alongwith hemorrhage, leading to shock and death.

16. PW-13 Sh. Naseeb Singh Patial, has proved report Ext. PW-12/C and PW-12/D dated 1.12.2010 and 8.12.2010, respectively.

17. PW-16 ASI Narayan Singh, has visited the spot on 14.10.2010 after receiving the information. The injured was sent to RH, Bilaspur. He also got recovered the cartridges.

18. PW-18 Dr. R.S. Kanwar has proved the opinions Ext. PW-18/A and Ext. PW-18/B.

19. PW-19 Dr. Vinit Aggarwal, has proved that Jai Nand was admitted at IGMC, Shimla.

20. The case of the prosecution, precisely, is that accused went to the house of PW-5 Nand Lal. He fired at him. He fell down. He was taken to the kitchen by his daughter-in-law, PW-6 Biasan Devi and PW-7 Sita Devi, his wife. The accused was identified by PW-5 Nand Lal, PW-6 Biasan Devi and PW-7 Sita Devi. Thereafter, the accused fired gun shot at PW-3 Jai Nand, who received injuries on his right foot and right calf. He also fell down from the chair. He was also taken to RH Bilaspur. The statement of PW-3 Jai Nand has been corroborated by his wife Smt. Urmila Devi. They had also identified the accused. According to them also, the accused was carrying gun and was also carrying belt of cartridges around his waist. Thereafter, the accused shot at Ramesh Kumar. He was taken to hospital. He died while being taken to IGMC, Shimla.

21. PW-5 Nand Lal has categorically testified that the accused had fired at him from his back. It hit him on his back and arm. He was taken to kitchen by his daughter-in-law and his wife. He was then taken to RH Bilaspur. PW-1 Dr. Poojan Jaswal has noticed multiple penetrating injuries present all over right arm, right back, left back close to spine and left scapular region. He issued MLC Ext. PW-1/C. PW-5 Nand Lal, PW-6 Biasan Devi and PW-7 Sita Devi have seen accused carrying the gun. He was identified by PW-5 Nand Lal, PW-6 Biasan Devi and PW-7 Sita Devi.

22. PW-3 Jai Nand also deposed that he was fired gunshot by the accused. He received pallet injuries on his right foot and right calf. He identified the accused. PW-4 Urmila Devi also saw the accused coming towards his husband and firing at him. He was also medically examined by PW-1 Dr. Poojan Jaswal. He noticed gunshot injury on right calf and right foot. He issued MLC Ext. PW-1/G. PW-1 Dr. Poojan Jaswal has also examined Ramesh Kumar. He noticed penetrating injury over right lower chest wall, one hand breaths right or mid line and approximately three fingers above lower edge of ribcage. He issued

MLC Ext. PW-1/A. He referred the patient to the department of Surgery Orthopedic, IGMC, Shimla for further management.

23. The accused was also examined by PW-1 Dr. Poojan Jaswal. He noticed injuries on left red eye, on left cheek splattered with bright blood, swelling left nose, soft swelling back of scalp, abrasion of triangle shape on left knee at five O' clock position, three lineal abrasions 1 cm long on lower back and right index finger nail, splattered with blood. The patient was advised C.T. Scan. He issued MLC Ext. PW-1/I.

24. Mr. Anup Chitkara, Advocate, for the accused has argued that the accused had no intention either to injure Nand Lal and Jai Nand or to kill Ramesh Kumar. According to him, his client was beaten mercilessly by the people and he has fired at them in his defence. This version cannot be believed. The accused has received injuries when he was being overpowered by the people gathered on the spot. Accused, firstly fired at Nand Lal and Jai Nand and finally at Ramesh Kumar. The gun shot to Ramesh Kumar has resulted in the death while taking him to hospital. The injuries received by Nand Lal were grievous. The injury received by Jai Nand was simple in nature and the same, according to PW-1 Dr. Poojan Jaswal, was possible with gunshot with multiple pallets. Similarly, PW-1 Dr. Poojan Jaswal has opined that injury received by PW-5 Nand Lal was possible with pallets of gunshot. He also opined that injury No. 1 mentioned in the MLC of Ramesh Kumar, deceased could be caused by gunshot.

25. The cause of death of Ramesh Kumar was firearm injury probably with gunshot from near range leading to rupture of vital organs i.e. liver and right lung alongwith hemorrhage, leading to shock and death as per post mortem report Ext. PW-12/B. The probable time that had elapsed between injury and death was 2 to 10 hours and between death and post mortem was 12 to 18 hours. PW-13 Sh. Naseeb Singh Patial, has proved report Ext. PW-12/C and PW-12/D. According to Ext. PW-12/D, the cartridge cases marked as exhibit E/1 (I) and E/1(II) have been fired from the right barrel of the firearm marked as exhibit E/B(DBBL gun) and the firearm gun was in working condition. The gunshot holes were detected on the kurta and T-shirt. The cartridge was fired from the left barrel of the firearm. Five cartridges used for test firing purpose were taken from the exhibit E/2. The gun was snatched by PW-9 Rakesh Kumar from the accused. The fired cartridges and unused cartridges were also recovered on the basis of disclosure statement made by the accused.

26. Mr. Anup Chitkara, Advocate, has also argued that all the witnesses cited by the prosecution are closely related to victim's family and thus their statements cannot be relied upon. He also contended that the relations between the complainant party and the accused were strained and the possibility of his client being falsely implicated can also be ruled out. It is settled law that the statements of closely related witnesses can be relied upon but it has to be done with caution.

27. Their lordships of the Hon'ble Supreme Court in the case of ***Balak Ram and another vrs. State of U.P.,*** reported in ***AIR 1974 SC 2165,*** have held that witness cannot be disbelieved merely because he is related to the deceased. Their lordships have held as follows:

> " 42. In fact. the High Court went a step further and held that these two witnesses corroborated Rajendra Kumar Misra also. Rajendra 'Kumaz is the brother-in-law of Tribeni Sahai's brother Radhey Shyam Sharma who at the relevant time was stationed at Lucknow .as Deputy Inspector General of Police and as a Member of the vigilance Commission. The trial court observed rightly that the witness ,could not be disbelieved merely because he

was related to Tribeni Sahai. But it gave various reasons for not accepting his evidence at its face value."

28. Their lordships of the Hon'ble Supreme Court in the case of ***State of Punjab vrs. Ramji Das,*** reported in ***AIR 1977 SC 1085,*** have held that relationship of the prosecution witness with the deceased is no ground for disbelieving him. Their lordships have held as follows:

> "5. We have gone through the statements of Gurbachan Singh (PW. 5) and Harnam Singh (P.W. 2) and we find that the High Court has not read them correctly. Gurbachan Singh was the brother of the deceased, but that could be no reason for disbelieving him. The High Court should have appreciated the fact that being such a close relation, he would have no reason for leaving out the real assailant of his brother Balbir Singh, and implicating respondent Ramji Dass falsely. Moreover it should have noticed the fact that there was not even a suggestion, in the court of the Committing Magistrate or in the trial Court, that Gurbachan Singh had any enmity or other reason to falsely implicate the respondent. His statement could not therefore be viewed with suspicion merely because of his relationship with the deceased."

29. Their lordships of the Hon'ble Supreme Court in the case of ***Arjun and others vrs. State of Rajasthan,*** reported in ***AIR 1994 SC 2507,*** have held that the complainant and accused had inimical terms is no ground by itself to reject the testimony of witness. The relationship between deceased and witness is also no ground to reject the testimony of the witnesses. Their lordships have held as follows:

> "12. According to the evidence of Puran, PW 3 he had taken the land of one Pt. Ram Saroop situated near out-skirt of the village, and had cultivated the same himself. He deposed that on the date and time of the occurrence when he was in his field he heard the uproar and cries of deceased Jyoti and Bahori, PW 1 and when he rushed towards the cries near his field he saw that the witnesses Bhagwan Sahai, PW 2, Harish Chandra, PW 4 and Sat Pal, PW 7 were also running towards the place of occurrence. He saw that the deceased was surrounded by the four appellants as well as the four acquitted accused. The appellant Arjun, Ram Pal and Bhagwan Sahai were armed with pick-axes while 4th appellant Mukho was armed with a lance and the acquitted accused were having lathies According to Puran PW 3, the appellant Arjun first gave a pick-axe blow on the right side of Jyoti's head, appellant Ram Pal attacked on the right side of the head, Mukho gave a blow with lance at the back side of the head as result of which Jyoti fell on the ground. Thereafter the appellant Bhagwan Sahai gave blows of pick-axe on his right cheek and the appellant Mukho also gave lance blow on his right cheek. Puran is totally an independent witness. His presence in the field near the place of occurrence was quite natural as according to him the crop was standing in the field cultivated by him. The evidence of these eye-witnesses, PW 1, PW 2, PW 3, PW 4 and PW 7 further finds corroboration from the medical evidence of Dr. Mangal, PW 8 as already discussed earlier. The injuries found on the person of the deceased tally with the ocular version of all these eye witnesses which further lend assurance and support to the prosecution case. In view of these facts and circumstances we find no reason whatsoever to differ from the concurrent view taken by the two Courts below as the evidence on the basis of which the conviction of these four appellants is founded is fully reliable and trust-worthy and hence no other view is possible than the one already taken by the Trial Court and the High Court.

> Normally Supreme Court does not appraise the evidence for itself under Article 136 of the Constitution. The conclusion of High Court on question of fact on appreciation of evidence is considered to be final, yet we have scruitinised the evidence to satisfy ourselves to see whether there is any infirmity in the conclusions recorded by the High Court and we find that there is no cause for any interference."

30. Their lordships of the Hon'ble Supreme Court in the case of ***Anil Rai Vrs. State of Bihar,*** reported in ***2001 Cri. L.J. 3969,*** have held that the testimony of eye witness which is consistent and convincing cannot be rejected on mere existence of enmity. Their lordships have held as follows:

> "28. There is no doubt that P.Ws. 1, 2, 5, and 6 relied upon and believed by the trial as well as the High Court are not friendly to the accused persons on account of previous existing enmity between them. The admitted position of law is that enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of the accused persons. In case of inimical witnesses, the courts are required to scrutinise their testimony with anxious care to find out whether their testimony inspires confidence to be acceptable notwithstanding the existence of enmity. Where enmity is proved to be the motive for the commission of the crime, the accused cannot urge that despite proof of the motive of the crime, the witnesses proved to be inimical should not be relied upon. Bitter animosity held to be a double edged weapon may be instrumental for false involvement or for the witnesses inferring and strongly believing that the crime must have been committed by the accused. Such possibility has to be kept in mind while evaluating the prosecution witnesses regarding the involvement of the accused in the commission of the crime. Testimony of eye-witnesses, which is otherwise convincing and consistent, cannot be discarded simply on the ground that the deceased were related to the eye-witnesses or previously there were some disputes between the accused and the deceased or the witnesses. The existence of animosity between the accused and the witnesses may, in some cases, give rise to the possibility of the witnesses exaggerating the role of some of the accused or trying to rope in more persons as accused persons for the commission of the crime. Such a possibility is required to be ascertained on the facts of each case. However, the mere existence of enmity in this case, particularly when it is alleged as a motive for the commission of the crime cannot be made a basis to discard or reject the testimony of the eye-witnesses, the deposition of whom is otherwise consistent and convincing."

31. Their lordships of the Hon'ble Supreme Court in the case of ***State of U.P. vrs. Jagdeo and others,*** reported in ***(2003) 1 SCC 456,*** have held that if eye witnesses are family members or friends of the deceased, their testimony should be examined cautiously but mere interestedness of the witnesses cannot be a ground for rejecting their evidence. Their lordships have held as follows:

> "7. There are three eye-witnesses of the incident, that is, P.W.1 Ramraj son of the deceased Ram Lachhan, P.W.2 Firangi and P.W.4 Sudama, who is an injured witness and whose son Rajendra is the other deceased. The High Court doubted the evidence of these eye-witnesses merely on the ground that they had motive in supporting the prosecution case. Legally speaking, we are unable to accept this reasoning. Most of the times eye-witnesses happen to be family members or close associates because unless a crime is committed in a public place, strangers are not likely to be present at the time of

occurrence. Ultimately, eye-witnesses have to be persons who have reason to be present on the scene of occurrence because they happen either to be friends or family members of the victim. The law is long settled that for the mere reason that an eye- witness can be said to be an interested witness, his/her testimony need not be rejected. For the interest which an eye-witness may have, the court can while considering his or her evidence exercise caution and give a reasonable discount, if required. But this surely cannot be reason to ignore the evidence of eye-witnesses. The High Court was clearly in error in not considering the evidence of eye-witnesses at all in the present case for the reason that they were interested witnesses. As seen earlier, one of the eye-witnesses in an injured person who received injuries in the incident itself. He was rather seriously injured. If he was not present at the time of occurrence, wherefrom he received the injuries, would be an obvious question. In fact, P.W.4 is also the father of the deceased Rajendra. It is common in villages that male members of a family sleep together in the open during summer season. Sleeping near the tube-well is understandable because that would lend some coolness to the atmosphere. The High Court totally ignored the other aspect of the evidence of the eye-witnesses. That is, the evidence was consistent and the version of the witnesses tallied with each other. In our view, there was no reason to discard the evidence of the eye-witnesses. This evidence is clinching and it clearly implicates the accused persons. There is no reason to doubt the veracity of the evidence of at least P.W.1 and P.W.4 and that is sufficient to convict the accused persons."

32. Their lordships of the Hon'ble Supreme Court in the case of ***State of Maharashtra vrs. Kashirao and others,*** reported in ***(2003) 10 SCC 434,*** have held that rejection of statement of inimical witnesses merely on the ground of animosity between him and accused is not permissible. Their lordships have held as follows:

"9. Evidence of PWs 1, 5 and 7 is cogent and credible. Merely because there was some animosity between PW-1 and accused persons as claimed by the prosecution, that cannot be a ground to discard his evidence even if it is credible and cogent."

33. Their lordships of the Hon'ble Supreme Court in the case of ***Sucha Singh and another vrs. State of Punjab,*** reported in ***AIR 2003 SC 3617,*** have held that foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. It cannot be said that the witness being a close relative and consequently being a partisan witness should not be relied upon. Their lordships have held as follows:

"13. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

16. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the

impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

34. Their lordships of the Hon'ble Supreme Court in the case of ***Rajinder and others vrs. State of Haryana and another,*** reported in ***AIR 2004 SC 4352,*** have held that the sons of deceased who were present at the time of occurrence and examined as eye witnesses were most natural witnesses. Their lordships have held as follows:

> "5. Mr. U.R. Lalit, learned Senior Counsel appearing in support of the appeal, submitted that though the occurrence has taken place in the broad day-light, the prosecution failed to examine a single independent witness but has examined PWs 2 and 3 who are nobody else than sons of the deceased. These witnesses consistently supported the prosecution case, disclosed in the First Information Report, in all material particulars, in their statements made before the Police as well as substantive evidence in Court. The trial court as well as the High Court has placed reliance upon their evidence and were of the view that merely because they were related to the deceased, the same ipso facto could not have been the ground to discard their evidence. In our view, the trial court as well as the High Court was quite justified in placing reliance upon their evidence as they were natural witnesses and consistently supported the prosecution case. That apart, their evidence has been accepted by this Court by upholding conviction of accused Laxman Singh and there is no reason to discard their evidence even in relation to the appellants."

35. Their lordships of the Hon'ble Supreme Court in the case of ***Kallu alias Masih & ors. vrs. The State of Madhya Pradesh,*** reported in ***AIR 2006 SC 831,*** have held that the evidence of witnesses who were injured cannot be rejected on ground of enmity. Their lordships have held as follows:

> "15. The trial court was of the view that absence of an independent eye-witness in the background of previous enmity, was a serious lacuna. But what the trial court failed to notice is that previous enmity was not denied and the prosecution case is that **Kallu** and other accused came in a group to Sadruddin's house specifically to beat him up. Therefore, the mere fact that there was enmity between Sadruddin and **Kallu** cannot be a ground to reject the clear evidence of the eye-witnesses -- PWs 4, 6, 7, 9 and 10 who were the injured, and PW-3. The High Court has, therefore, rightly held that the appellants and other accused were the assaulting party; that they had come together with weapons and had acted jointly and had run away after injuring Sadruddin and four female members of his family."

36. Their lordships of the Hon'ble Supreme Court in the case of ***S. Sudershan Reddy and others vrs. State of A.P.,*** reported in ***(2006) 10 SCC 163,*** have held that foundation has to be laid if plea of false implication is made and the mere relationship of the witness with the deceased does not affect its credibility.

37. Their lordships of the Hon'ble Supreme Court in the case of ***State of Maharashtra vrs. Tulshiram Bhanudas Kamble and ors,*** reported in ***(2007) 14 SCC 627,*** have held that acceptability of testimony of inimical witnesses cannot by itself be a ground to discard their evidence although in accepting the same, some amount of caution is required to be maintained. Their lordships have held as follows:

> "29. Each of the reasoning assigned by the High Court, in our opinion, is contrary to the well-settled legal principle. The witnesses examined on behalf of the prosecution, apart from being eye-witnesses, were injured witnesses. Their presence at the place of occurrence, therefore, cannot be doubted. Only because they were inimical to the respondents, the same by itself cannot be a ground to discard their evidences. Although in accepting the same, some amount of caution is required to be maintained."

38. Their lordships of the Hon'ble Supreme Court in the case of ***Dinesh Kumar vrs. State of Rajasthan,*** reported in ***(2008) 8 SCC 270,*** have held that the mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. The truth or otherwise of the evidence has to be weighed pragmatically. Their lordships have held as follows:

> "11. It is to be noted that PWs 7 and 13 were the injured witnesses and PW-10 was another eye-witness and was the informant. Law is fairly well settled that even if acquittal is recorded in respect of co-accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence.
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> 12. In law testimony of an injured witness is given importance. When the eye-witnesses are stated to be interested and inimically deposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimically deposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witness appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."

39. Their lordships of the Hon'ble Supreme Court in the case of ***Rajesh Kumar vrs. State of H.P.,*** reported in ***AIR 2009 SC 1,*** have held that statements of relatives of deceased cannot be treated as untruthful witnesses. Reasons are to be shown if plea of partiality is raised. Their lordships have held as follows:

> "11. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused. No evidence has been led in this regard."

40. Their lordships of the Hon'ble Supreme Court in the case of ***Arumugam vrs. State,*** reported in ***AIR 2009 SC 331,*** have held that plea that witness being close relative

and consequently being partisan witness should not be relied upon is not tenable. Relationship is not a factor to affect the credibility of a witness. Their lordships have held as follows:

> "7. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.
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> 10. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:
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> > "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - `Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

41. Their lordships of the Hon'ble Supreme Court in the case of ***Sonelal vrs. State of M.P,*** reported in ***AIR 2009 SC 760,*** have held that relationship with the deceased does not per se make evidence unreliable. Their lordships have held as follows:

> "6. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

42. Their lordships of the Hon'ble Supreme Court in the case of ***Rajender Singh and anr. vrs. State of Haryana,*** reported in ***AIR 2009 SC 1734,*** have held that evidence of related witness has to be accepted because he would inter alia be interested in ensuring that real culprits are punished. Their lordships have held as follows:

"23. On reappraisal and scrutiny of the evidence discussed hereinabove, we find no particular reason as to why the two eyewitnesses PW-1 and PW-11 should falsely depose against the appellants. It is difficult to believe that the relatives of deceased Dinesh would spare his real assailants and falsely involve other persons responsible for committing the offence. It is well settled that if the witness is related to the deceased, his evidence has to be accepted if found to be reliable and believable because he would inter alia be interested in ensuring that real culprits are punished. The trial court as well as the High Court have rightly held that there was a motive for the accused to commit murder of Dinesh because as per the prosecution evidence, A-1 was nursing a grudge against the deceased because he allegedly sexually assaulted his daughter, for which offence Dinesh was acquitted by the trial court on 18.03.2002 whereas the prosecutrix was later on married to DW-3 on 26.05.2002. Dinesh was murdered on the intervening night of 29/30.05.2002 in the house of A-1 in village Sundana. The evidence of PWs 1 and 11 has been found to be satisfactory, reliable, consistent and creditable by the trial court as well as by the High Court. Both the witnesses have been cross-examined at length by the defence, but nothing tangible has been extracted from their evidence to create any shadow of doubt that they are not truthful witnesses. They have given reliable and consistent version of the crime and their evidence inspires confidence. On our examination of the judgment given by the trial court and confirmed by the High Court, we find that both the Courts have properly and rightly appreciated and re-appreciated the entire evidence on record and there is no infirmity or perversity in the findings recorded by the Courts below to interfere with the well-reasoned judgments."

43. The enmity is a double edged weapon. In the present case, the basis for firing at deceased Ramesh Kumar, PW-3 Jai Nand and PW-5 Nand Lal, is the litigation going on between the parties, more particularly, when the accused had lost the case before the Court of SDM. The accused also had the knowledge that if the firearm is shot from the close range, it may result in the death of a person. Thus, the prosecution has proved the case against the accused under Sections 302, 307, 325, 323 IPC and under Sections 27, 54 and 59 of the Arms Act.

44. Consequently, there is no merit in this appeal and the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

CWP No. 6738 of 2014 a/w CWPs No. 4964, 5055, 5093, 5663, 9404, 11248 of 2011, 216, 420 of 2012 and 378 of 2015
Reserved on: 24.07.2015
Decided on: 06.08.2015

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1. CWP No. 6738 of 2014

Sh. Thakur Dass Bhardwaj and others ...Petitioners.

Versus

State of Himachal Pradesh and others ...Respondents.

.....

2. CWP No. 4964 of 2011
Sh. Manohar Lal and others ...Petitioners.
Versus
The State of Himachal Pradesh and others ...Respondents.
3. CWP No. 5055 of 2011
Sh. Balak Ram and others ...Petitioners.
Versus
The State of Himachal Pradesh and others ...Respondents.
4. CWP No. 5093 of 2011
Sh. Mehar Chand and others ...Petitioners.
Versus
The State of Himachal Pradesh and others ...Respondents.
5. CWP No. 5663 of 2011
Arki Tehsil Truck Operators Union and others ...Petitioners.
Versus
State of Himachal Pradesh and others ...Respondents.
6. CWP No. 9404 of 2011
Gram Panchayat Beral ...Petitioner.
Versus
State of Himachal Pradesh and others ...Respondents.
7. CWP No. 11248 of 2011
Labdh Ram and others ...Petitioners.
Versus
State of Himachal Pradesh and others ...Respondents.
8. CWP No. 216 of 2012
Kisan Kalyan Samiti and others ...Petitioners.
Versus
State of Himachal Pradesh and others ...Respondents.
9. CWP No. 420 of 2012
M/s Jaiparkash Associates Ltd. and another ...Petitioners.
Versus
State of Himachal Pradesh and others ...Respondents.
10. CWP No. 378 of 2015
Sh. Labdh Ram and another ...Petitioners.
Versus
State of Himachal Pradesh and others ...Respondents.

Constitution of India, 1950- Article 227- **Himachal Pradesh Co-operative Societies Rules, 1971-** Section 94- Chief Secretary to the Government held that general body meeting was not held in terms of mandate of the provision and the entire exercise of bye-laws suffers from procedural defects- writ petitions were filed challenging this order – land of villagers of Gram Panchayats Mangal and Beral were acquired for the construction of cement project and a society was constituted to provide transport business for the landless losers, houseless and affected persons of Gram Panchayats Mangal and Beral – bye-laws were amended in a meeting dated 19.07.2009- this gave rise to dispute between the parties - Registrar directed to deregister the amendments carried out in the general house- an appeal was preferred which was allowed and the case was remanded to the Registrar – Chief Secretary held in revision that amendments were valid- held, that Chief Secretary and the

Registrar were to keep in mind that procedure is meant to further the ends of the justice and not to frustrate the same- They were within their power to pass any order which they thought proper in the facts and circumstances of the case and it was their duty to set the controversy at rest by passing an appropriate order- however, order had left the parties in a lurch- case remanded to Registrar Co-operative Societies to pass a fresh order in accordance with law. (Para-40 to 63)

Cases referred:

Rani Kusum (Smt) versus Kanchan Devi (Smt) and others, (2005) 6 SCC 705

R.N. Jadi & Brothers and others versus Subhashchandra, (2007) 6 SCC 420

Sadhuram Bansal versus Pulin Behari Sarkar and others, (1984) 3 SCC 410

Rati Ram versus Niader Mal, (28) AIR 1941 Allahabad 215

Swastik Oil Mills Ltd. versus H.B. Munshi, Deputy Commissioner of Sales Tax, Bombay, AIR 1968 Supreme Court 843

Hindustan Petroleum Corporation Ltd. versus Dilbahar Singh, 2014 AIR SCW 5018

CWP No. 6738 of 2014

For the petitioners: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for resps No. 1 to 4.
Mr. Vinay Kuthiala, Senior Advocate, with Mr. Rajiv Rai, Advocate, for respondents No. 5 and 6.
Mr. Vijay Chaudhary, Advocate, for respondent No. 7.

.....

CWPs No. 4964, 5055 & 5093 of 2011

For the petitioners: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for resps No. 1 to 5.
Mr. Suneet Goel, Advocate, for respondent No. 6.
Mr. Vijay Chaudhary, Advocate, for respondent No. 7.

.....

CWP No. 5663 of 2011

For the petitioners: Mr. Sunil Mohan Goel, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for ress No. 1 to 3.
Mr. Vijay Chaudhary, Advocate, for respondent No. 4.
Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate, for respondents No. 5 to 10.

.....

CWP No. 9404 of 2011

For the petitioners: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for respondents No. 1 to 3, 5 and 6.
Mr. Vijay Chaudhary, Advocate, for respondent No. 4.
Mr. Suneet Goel, Advocate, for respondent No. 7.

Nemo for respondents No. 8 and 11.
Mr. Sunil Mohan Goel, advocate, for respondent No. 9.
Mr. Ramakant Sharma, Advocate, for respondent No. 10.
Mr. Anand Sharma, Advocate, for respondent No. 12.
Other respondents already ex-parte.

.....

CWP No. 11248 of 2011

For the petitioners: Mr. Vinay Kuthiala, Senior Advocate, with Mr. Rajiv Rai, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for resps. No. 1 to 4.
Mr. Vijay Chaudhary, Advocate, for respondent No. 5.
Mr. Sunil Mohan Goel, Advocate, for respondent No. 6.
Mr. Anand Sharma, Advocate, for respondent No. 7.
Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate, for respondents No. 8 and 9.

.....

CWP No. 216 of 2012

For the petitioners: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for respondents No. 1 to 3, 5 and 6.
Mr. Vijay Chaudhary, Advocate, for respondent No. 4.
Mr. Suneet Goel, Advocate, for respondent No. 7.
Nemo for respondent No. 8.
Mr. Sunil Mohan Goel, Advocate, for respondent No. 9.
Mr. Ramakant Sharma, Advocate, for respondent No. 10.
Respondents No. 11 and 12 already ex-parte.

.....

CWP No. 420 of 2012

For the petitioners: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for resps. No. 1 to 5.
Mr. Suneet Goel, Advocate, for respondent No. 6.
Mr. Vijay Chaudhary, Advocate, for respondent No. 7.
Mr. Sandeep Sharma, Advocate, vice Mr. Ashwani Pathak, Advocate, for respondent No. 8.

.....

CWP No. 378 of 2015

For the petitioners: Mr. Vinay Kuthiala, Senior Advocate, with Mr. Rajiv Rai, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, for resps No. 1 to 4.
Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate, for respondents No. 5, 6 and 8 to 11.

Mr. Nand Lal Chauhan, Advocate, for respondents No. 12 to 14, 17, 18 and 20.
Mr. Vijay Chaudhary, Advocate, for respondent No. 21.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

In **CWP No. 6738 of 2014,** the writ petitioners have questioned the order, dated 08.08.2014, made by the Chief Secretary (Cooperation) to the Government of Himachal Pradesh in the revision petitions to the extent that the amendment in the bye-laws carried out on 19.07.2009 have not been declared to be illegal and invalid despite the fact that the Chief Secretary has held that the general body meeting, dated 19.07.2009, was not held in terms of the mandate of the procedure and the entire exercise of the bye-laws suffers from procedural flaws. The writ petitioners have also sought writ of mandamus commanding the respondents to follow the unamended Bye-laws, which were holding the field before 19.07.2009.

2. In **CWP No. 378 of 2015,** the writ petitioners have sought quashment of order, dated 08.08.2014, made by the Chief Secretary (Cooperation) to the Government of Himachal Pradesh to the extent that he has fallen in error in holding that the general body meeting held on 19.07.2009 was not in accordance with law and was suffering from procedural flaws, which finding is not correct.

3. In **CWPs No. 4964, 5055 and 5093 of 2011,** the writ petitioners have questioned paras 37 to 43 of the order, dated 20.06.2011, made by the Registrar, Cooperative Societies.

4. The writ petitioners in **CWPs No. 5663, 9404 of 2011, 216 of 2012,** have questioned the order, dated 20.06.2011, made by the Registrar, Cooperative Societies.

5. In **CWP No. 420 of 2012,** the writ petitioners have sought quashment of agreements, dated 17.02.2010 & 01.09.2011 and have also sought writ of mandamus directing the State authorities to perform their constitutional obligations and statutory duties and to maintain law and order on spot.

6. Before we deal with the factual background, the womb of which has given birth to these writ petitions, we deem it proper to record herein that this Court in CWP No. 4964 of 2011, while passing orders in CMP No. 6190 of 2011, issued directions vide order, dated 01.07.2011, the relevant portion of which reads as under:

> *".....*
>
> *When the JP Cement Factory was set up in Arki Sub Division, a division of labour in the matter of transportation was arrived at between Arki and Non-Arki people in the ratio of 70:30. The basis was that the people in Arki Sub Division, where the plant is set up, are the more affected persons when compared to the Non-Arki people. Of course, the people whose lands were acquired and who lost their houses are from Mangal and Beral Panchayats only apart from lost means of livelihood in these Panchayats since the plant*

is set up in those Panchayats only. Taking clue from that division of transport, we feel that by way of an interim arrangement, 70% of the work allotted to the people of Arki Sub Division could be for the time being sub divided into 70:30. 70% will go to the members who are residents of Mangal and Beral Panchayats and 30% will go to non-residents of Mangal and Beral Panchayats in the Society. There will be a direction to respondents No. 3 to 5 to render necessary assistance to the Administrator of the 7th respondent-Society to work out a formula, as above, if requested by the Administrator. There will be a direction to respondents No. 4 & 5 to file short affidavit as to the working out of the ratio as proposed in this interim order, within two weeks."

7. It appears that after noticing the said order, CWPs No. 5055 & 5093 of 2011 were filed and same directions came to be passed in the said writ petitions on different dates, i.e. on 04.07.2011 and 05.07.2011, respectively.

Background:

8. M/s. Jay Pee Himachal Cement Plant Limited Baga-Bhalag, with its project site at Baga and mining area in Gram Panchayats Mangal and Beral, gave birth to a scheme on 22.08.2005 for rehabilitation of the affected persons and the non-affected persons of Arki Tehsil, known as the Scheme for the Rehabilitation and Resettlement of the Oustees of the Jaypee Himachal Cement Project (A Unit of Jaiprakash Associates Limited (for short "the Scheme") and the Bye-laws of The Mangal Land Loosers and Effected Transport Co-operatives Society Limited Baga, P.O. Mangal, Tehsil Arki, District Solan, H.P. (for short "the Bye-laws").

9. Rule 5 (iv) of the said Bye-laws mandates that the Society is to provide transport business for the landless losers houseless and affected persons of Mangal and Beral Panchayats and non-affected persons of Arki Tehsil. It is apt to reproduce Rule 5 (iv) of the Bye-laws herein:

"5. .....

(iv) the society is to provide 80% transport business for landless loosers houseless and Effected persons of the above Panchayats and 20% to other non-effected persons of Arki Tehsil."

10. It appears that the Bye-laws were amended on 19.07.2009, whereby amendment was carried out in Rule 5 (iv), which reads as under:

"5(iv). The society is to provide 50% transport business for landless loosers houseless and Effected persons of above panchayats and 50% to other non-effected persons of Arki Tehsil."

11. Amendment of the said Rule in the Bye-laws of the Society is the bone of contention between the landless losers, houseless and affected persons of Gram Panchayats Mangal and Beral and non-affected persons of Arki Tehsil.

12. It is apt to record herein that a meeting was held on 08.02.2010 in the office of Deputy Commissioner, Shimla, under the chairmanship of Deputy Commissioner, Solan,

with regard to the allocation of transport work from Jay Pee Cement Plant Bagga, wherein the following orders were made:

> *".....From the record it was found that people living in Solan district have lost maximum land. Therefore it was decided that higher allocation of transportation work of cement/clinker would go in favour of residents of Arki Sub Division of Solan District. Hence 70% transportation share was allocated to Mangal Gram Panchayat and Arki Sub Division of Solan District and 30% for affected Panchayats of District Bilaspur, which would include 5% share (25% + 5%) for the ex-servicemen of entire H.P. State through Ex-Servicemen Corporation, Hamirpur."*

13. Thereafter, a representation was filed by the Arki Tehsil Truck Operators Union (for short "ATTOU") before the District Magistrate, Solan, who passed orders on 04.04.2011 and made distribution of 70% share of the transport business between the Society and ATTOU in equal shares. It is apt to reproduce relevant portion of the said order herein:

> *".....*
>
> *Therefore, in view of the decision dated 08-02-2010 & agreement drawn on 17-2-2010, I.C. Palrasu, District Magistrate Solan hereby order the following distribution of Transportation of cement/clinker between The Arki Tehsil Truck Operator Union (ATTOU) & The Mangal Looser & Affected Transport Co-Operative Society Bagga in the following manner:-*
>
> *1. The Arki Tehsil Truck Operator Union (ATTOU) = 35%*
>
> *2. The Mangal Looser & Affected Transport Co-operative Society Bagga = 35%*
>
> *The above arrangement would come into force with immediate effect to provide equal opportunity to all truck operators and make this viable and shall be operative as per agreement and the company shall not revise this system during the period as specified in the agreement."*

14. This order of the District Magistrate was questioned, by the medium of CWP No. 2086 of 2011 before this Court, which came to be disposed of vide judgment and order, dated 28.04.2011, with a direction to the Registrar, Cooperative Societies to pass appropriate orders after hearing the concerned parties.

15. In sequel thereto, Registrar, Cooperative Societies passed fresh orders on 20.06.2011. It is apt to reproduce para 42 of the said order herein:

> *"42. The criteria for the distribution of transportation work has already been settled in principle in the judgment passed by the Hon'ble High Court of H.P. in CWP No. 606 of 2010 on 18.03.2010. Accordingly, the land losers belonging to Mangal area deserve greater proportion of transportation quota in all eventualities and*

> *probabilities. Since 70% quota of Solan District is to be distributed among the Land Losers and affected persons of Mangal and Beral area on one side, and the non-affected persons of Arki Sub-Division on the other, therefore, there could not be any scientific formula devised for such distribution. I, therefore, order that 60% of the total transportation quota of Solan District as fixed in the meeting dated 8.02.2010 shall be allocated to the Mangal Land Losers and Affected Persons' Transport Co-operative Society comprising members of Mangal and Beral Panchayats and 40% to the new transport co-operative society to be formed by the division of the existing society."*

16. The order, dated 20.06.2011, is subject matter of CWPs No. 4964, 5055, 5093, 5663, 9404, 11248 of 2011 and 216 of 2012, as discussed hereinabove, and amendment of the Bye-laws on 19.07.2009, as reproduced hereinabove, is the bone of contention in CWPs No. 6738 of 2014 and 378 of 2015.

17. Perusal of the entire pleadings does disclose that the basic issue is how to regulate the transport business and in which ratio?

18. While going through the Scheme and the Bye-laws, the purpose was to provide relief to the affected persons, who became land losers, houseless and the other persons, i.e. non-affected persons of Arki Tehsil. The Bye-laws were registered on 30.07.2005, which contain a mechanism as to who can be the member of the Society, how to regulate the business and transportation work.

19. Unfortunately, the general house convened on 19.07.2009 gave birth to the dispute between the parties, who are the beneficiaries of the said Bye-laws and Scheme.

20. The writ petitioners in some of the writ petitions have questioned the convening of general house meeting on the ground that the said meeting was illegal and not in accordance with the mandate of law, Rules and Regulations occupying the field.

21. On their application/complaint, the Registrar, Cooperative Societies directed the Joint Registrar (Marketing) Cooperative Societies to inquire into the affairs of the Society, particularly regarding the general house meeting held on 19.07.2009, who submitted the inquiry report to the Registrar, Cooperative Societies on 25.02.2012 and recommended for quashment of the amendments made in the Bye-laws in the said general house meeting. It is apt to reproduce relevant portion of the report herein:

> *".....*
>
> *In view of the above narrations, submissions made by all the parties present on the day and the examination of the record of the above society, I have arrived at this conclusion that the General House which was convened on 19.7.2009 was attended by 132 members which constituted full quorum for the sake of General House and the business was transacted in a voice votes and no dissent or disagreement was recorded by any of the members present and the Assistant Registrar Cooperative Societies Solan registered the amendment in tune with the General House proceedings and the*

> *recommendations of Local Inspector but as for as the Bye-Laws No. 24 is concerned the modus-operandi adopted by the managing committee to convene the General House was not in consonance with the Bye-Law No. 24 and hence legality and validity of the General House is questionable and can not be held good in eyes of the Law but the enrollment and purchase of trucks by the non effected members of the Arki Area, were as a consequence of General House convened by the managing committee for which these members can not be held guilty.*
>
> *....."*

22. The said report was accepted by the Registrar, Cooperative Societies and the Assistant Registrar, Cooperative Societies, was directed, vide letter, dated 20.02.2013, to de-register the amendments carried out in the general house with immediate effects. It is apt to reproduce relevant portion of the said letter herein:

> *"With reference to the letter of this Directorate of dated 19.05.2011 vide Joint Registrar Cooperative Societies (Marketing) was ordered to conduct inquiry with regard to the General body meeting held on 19.07.2009 and the decisions taken in that meeting, on the complaint of 52 members/complainants. The Inquiry Officer submitted his findings on 25.02.2012 concluding therein that the General House convened on 19.07.2009 was illegal and conducted in violation of by-laws no. 24 of the Managal Land Looser & effected Transport Cooperative Society Ltd. Baga P.O. Mangal Tehsil Arki District Solan.*
>
> *The inquiry report submitted by the Inquiry Officer was taken into consideration and accepted accordingly and the general house convened on 19.07.2009 is hereby declared illegal and consequently the decisions taken in this general house are also illegal. The Assistant Registrar Cooperative Societies is further directed to de-register the amendments carried in this general house with immediate effect."*

23. The order, dated 20.02.2013, made by the Registrar, Cooperative Societies was questioned by respondents No. 5 and 6 in CWP No. 6738 of 2014, by the medium of appeal, which was heard by the Principal Secretary (Cooperation), who accepted the appeal, in terms of order, dated 22.02.2013, kept the order, dated 20.02.2013, in abeyance and remanded the matter to the Registrar, Cooperative Societies. It is apt to reproduce relevant portion of the order, dated 22.02.2013, herein:

> *".....It would meet the end of justice if the matter is remanded to the Registrar, Cooperative Societies for examining the point of limitation as well as non-association of necessary parties with the enquiry. Letter No. Coop PA/Joint RCS/2012 dated 20.2.2013 of the RCS will be kept in abeyance till such time. A proper speaking order shall be passed by the Ld. Registrar, Coop. Societies."*

24. Respondents No. 5 and 6 in CWP No. 6738 of 2014, feeling aggrieved by the inquiry conducted by the Joint Registrar (Marketing) Cooperative Societies, filed a revision petition before the Registrar, Cooperative Societies, Himachal Pradesh at Shimla, which was allowed, the inquiry report was quashed and the amendments made on 19.07.2009 in the Bye-laws were held to be valid vide order, dated 27.05.2013.

25. The writ petitioners in CWP No. 6738 of 2014 questioned the said order by the medium of CWP No. 4277 of 2013-H before this Court, which was allowed vide judgment and order, dated 26.06.2013, the order of Registrar, Cooperative Societies, dated 27.05.2013, was set aside, the case was remanded with a direction to consider the case afresh on its own merits in accordance with law without being influenced by the observations made by the Registrar, Cooperative Societies in its order, dated 27.05.2013.

26. The revision petition was revived and came up for hearing before the Registrar, Cooperative Societies, again parties were heard and vide order, dated 11.09.2013, it was held that the amendments carried out in the Bye-laws on 19.07.2009 were valid. The writ petitioners in CWP No. 6738 of 2014 questioned the order, dated 11.09.2013, made by the Registrar, Cooperative Societies, by the medium of CWP No. 7587 of 2013, was allowed vide order, dated 14.11.2013 and the order, dated 11.09.2013, made by the Registrar, Cooperative Societies, was set aside with some observations.

27. It appears that this Court, vide judgment and order, dated 14.11.2013, directed the writ petitioners to invoke the remedy of revision under Section 94 of the Himachal Pradesh Cooperative Societies Act, 1968 (for short "the Act"). The Revisional Authority, i.e. Secretary (Cooperation), was directed to examine all the questions on facts as well as law and the approach of the concerned Registrar was deprecated and the Secretary (Cooperation) was asked to take appropriate action against him in accordance with law. It was also observed that the writ petitioners were at liberty to resort to the remedy of contempt against the said Registrar.

28. Review petitions were filed before this Court, which were considered alongwith the contempt petition. The judgment and order, dated 14.11.2013, passed in CWP No. 7587 of 2013 was reviewed and recalled in terms of the order and judgment made by this Court on 22.05.2014. CWP No. 7587 of 2013 was taken on Board with the consent of the learned counsel for the parties and the Principal Secretary (Cooperation) was directed to decide the revision petition uninfluenced by any observations made by this Court in series of the judgments. The observations/remarks made against the Registrar, Cooperative Societies were expunged and the action drawn against the Registrar, Cooperative Societies by the authority was ordered to be closed and dropped. The contempt proceedings were also closed. All the files were withdrawn from the dockets of the Registrar, Cooperative Societies with a direction to send all the files with record to the Secretary (Cooperation), who was directed to decide the entire lis.

29. It is stated that the Chief Secretary is also exercising the powers and authority of Secretary (Cooperation) and has determined the lis, vide order, dated 08.08.2014, by holding that the amendments carried out in the Bye-laws in the general house meeting held on 19.07.2009 are not illegal or invalid but are valid despite the fact that there were some procedural flaws, which cannot be a ground for declaring the said amendments in the Bye-laws to be invalid.

30. Feeling aggrieved by the said order, two writ petitions, i.e. CWPs No. 6738 of 2014 and 378 of 2015, came to be filed before this Court. The writ petitioners in CWP No. 6738 of 2014 have questioned the order to the extent of not declaring the amendments

carried out in the Bye-laws on 19.07.2009 to be illegal and invalid. The writ petitioners in CWP No. 378 of 2015 have questioned the said order to the extent that it has fallen in an error in holding that there were some procedural flaws in holding the general body meeting and also the amendments were suffering from the procedural flaws.

31. The order, dated 20.06.2011, made by the Registrar, Cooperative Societies, has been questioned by the writ petitioners in CWPs No. 4964, 5055, 5093, 5663, 9404, 11248 of 2011 and 216 of 2012, who has made orders in pursuance of the orders, dated 28.04.2011, passed by this Court in CWP No. 2086 of 2011, while quashing the order, dated 04.04.2011, made by the District Magistrate, Solan.

32. It is apt to record herein that interim arrangement was made by this Court in terms of order, dated 01.07.2011, passed in CWP No. 4964 of 2011, which also provides how to regulate the transport business and all the parties have been directed to ensure that the said directions are made practicable and applicable. The said directions are still in place and no grievance has been made by any of the parties till today.

33. While going through the Bye-laws and the orders made by this Court, Chief Secretary (Cooperation), Registrar, Cooperative Societies and the District Magistrate, the basic issue is relating to transport business and how to regulate the work amongst the affected persons in terms of the Scheme and Bye-laws. Thus, the entire controversy revolves around Rule 5 (iv) of the Bye-laws, as reproduced hereinabove.

34. Mr. R.L. Sood, learned Senior Counsel, argued that Rule 30 of the Bye-laws has remained unamended, thus, the business is to be regulated in terms of the said Rule.

35. It is apt to reproduce Rule 30 of the Bye-laws herein:

> ***"DISTRIBUTION OF WORK***
>
> *30. The hereditary Land loosers and Houseless members of G.P. Mangal and Beral shall be authorized to ply 5 (Five) Trucks each and the effected members of the above said Panchayats shall be authorized to ply 3 Trucks each and members of other Panchayats of Tehsil Arki shall be authorised to ply 2 (Two) each through the society. However the priority in the work will firstly be given to the hereditary landlooser and effected members of G.P. Mangal and Beral."*

36. While going through Rule 30 of the Bye-laws, it appears that it is not creating any right or interest in favour of any person. It contains the procedure relating to distribution of the work, not business. Rule 5 (iv) of the Bye-laws is the core of the lis.

37. In the given circumstances, the following questions arise for consideration:

> (i) Whether this Court can settle and fix the ratio of the allocation of transport business between the parties in view of the Bye-laws, which were made before the project was set up, i.e. on 30.07.2005?
>
> (ii) Whether it can be held that the amendments in the Bye-laws carried out in the year 2009 are illegal and invalid?

(iii) What is the effect of subsequent developments read with the fact that the membership of the Society has gone up from 260 to 1495?

(iv) Whether the persons, who became the members of the Society after amendment, i.e. from 261 to 1495, can be deprived of the rights, duties, liabilities and interests, which they have earned after they became members?

(v) Whether the writ petitioners, who had questioned the amendments of the Bye-laws, were within their rights to question the same after a period of two years from the date when amendments were carried out in the Bye-laws?

(vi) Whether the said writ petitioners are caught by law of limitation, estoppel, waiver and acquiescence?

(vii) Whether the Chief Secretary was competent to pass the order, dated 08.08.2014, as Chief Secretary, though, he was holding the additional charge of Secretary (Cooperation), but signed the same as Chief Secretary?

(viii) Was it possible to convene a general house of all the members of the Society and determine the issue afresh without entering into the controversy as to whether there were procedural lapses / deficiencies in convening the general house meeting on 19.07.2009 and whether the amendments made in the Bye-laws were valid or invalid?

(ix) Has the Chief Secretary marshalled and thrashed out what procedural breach was committed by the general house, which was convened on 19.07.2009?

(x) Whether the procedural flaw(s), if any, is/are sufficient ground(s) for quashing the amendments carried out in the Bye-laws or whether such procedural defects were mere irregularities and could have been rectified?

38. The Chief Secretary and the authorities under the Act have not discussed all the said questions.

39. Admittedly, much water has flown down right from the year 2009 till the writ petitioners have raised the finger and the membership of the Society has gone from 260 to 1495 after the amendment was made, mention of which has been made in para 39 of the order, dated 08.08.2014. It is apt to reproduce para 39 of the said order herein:

"39. In fact I would venture to point out that procedural flaws occur in practically every sphere. We should go more by the consequences of the amendments to see whether these were as per the wishes of the members of the Society. Here we need to take note that practically nobody had any objection to the amendments for nearly 2 years. A large number of persons became members of

> *the Society resulting in the situation that the number of member increased from 260 to 1495. This did not happen in overnight but happened over 2 years. Secondly as the new members joined, many more trucks were purchased and started plying on the roads. It cannot be said that the new members or the new trucks were not seen by the original members. The very fact that objections were not raised by them for nearly 2 years indicates that the situation which was emerging was acceptable to them."*

40. It was the duty of the Chief Secretary and the Registrar, Cooperative Societies to keep in mind that the procedure is meant to further the ends of justice and not to frustrate the same. They had also to keep in mind the purpose for which the project was set up, the aim and object of the Scheme and effect of the Bye-laws.

41. The Apex Court in a case titled as **Rani Kusum (Smt) versus Kanchan Devi (Smt) and others,** reported in **(2005) 6 Supreme Court Cases 705,** has laid guidelines. It is apt to reproduce para 14 of the judgment herein:

> *"14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."*

42. It would also be profitable to reproduce para 14 of the judgment rendered by the Apex Court in a case titled as **R.N. Jadi & Brothers and others versus Subhashchandra,** reported in **(2007) 6 Supreme Court Cases 420,** herein:

> *"14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knock-outs. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in Kailash vs. Nankhu, (2005) 4 SCC 480, which held that the provision was directory and not mandatory But there could be situations where even a procedural provision could be construed as mandatory, no doubt retaining a power in the court, in an appropriate case, to exercise a jurisdiction to take out the rigor of that provision or to mitigate genuine hardship. It was in that context that in Kailash vs. Nankhu (supra) it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. Kailash is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner."*

43. The Apex Court in the case titled as **Sadhuram Bansal versus Pulin Behari Sarkar and others,** reported in **(1984) 3 Supreme Court Cases 410,** held that some procedure here and there, mere technicalities here and there cannot be the ground to quash a rule. It is a duty of the Court to see that proper justice is granted and rights are protected. It is apt to reproduce paras 29, 30 and 35 of the judgment herein:

> *"29. Mr. S. S. Ray, appearing for the appellant, submitted that the entire question was a legal issue and there was no warrant for the learned Judges of the High Court to have imported the doctrine of social justice. In our opinion, there, appears to be some misapprehension about what actually social justice is. There is no ritualistic formula or any magical charm in the concept of social justice. All that it means is that at between two parties if a deal is made with one party without serious detriment to the other, then the Court would lean in favour of the weaker section of the society. Social justice is the recognition of greater good to larger number without deprivation of accrual of legal rights of any body. If such a thing can be done then indeed social justice must prevail over any technical rule. It is in response to the felt necessities of time and situation in order to do greater good to a larger number even though it might detract from some technical rule in favour of a party. Living accommodation is a human problem for vast millions in our country. The owners, in this case, are getting legally Rs. 1 lac more.*
>
> *30. We must remember that in administering justice - social or legal Jurisprudence has shifted away from finespun technicalities and abstract rules to recognition of human beings as human beings and human needs as human needs and if these can be fulfilled without deprivation of existing legal rights of any party concerned, Courts must lean towards that and if the Division Bench of the High Court, in the facts and circumstances of the case, has leaned towards that, it is improper for this Court in exercise of the discretion vested under Art. 136 of the Constitation to interfere with that decision. We would do well to remember that justice - social, economic and political - is preamble to our Constitution. Administration of justice can so longer be merely protector of legal rights but must whenever possible be dispenser of social justice.*
>
> *xxx xxx xxx*
>
> *35. In such a situation, therefore, in our opinion, the Division Bench of the High Court has done substantial justice throwing aboard the technicalities particularly for the reason that Courts frown over a champertous litigation or agreement even though the same may be valid. Thus, by its decision the Division Bench got more money for the owners an the one hand and on the other*

sought to rehabilitate the 38 families of the respondent who had already built permanent structures."

44. The Registrar, Cooperative Societies has not discussed in its order, dated 20.06.2011, which is impugned in CWPs No. 4964, 5055, 5093, 5663, 9404, 11248 of 2011 and 216 of 2012, the effect of the amendments carried out on 19.07.2009, which is directly or indirectly related with the issue.

45. The authorities discharging the functions of Secretary, Registrar, Joint Registrar and Assistant Registrar under the Act read with the Himachal Pradesh Co-operative Societies Rule, 1971 (for short "The Rules") were and are under obligation to examine the provisions of the Act, Rules, Scheme, Bye-laws and other prevailing factors, i.e. subsequent developments, which have crept-in w.e.f. 30.07.2005 in order to pass directions which, according to them, were fit, in the given circumstances of the cases.

46. It is apt to reproduce Section 94 of the Act herein:

"***94. Review and Revision:-***

(1) The state Government except in a case in which an appeal is preferred under Section 93 may call for and examine the record of any inquiry or inspection held or made under this Act or any proceedings of the Registrar or of any person subordinate to him or acting on his authority, and may pass thereon such orders as it thinks fit.

(2) The Registrar may at any time:-

(a) review any order passed by himself; or

(b) call for and examine the record of any inquiry or inspection held or made under this Act of the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit;

Provided that before any order is made under sub-section (1) and (2), the State Government or the Registrar as the case may be shall afford to any person likely to be affected adversely by such orders an opportunity of being heard.

Provided further that every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be shall be made within ninety days from the date of the communication of the order sought to be reviewed or revised.

The section empowers the State Government and the Registrar to review and revise certain orders or proceedings made or held under this Act.

(Emphasis added)"

47. Thus, the Secretary (Cooperation) as well as the Registrar, Cooperative Societies were within their powers to pass any order, as they would have thought proper and fit in the given circumstances and facts of the case.

48. The question arose before the Allahabad High Court as to what orders can be made by the revisional authority and what is the mandate of the words 'as they think fit' in the case titled as **Rati Ram versus Niader Mal,** reported in **(28) AIR 1941 Allahabad 215.** It is apt to reproduce relevant portion of the judgment herein:

> *".....There was then a second appeal to this Court which came before me in April last year and in which I passed the order to which I have already referred. It was conceded that no appeal lay and, by what appears to me now to have been a great concession to the applicant, I refrained from dismissing the second appeal then and there and gave him time to launch the present revision application. This revision application was, accordingly, set on foot on 7th May. Two preliminary objections were first taken by Mr. Mukerji on behalf of the respondent. He says first that even this revision application is entitled under S. 115, Civil P.C., and, inasmuch as that section is wholly inapplicable to a proceeding under the Agra Tenancy Act, this revision is already 'out of Court'. I see the force of that, but I feel that so to hold would be taking a rather technical view, because, even if S. 115, Civil P.C., does not apply, S. 253, Agra Tenancy Act, itself clearly does. Mr. Mukerji then says that, if this is to be considered as a revision application under S. 253, Agra Tenancy Act, it still is defective, because what is being sought to be revised is not the judgment of the Assistant Collector but the judgment of the Additional District judge. I do not think that there is any real force in that, because once the High Court is seized of the revision, then, in my view, it becomes its duty to cast its eye not merely on one part of the proceedings but the whole them. What come under the review of the High Court are the proceedings as a whole from start to finish and the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole. Again, I feel that the point is a technical one. (Emphasis added)"*

49. The Apex Court in the case titled as **Swastik Oil Mills Ltd. versus H.B. Munshi, Deputy Commissioner of Sales Tax, Bombay,** reported in **AIR 1968 Supreme Court 843,** has also discussed the issue. It is apt to reproduce para 2 of the judgment herein:

> *"2. In this appeal, Mr. S. T. Desai, appearing on behalf of the appellant, urged the same objections against the notice which were the basis of the prayer for writ in the High Court, and we proceed to deal with them in the order in which he has put them forward before us in his submissions. The first point urged by learned counsel was that, in exercise of the revisional powers, the Deputy Commissioner of Sales Tax, whether acting under the Sales Tax Act of 1946, or of 1953, or of 1959, could only proceed to take action on the basis of*

> *the material already present on the record and was not entitled to act on conjecture or to institute any enquiry so as to include additional material in order to judge the correctness of the order sought to be revised. In support of this proposition, learned counsel referred us to a decision of the Andhra Pradesh High Court in State of Andhra Pradesh v. T. G. Lakshmaiah Setty & Sons., 1961-12 STC 663 (AP). In that case, the Deputy Commissioner, in exercising the revisional jurisdiction, was found by the High Court to have based his assessment on guess-work, and the Court held that "this conjecture could not be a justification for seeking to revise the order of the assessing authority. If the Deputy Commissioner could, on the material before him, find data for revising the assessment, it was open to him to do so. It must be made clear that he has no jurisdiction to travel beyond the record that is available to the assessing authority and the basis should be found on the record already in existence." We are unable to accept this principle laid down by that High Court as correct. Whenever a power is conferred on an authority to revise an order, the authority is entitled to examine the correctness, legality and propriety of the order and to pass such suitable orders as the authority may think fit in the circumstances of the particular case before it. ..... (Emphasis added)"*

50. The word "think fit" is defined in the **Webster's Encyclopedic Unabridged Dictionary of the English Language, Deluxe Edition,** at page 1971, which reads as under:

> *"**Think fit:** to consider advisable or appropriate: By all means, take a vacation if you think fit."*

51. The Apex Court in a recent judgment rendered in the case titled as **Hindustan Petroleum Corporation Ltd. versus Dilbahar Singh,** reported in **2014 AIR SCW 5018,** discussed the powers of the Appellate Court and the revisional Court and, while discussing the expressions 'legality', 'propriety', 'correctness' and 'regularity', held that though the revisional Court has vast powers, but has to determine only the questions of law. It is apt to reproduce paras 25 and 27 to 30 herein:

> *"25. Before we consider the matter further to find out the scope and extent of revisional jurisdiction under th above three Rent Control Acts, a quick observation about the 'appellate jurisdiction' and 'revisinoal jurisdiction' is necessary. Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice-versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding, as the case may be. The power of the appellate court is co-extensive with that of the trial court. Ordinarily, appellate jurisdiction involves re-hearing on facts and law but such*

jurisdiction may be limited by the statute itself that provides for appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a full-fledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of revisional court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the Tribunal/Appellate Authority, the decision of the revisional court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction.

26. .....

27. The ordinary meaning of the word 'legality' is lawfulness. It refers to strict adherence to law, prescription or doctrine; the quality of being legal.

28. The term 'propriety' means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition in conformity with requirement; rules or principle, rightness, correctness, justness, accuracy.

29. The terms 'correctness' and 'propriety' ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'.

30. The expression "regularity" with reference to an order ordinarily relates to the procedure being followed in accord with the principles of natural justice and fair play."

52. The Registrar, Cooperative Societies was hearing revision petition in terms of Section 94 of the Act against the inquiry conducted by the Joint Registrar (Marketing), Cooperative Societies, and vide order, dated 27.05.2013, declared the inquiry report bad in law and upheld the amendments carried out in the Bye-laws.

53. At the cost of repetition, the said order was questioned before this Court by the medium of CWP No. 4277 of 2013, was set aside with a direction to the Registrar, Cooperative Societies to consider the case afresh and pass orders. He made order on 11.09.2013, was again questioned before this Court by the medium of CWP No. 7587 of 2013 and vide order, dated 14.11.2013, all the files were withdrawn from the dockets of the Registrar, Cooperative Societies and the Secretary (Cooperation) was directed to hear the revision petition instead of the Registrar, Cooperative Societies.

54. It is also apt to record herein that vide judgment and order, dated 28.04.2011, made by this Court in CWP No. 2086 of 2011, the order, dated 04.04.2011,

made by the District Magistrate, Solan, was quashed and the Registrar, Cooperative Societies was directed to pass appropriate orders after hearing the parties.

55. The Act contains the complete mechanism and provides complete procedure for invoking the jurisdiction of the authorities under the Act by the affected persons.

56. It is also beaten law of land that procedural laws are aimed at to provide relief to the affected persons and to rehabilitate them and not to defeat the same.

57. Having glance of the Act, the Rules made under the Act read with the Bye-laws and the Scheme, it was the duty of the authorities, particularly the Registrar, Cooperative Societies, to see that the controversy is set at rest once for all by making an appropriate and just order, which they would have thought fit to pass, while keeping in mind the basic foundation of the Scheme, the Bye-laws, subsequent events and aim/object of the procedural laws.

58. Respondents No. 5 and 6 in CWP No. 6738 of 2014 have taken pleas of limitation, estoppel, waiver and acquiescence in all the proceedings before the authorities under the Act and in all the writ petitions before this Court. All the authorities under the Act and this Court have not determined the said pleas so far.

59. The said pleas have also been taken by the private respondents, while filing replies in CWPs No. 4964, 5055, 5093, 5663, 9404, 216 of 2012 & 6738 of 2014 and the writ petitioners in CWPs No. 11248 of 2011 & 378 of 2015.

60. Applying the test in this case, all the parties litigating have been left in lurch and have been made to get entangled in the endless litigation.

61. Having glance of the above discussions, we deem it proper to set aside the order, dated 08.08.2014, made by the Chief Secretary (Cooperation) and the order, dated 20.06.2011, made by the Registrar, Cooperative Societies with a direction to the Registrar, Cooperative Societies to hear all the interested parties, i.e. the writ petitioners and respondents in all the writ petitions, on all the issues raised by the parties in these writ petitions before this Court and before the authorities under the Act and pass fresh order(s) within three months with effect from 17th August, 2015. While making the decision, Registrar, Cooperative Societies, is directed to keep in mind the basic foundation of the Bye-laws, the aim and object of the Scheme and the discussions made hereinabove.

62. It is made clear that the Registrar, Cooperative Societies, shall not get influenced by the observations made by this Court, the Chief Secretary, his predecessor as the Registrar, the Joint Registrar (Marketing), Cooperative Societies or the District Magistrate(s) from time to time.

63. All the writ petitioners, through their respective counsel, are directed to cause appearance before the Registrar, Cooperative Societies, on **17th August, 2015.**

64. Viewed thus, all the writ petitions are disposed of, as indicated hereinabove, alongwith all pending applications.

****

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

Vipan Kumar ....Appellant
Versus
State of H.P. ....Respondent

Cr.A. No. 269/2014
Reserved on: 5.8.2015
Decided on: 6.8.2015

Indian Penal Code, 1860- Section 376- Prosecutrix had gone to urinate but she had not returned- she was found by her mother to be coming out from the house of the accused- prosecutrix told her mother that accused used to give her biscuits and to take her to his residence- prosecutrix also told her that accused had committed sexual intercourse with her and had told her not to disclose this fact to any person- prosecutrix was aged 13 years and was mentally weak – the version of the prosecutrix was supported by her parents- DNA profile obtained from the shirt and vaginal slides of prosecutrix matched with the DNA profile obtained from the blood sample of the accused- this report also corroborates the version of the prosecution- held, that in these circumstances, accused was rightly convicted. (Para-16 to 18)

For the appellant: Mr. Lalit Sehgal, 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/order dated 25.2.2014/26.2.2014 rendered by the Sessions Judge Kullu in Sessions Trial No. 38/2013 (4167/2013), whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 376 IPC has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.20,000/- and in default of payment of fine he was further directed to undergo rigorous imprisonment for one year.

2. Case of the prosecution, in a nutshell, is that on 9.8.2012, at about 6.30 pm at Lower Bhosa, the prosecutrix, daughter of the complainant, Smt. Hiramani, had gone to urinate. The prosecutrix did not come back. Her mother went outside in search of the prosecutrix. At 9.30 pm, Smt. Hiramani saw her daughter coming out of the quarter of the accused. On asking, the prosecutrix told her mother that accused used to come and give her biscuits and thereafter used to take her to his quarter earlier also. Accused had committed sexual intercourse with her on two occasions. The prosecutrix also disclosed that she was taken by the accused inside his quarter and he committed sexual intercourse with her. She developed stomach ache and blood also started oozing out from her private part. The accused told her not to disclose this fact to anybody. The age of the prosecutrix was 13 years. She was mentally weak. The prosecutrix was got medically examined. The police also took into possession the birth certificate of the prosecutrix. The police investigated the case and the challan was put up in the Court after completing all the codal formalities.

3. Prosecution examined a number of witnesses 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. Hence, this appeal.

4. Mr. Lalit Kumar Sehgal, 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 Smt. Hiramani has testified that in the month of *Bhadon* about nine months back, prosecutrix had gone to urinate at about 6.00 pm. She did not come back. They searched her. She could not be traced. Prosecutrix was found in the house of Sher Singh, in which there was quarter of accused. The prosecutrix told her that accused called her and asked to take biscuits. The prosecutrix disclosed to her that accused asked her to remove her pajama and committed wrong act with her. There was bleeding from the private part of the prosecutrix. She reported the matter to the police. FIR is Ext. PW-1/A. The prosecutrix was medically examined. In her cross-examination she has deposed that age of the prosecutrix was 13 years. The prosecutrix could identify the eatables such as rice and *roti*.

8. PW-2 Ibrahim deposed that accused used to reside in the house of Sher Singh in village Bhosa.

9. PW-3 Doctor Sarita Sharma has medically examined the prosecutrix. According to her, Labia Majora was covering Labia Minora. Hymen was torn, one tear was present at 6'o clock position, fresh blood was present, which bled on touch. Another tear was present at 10'o clock position. Fresh blood was present. Hymen tear was within 48 hours to 72 hours, bruises within 48 hours and abrasions within 24 to 48 hours. According to her final opinion, there was interference with external genitalia. She issued MLCs Ext. PW-3/B and PW-3/C.

10. PW-4 Dr. Rituvesh Negi has medically examined the accused. He issued MLC Ext. PW-4/A-1.

11. PW-5 Rot Ram is the father of the prosecutrix. He had gone to Bhunter on 9.8.2012. He came back at 9.45 pm. When he reached home, his wife told him that accused has committed sexual act with his daughter. His wife also disclosed to him that prior to it, accused had also committed similar act with his daughter. Accused was living in the house of Sher Singh.

12. PW-6 Padma has testified that accused used to live with him at his home. One girl came in their room and thereafter she left the room. She remained in the room for about 5-10 minutes. The witness was declared hostile and cross-examined by the learned Assistant Public Prosecutor.

13. Statements of PW-7 Lal Chand, PW-8 Naresh Chand, PW-9 Tara Chand, PW-10 Uma Devi, PW-11 Khem Chand and PW-12 Kushal Dev are formal in nature.

14. PW-13 is the prosecutrix (name withheld). She knew the accused. Accused used to give her biscuits. He had taken her to the room and committed sexual intercourse with her. She developed stomach ache. She narrated the occurrence to her mother. Blood also oozed out from her private part.

15. Statement of PW- 14 Yog Raj is formal in nature.

16. The age of the prosecutrix is 13 years. She was of low intellect though of sound mind as per the observation made by the trial court while recording her statement. PW-1 Smt. Hiramani, mother of the prosecutrix has deposed that the prosecutrix had gone to urinate at about 6.30 pm. She did not come back. The prosecutrix was found in the quarter of the accused. The prosecutrix narrated that accused used to call her and asked her to take biscuits. The accused had asked her to remove her pajama. He has committed wrongful act. PW-13 Prosecutrix has categorically deposed that accused has taken her to his room and committed sexual intercourse with her. According to PW-3 Dr. Sarita Sharma, the hymen was torn. She noticed bruises and abrasions on the body of the prosecutrix. She issued MLC. According to her, there was interference with external genitalia of the prosecutrix. The accused was also medically examined by PW-4 Dr. Rituvesh Negi. PW-5 Rot Ram has also supported the version of PW-1 Smt. Hiramani. According to PW-5 Rot Ram, his wife had told him that his daughter was raped by the accused. The accused had taken advantage of weak intellect of the prosecutrix by alluring her to his quarter and raping her.

17. Mr. Lalit Sehgal, has vehemently argued that his client was falsely implicated as there was some money dispute. There is no evidence worth credence on record to support his submission. No respectable family would falsely implicate a person even if there is some money dispute. Statement of PW-13 prosecutrix is natural and inspires confidence. Her statement is duly corroborated by medical evidence. Date of birth, as per Ext. PW-12/A of the prosecutrix is 3.12.1997.

18. Mr. Ramesh Thakur, learned Assistant Advocate General has drawn attention of the Court to Ext. PW-14/E. The first profile matched with the DNA profile obtained from Exhibit-4a (shirt of prosecutrix) and Exhibit 5(vaginal slides of prosecutrix) and the second profile matched with the DNA profile obtained from Exhibit-2d (blood sample of accused). Human semen was detected on Ext. PW-1/A (underwear of accused). Human blood was detected on the Ext. 4C (Salwar of the prosecutrix) though semen was not detected. Reports Ex.PW-14/D and Ex.PW-14/E further strengthen the case of the prosecution that it was accused, who has raped the minor.

19. Accordingly, in view of the analysis and discussion made herein above, there is no merit in the appeal and the same is dismissed.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.671 of 2008 & CO No.324 of 2009 and
FAO No.672 of 2008 & CO No.356 of 2009.
Decided on: 07.08.2015.

FAO No.671 of 2008	
Amar Nath	...Appellant
VERSUS	
Deli Devi and another	...Respondents.
FAO No.672 of 2008	
Amar Nath	...Appellant
VERSUS	
Bantu Devi and another	...Respondents.

Motor Vehicles Act, 1988- Section 149- Tribunal had held that driver did not have a valid driving licence to drive the vehicle at the time of accident- registration certificate shows that unladen weight of the vehicle was 1660 kg. – driver was competent to drive the light motor vehicle- vehicle fell within the definition of 'Light Motor Vehicle'- held, that Tribunal had wrongly held that driver did not possess a valid driving licence to drive the vehicle at the time of accident. (Para-10 to 13)

For the Appellant(s):	Mr.Bimal Gupta, Senior Advocate, with Mr.Vineet Vashista & Mr.Maan Singh, Advocates.
For the Respondents:	Mr.Bhupender Gupta, Senior Advocate, with Mr.Neeraj Gupta, Advocate, for respondent No.1 in both the appeals. Mr.B.M. Chauhan, Advocate, for respondent No.2, in both the appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

Appellant-insured, by the medium of instant appeals, has questioned the awards, dated 20th October, 2008, passed by the Motor Accident Claims Tribunal, Kullu, (for short, the Tribunal), in Claim Petition No.22 of 2007, titled Deli Devi vs. Amar Nath & another, and Claim Petition No.21 of 2007, titled Bantu Devi vs. Amar Nath and another, whereby compensation to the tune of Rs.50,000/- each, with interest at the rate of 9% from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, in both the claim petitions, and the insurer was saddled with the liability, with right of recovery, (for short, the impugned awards).

Cross Objections No.324 of 2009 & 356 of 2009:

2. The Claimant Deli Devi has preferred Cross objections No.324 in 2009 in FAO No.671 of 2008 and the claimant Bantu Devi has preferred Cross Objections No.356 of 2009 in FAO No.672 of 2008, for enhancement of compensation.

3. As the appeals and the cross objections arise out of one accident, therefore, they are taken up together for final disposal.

4. Facts of the case, in brief, are that on 27th March, 2006, the claimants, in both the claim petitions, were traveling in a Taxi bearing No.HP-33T-9825, which was being, allegedly, driven by the driver, namely, Amar Nath rashly and negligently. The offending vehicle met with an accident as a result of which both the claimants sustained multiple injuries. Thus, the claimants filed separate claim petitions and sought compensation as per the break-ups given in the Claim Petitions.

5. The Claim Petitions were resisted by the respondents on various grounds.

6. The Tribunal, after scanning the pleadings of the parties, framed following similar issues:

> *1. Whether the petitioner sustained injuries in a mother accident caused on 27.3.06 at Sumli on Patlikuhal-Pangan road due to rash and negligent driving of tempo-trax bearing Regn.No.HP-33-T-9825 by its owner-cum-driver-respdt No.1? OPP.*
>
> *2. If issue No.1 is proved in affirmative, to what amount of compensation, the petitioner is entitled and from whom? OPP*

3. Whether the petition is bad for non joinder of necessary parties as alleged?OPR-1

4. Whether the driver of the offending vehicle was not holding a valid and effective driving licence at the time of accident? …OPR-2

5. Whether the petitioner was traveling as gratuitous/unauthorized passenger in the vehicle in question at the time of accident? OPR-2.

6. Whether the petition has been filed in collusion with respdt-1. if so its effect? OPR-2

7. Relief.

7. Parties led their evidence. After scanning the evidence, the Tribunal has held that the driver of the offending vehicle had driven the vehicle rashly and negligently and caused the accident. However, the Tribunal saddled the insurer with the liability at the first instance, with right of recovery from the owner, on the ground that the driver of the offending vehicle, namely, Amar Nath was not having a valid and effective driving licence. Feeling aggrieved, the owner has filed the instant appeals.

8. The claimant has also questioned the impugned awards on the ground of adequacy of compensation by way of filing Cross Objections, as detailed above.

9. Thus, following issues arise for determination in the present appeals:

1. Whether the Tribunal has rightly granted right of recovery to the insurer?

2. Whether the amount awarded in favour of the claimants is adequate?

10. I have gone through the impugned awards and the entire record. The Tribunal has fallen in an error in holding that the driver of the offending vehicle, namely, Amar Nath was not having a valid and effective driving licence to drive the vehicle involved in the accident.

11. Registration certificate of the vehicle has been proved on record as RW-3/A, wherein it is mentioned that the unladen weight of the offending vehicle was 1660 kg. Thus, the offending vehicle, in terms of Section 2(21) of the Motor Vehicles Act, 1988, comes under the definition of "light motor vehicle".

12. A perusal of the copy of the driving licence Mark X shows that driver Amar Nath was competent to drive a Car/Jeep/Tractor and the said license was valid at the time of accident. Therefore, the driver of the offending vehicle, can be said to be having the driving license to drive vehicles falling within the definition of "light motor vehicle", thus, was having a valid and effective driving licence.

13. In view of the above, it can safely be concluded that the Tribunal has fallen in an error while holding that the driver of the offending vehicle, namely, Amar Nath was not having a valid and effective driving licence. Therefore, the findings recorded by the Tribunal are not sustainable and the same are set aside.

14. The findings recorded by the Tribunal are not sustainable on another count. The Tribunal below vide impugned award passed in Claim Petition No.40 of 2006, titled Kubza Devi and others vs. Amar Nath and others, Ext.RA, arising out of the same accident, held the insurer liable to pay the compensation. During the course of hearing, it was informed that no appeal is pending viz. a viz. the said findings recorded by the Tribunal.

15. Having said so, it is held that the owner has not committed any willful breach and the findings recorded by the Tribunal to that extent are set aside and the insurer is saddled with the liability.

16. Now coming to the adequacy of compensation, the Tribunal in both the Claim Petitions (i.e. Claim Petition No.22 of 2007, subject matter of FAO No.671 of 2008, and Claim Petition No.21 of 2007, subject matter of FAO No.672 of 2008), has awarded Rs.50,000/- each (Rs.25,000/- towards permanent disability suffered by the claimants and Rs.25,000/- towards expenses for treatment), excluding the amount already granted as interim compensation. However, the Tribunal has not granted compensation to the claimants under the head 'pain and suffering'. Further, no compensation has been granted for the loss of earning during the period when the claimants remained under treatment.

17. Accordingly, I deem it proper to award Rs.50,000/- each as compensation for the pain and suffering and loss of earning and Rs.10,000/- under the head special diet etc., in addition to the amount already awarded.

18. The enhanced amount shall carry interest as awarded by the Tribunal with effect from the date of impugned award. The insurer is directed to deposit the entire amount alongwith interest within a period of six weeks from today and on deposit, the Registry is directed to release the same in favour of the claimants, after proper identification. The Registry is also directed to refund the entire amount, if any, deposited by the owner-appellant, alongwith up-to-date interest.

19. The appeals filed by the Owner and the Cross Objections filed by the Claimants are allowed and the impugned awards are modified, as indicated above.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Shri Desh Raj Bhardwaj .....Appellant.

Versus

Veena Devi and others ...Respondents

FAO (MVA) No. 668 of 2008.
Date of decision: 7th August, 2015

Motor Vehicles Act, 1988- Section 166- Claimant was a government employee - he had suffered 10% permanent disability- his age was 54 years- injury would be a handicap for re-employment and for other jobs- claimant had lost future income due to the injury sustained by him which was assessed as Rs. 2,200/- per month- applying multiplier of '11'- claimant is entitled to compensation of Rs. 2200x12x11= Rs. 2,90,400/ with interest. (Para-7 and 8)

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. Bhupinder Pathania, Advocate.
For the respondents: Ms. Kanta Thakur, Advocate, for respondent No.1.

Respondent No. 2 already deleted.
Nemo for respondent No.3.
Mr.Jagdish Thakur, Advocate, for respondent No.4.

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 10.6.2008, made by the Motor Accident Claims Tribunal, (I), Kangra at Dharamshala in MACP No. 57-B/II-2002, titled *Sh. Desh Raj Bhardwaj versus Veena Devi and others,* for short "the Tribunal", whereby compensation to the tune of Rs.1,50,000/- with 9% interest per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Owner, driver and insurer have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The claimant has questioned the impugned award on the ground of adequacy of compensation.

4. Thus the only point to be determined in this appeal is whether the amount awarded is adequate or otherwise?

5. I have gone through the impugned award. I am of the considered view that the impugned award is inadequate for the following reasons.

6. It is unfortunate that the learned counsel for the appellant has pressed the appeal, so fat as it relates to future income. He has not pressed the appeal on other issues. His statement is taken on record. Thus, I deem it proper to deal with whether the claimant is entitled to compensation under the head "loss of income."

7. Admittedly, the claimant was a government employee and he has suffered 10% permanent disability which has been proved by Dr. PW2 Dr. Bhanu Awasthi, Assistant Professor of Orthopedics Surgery and have been discussed by the Tribunal in paras 6 to 14 of the impugned award. It is stated that this 10% permanent disability has affected his income and earning capacity. He also came to be transferred because of that injury.

8. Admittedly, the age of the claimant was 54 years at the time of accident and he would have retired at the age of 58 years. That injury would be a handicap for his re-employment and for other jobs. Thus, at the best, it can be said that the claimant was entitled to loss of future income, in view of the said disability. The multiplier applicable, as per the Schedule appended to the Motor Vehicles Act read with ***Sarla Verma and ors. versus Delhi Transport Corporation and anr.,*** reported in ***AIR 2009 SC 3104*** and upheld by the larger Bench of the Apex Court in **Reshma Kumari and others** ***versus*** **Madan Mohan and anr.** reported in **2013 AIR SCW 3120**, case is "11". Admittedly, the income of the injured was Rs.22000/- per month at the relevant point of time, has lost source of income to the tune of Rs.2200/- per month. Thus, the total amount of compensation which the claimant is entitled to under the head "loss of future income" is Rs.2200x12x11= Rs.2,90,400/. Accordingly, the amount of compensation is enhanced to Rs.2,90,400/- with interest, as given in the impugned award.

9. Accordingly, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

10. The insurer is directed to deposit the enhanced amount of compensation within 6 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, through payee's cheque account.

11. Send down the record, forthwith, after placing a copy of this judgment.

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

Hem Raj Sharma. ...Petitioner.

Versus

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

CWP No. 2549 of 2015
Reserved on: 6.8.2015
Decided on: 7.8.2015

Constitution of India, 1950- Article 226- Petitioner pleaded that he was not being paid grant-in-aid- he pleaded that three teachers were appointed subsequent to his appointment and they are being paid grant-in-aid- held, that case of the petitioner should have been treated on parity with three teachers and he should not have been discriminated- respondents are directed to release the grant-in-aid to the petitioner on parity with three teachers. (Para-3 to 5)

For the Petitioner : Mr. Rajesh Verma, Advocate.
For the Respondents : Mr. M.A. Khan, Additional Advocate General with P.M. Negi, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge

Petitioner was appointed as DPE in Government Senior Secondary School, Thona on P.T.A. basis on 1.10.2008. His services were terminated on 24.12.2010. He approached this Court by filing CWP No. 785/2011 against his termination dated 24.12.2010. In sequel to the direction issued by this Court, petitioner rejoined in Government Senior Secondary School, Thona on 7.4.2011. He was again terminated on 8.7.2011. He approached this Court by filing CWP No. 2729/2012. CWP No.2729/2012 was decided on 23.4.2012. Petitioner rejoined on 13.6.2012 after the judgment dated 23.4.2012. Petitioner had earlier approached this Court by filing CWP No. 2304/2014. It was decided on 23.1.2015. Thereafter, case of the petitioner was rejected vide Annexure P-9 dated 9.4.2015. Case of the petitioner in a nutshell is that he is not being paid grant-in-aid.

2. Mr. P.M. Negi, learned Deputy Advocate General has drawn the attention of the court to Annexure R-1 dated 3.1.2008 whereby the PTAs were stayed immediately accepting the joining of PTA teachers.

3. Petitioner was appointed as DPE in Government Senior Secondary School, Thona on PTA basis on 1.10.2008. Petitioner has given instances of 5 teachers, who were appointed after 3.1.2008 in para 9 of the petition vide Annexure P-5. It has come in the reply that these 5 teachers were offered appointment by the PTA, Government Senior Secondary School, Dheera on 9.10.2007 after conducting the interview, but they were not allowed to join the duties. They filed CWP No. 93/2008. Thereafter, these 5 teachers were permitted to join on PTA basis in Government Senior Secondary School, Dheera. Petitioner has also given the instances of 3 teachers, namely, Indira Devi, Kaurra Devi and Mukand Lal, who were appointed on PTA basis after 3.1.2008 and are being paid grant-in-aid. Respondents have not denied the averments made qua these 3 teachers, who were appointed after 3.1.2008 but are being paid grant-in-aid.

4. Petitioner has been discriminated against by the respondent-State. He was constrained to approach this Court repeatedly for the redressal of his grievances. Petitioner's case should have been considered on the parity of Indira Devi, Kaurra Devi and Mukand Lal for the purpose of release of grant-in-aid. The decision of the respondents not to release the grant-in-aid to the petitioner is arbitrary.

5. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Annexure P-9 dated 9.4.2015 is quashed and set aside. Respondents are directed to release grant-in-aid to the petitioner on the parity of Indira Devi, Kaurra Devi and Mukand Lal within a period of 6 weeks from today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Iffco Tokio General Insurance Co.. .....Appellant.

Versus

Ajay Thakur and others ...Respondents

FAO (MVA) No. 539 of 2008.
Date of decision: 7th August, 2015

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that insurance policy did not cover the third party risk at the time of accident and that the driver did not have a valid and effective driving licence at the time of accident- cover note showed that vehicle was insured from 21.1.2003 till 20.1.2004- therefore, risk was covered on 24.10.2003, date of the accident- insurer had failed to prove that driver did not possess a valid driving licence at the time of accident- licence was valid from 15.6.1989 till 14.6.1992 – it was also valid till 14.6.2001 and from 5.5.2005 till 21.5.2008- Insurance Company had not brought on record a renewal order – it was not proved that licence was not effective w.e.f. 14.6.2001 till 5.5.2005- appeal dismissed. (Para-7 to 10)

For the appellant: Mr. B.S. Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate.
For the respondents: Mr. Y.P. Sood, Advocate, for respondents No. 1 and 2.
Mr. Dalip K. Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is the judgment and award dated 23.05.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla in MAC No. 32-

S/2 of 2005/2004, titled *Sh. Ajay Thakur and another versus Sh. Jaswinder Singh and another,* for short "the Tribunal", whereby compensation to the tune of Rs.7,95,000/- with 9% interest per annum was awarded in favour of the claimants and insurer/appellant herein 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. Owner, driver and claimants have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The appellant/insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The learned Senior Counsel for the appellant argued that the award is bad and illegal on the following two grounds:-

(i) That the driver was not having a valid and effective driving license, at the time of accident,

(ii) That there was no insurance policy covering 3rd party risk at the time of the accident,

5. I have gone through the impugned award and have perused the entire record.

6. Before I will deal with ground No.(i), I deem it proper to deal with ground No. (ii).

7. The insurance policy is at page 171 of the record file of the Tribunal, which do disclose that the vehicle was insured from 25.3.2004 to 24.3.2005. According to the learned Senior Counsel for the appellant, the risk was not covered on 24.10.2003 at the time of the accident. The argument is devoid of any force for the reasons that the owner-insured has insured the vehicle in terms of the mandate of the Motor Vehicles Act, for short "the Act" with the Iffco Tokio General Insurance Company, i.e., the appellant herein right from he has purchased the vehicle. The cover note is at page 50 of the record file of the Tribunal, which do disclose that the vehicle was insured w.e.f. 21.1.2003 to 20.1.2004.

8. Having said so, the vehicle was insured and the risk was covered. Accordingly, the ground taken by the learned counsel for the appellant is turned down.

9. Now, coming to first ground, was specifically taken before the learned Tribunal and issue No. 4 was framed and onus was on the insurer/appellant. It was for the insurer-appellant to lead evidence, failed to do so. Thus, failed to discharge the onus. Not only it has failed to discharge the onus but has not pressed the said issue before the Tribunal and the Tribunal recorded that the insurer has not pressed issue No.4. Accordingly, it was decided in favour of the claimants, owner, driver and against the insurer, as not pressed.

10. The appellant has not questioned the statement of the learned counsel for the insurer who has made such statement before the Tribunal and has not questioned the impugned judgment so far it relates to issue No. 4. However, on going through the driving license, it appears that the driving license was valid w.e.f. 15.6.1989 to 14.6.1992. It was also valid upto 14.6.2001 and from 5.5.2005 to 21.5.2008. The renewal order is not on the file. It is not known from which date the renewal order was effective. It was the duty of the insurer to prove that the driving license was not effective from 14.6.2001 to 5.5.2005. It was for the insurer to send for the record but has not led any evidence and even at the cost of repetition, it has not pressed the said issue.

11. The insurer has also not pleaded and proved that the owner/insured has committed any willful default.

12. Viewed thus, this ground taken by the learned Senior Counsel for the appellant also fails. Accordingly, the appeal is dismissed and the impugned award is upheld.

13. Registry is directed to release the amount in favour of the claimants strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

14. Send down the record, forthwith, after placing a copy of this judgment.

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

Krishna Devi .....Petitioner.
Versus
State of H.P. & ors. .....Respondents.

CWP No. 7311 of 2014.
Reserved on: 3.8.2015.
Decided on: 7.8.2015.

Constitution of India, 1950- Article 226- Petitioner was selected for the post of Anganwari Worker but her appointment was cancelled on the application filed by respondent No. 4 by Deputy Commissioner- appeal preferred by the petitioner was dismissed- record showed that appointment letter was issued to the petitioner on 4.8.2007 and the appeal was filed by respondent No. 4 on 21.8.2007- respondent No. 4 pleaded that she came to know about the declaration of the result only on 8.8.2007- held, that in absence of any material, it cannot be said as to when result was declared and when it was notified or published- appeal preferred within 15 days of the knowledge cannot be said to be barred by limitation- there was no recommendation of Block Development Officer nor any order was passed by Sub Divisional Officer (C) for separation of the family of the petitioner- hence, plea of the petitioner that his family had separated on or before 1.1.2014 is not acceptable- order was rightly passed by Deputy Commissioner- petition dismissed. (Para-4 to 7)

For the petitioner: Mr. Dalip K. Sharma, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma Dy. AG for respondent-State.
Mr. Vishal Panwar, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner applied for the post of Anganwari Worker for Anganwari Centre, Kurmala along with respondent No. 4. The interviews were held on 23.7.2007. The Selection Committee selected the petitioner. The appointment letter was issued to the petitioner by respondent No. 3 on 4.8.2007. Respondent No. 4 challenged the appointment of petitioner before the Deputy Commissioner, Solan. The Deputy Commissioner, Solan, dismissed the appeal vide order dated 21.5.2008. Respondent No. 4 preferred an appeal before the learned Divisional Commissioner, Shimla. He remanded the matter to decide it

afresh on 4.9.2008. Thereafter, the Deputy Commissioner, Solan, allowed the appeal vide order dated 23.11.2009. The petitioner filed CWP No. 4872 of 2009 before this Court. It was disposed of by this Court vide order dated 17.5.2010. Thereafter, the Deputy Commissioner, Solan, again cancelled the appointment of the petitioner vide order dated 8.3.2011. The petitioner filed an appeal before the learned Divisional Commissioner. The learned Divisional Commissioner dismissed the same on 4.9.2014, vide Annexure P-5.

2. The case of the petitioner, precisely, is that the appeal was filed beyond the period of limitation prescribed under para 12 of the Scheme. It was also contended that the petitioner separated from the joint family before 1.1.2004.

3. Mr. Parmod Thakur, learned Addl. Advocate General for the State and Mr. Vishal Panwar, Advocate, for respondent No. 4 have supported the orders of Deputy Commissioner, Solan and learned Divisional Commissioner dated 8.3.2011 and 4.9.2014, respectively.

4. The interviews were held on 23.7.2007. The appointment letter was issued to the petitioner on 4.8.2007. The petitioner joined duty on 8.8.2007. According to the reply filed by respondent No. 4, she came to know about the joining of the petitioner only on 8.8.2007 and thereafter within 15 days, she filed the appeal on 21.8.2007.

5. According to para 12 of the Scheme, any candidate aggrieved by any order passed by the Child Development Project Officer appointing Anganwadi Worker and Helper, may file an appeal to the Deputy Commissioner within a period of 15 days of the declaration of the result. There is no contemporaneous material placed on record to show as to when the result was declared and in what manner it was notified or published. Respondent No. 4 came to know about the result only when the petitioner joined the duty on 8.8.2007. She filed an appeal on 21.8.2007. Thus, in these circumstances, it cannot be held that the appeal was filed beyond the period of limitation, prescribed under para 12 of the Scheme.

6. The Deputy Commissioner, Solan in his order has observed that according to the enquiry held by S.D.O.(C), Arki, the family of petitioner was recorded to be separated w.e.f. 12.4.2005 but there was no order from the S.D.O.(C) to this effect. Mr. Vishal Panwar, Advocate, for respondent No. 4 has drawn the attention of the Court to the fact that Daulat Ram, husband of the petitioner, has filed affidavit dated 12.4.2005 to the effect that on 1.1.2004, they were not holding the status of separate family. The petitioner's father-in-law Het Ram was working as regular Conductor in HRTC, Unit No. 3. He was drawing more than Rs. 10,000/- as monthly salary. Thus, the income certificate dated 14.5.2007 was not in accordance with law. There is a detailed procedure, the manner in which the entries in the Pariwar Register are to be made under Rule 21 of the H.P. Panchayati Raj (General) Rules, 1997. Sub-rule (2) of Rule 21 provides that at the close of each calendar year, the entries in the Pariwar Register, required to be prepared under sub-rule (1) to be revised and all entries pertaining to births, deaths and marriages shall be made in the register, which had taken place during the preceding year i.e. upto the 31st day of December. No other addition or alteration can be made without any authenticated evidence or certificate of the member of concerned constituency of the Gram Panchayat. In the event of division of the family, separation of family is to be entered in the Pariwar Register, on the recommendation of the Block Development Officer, given by him after due inquiry and order thereon by Sub-Divisional Officer (Civil) concerned. It is the duty of the Panchayat Inspector to very those entries after satisfying himself about the reasons recorded by the Panchayat Secretary.

7. In the instant case, as rightly observed by the learned Divisional Commissioner, Shimla, in order dated 4.9.2014, there is neither the recommendation of the

Block Development Officer nor any order was issued by the Sub Divisional Officer (C), for separation of family of the petitioner before 1.1.2004. The orders passed by the Deputy Commissioner, Solan and learned Divisional Commissioner, Shimla, dated 8.3.2011 and 4.9.2014, respectively, are speaking and detailed orders. All the pleas raised by the parties have been considered in the right perspective.

8. Accordingly, there is no merit in this petition and the same is dismissed, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

M/s. Jogindra Transport Co. ...Appellant.
Versus
Deepak Kumar and others ...Respondents.

FAO No. 65 of 2009
Decided on: 07.08.2015

Motor Vehicles Act, 1988- Section 149- Driver had a fake licence- insured had not pleaded that he had exercised due care and caution while employing the driver or he had perused the driving licence- held, that Tribunal had rightly held that owner had failed to discharge his duty and had committed willful breach and tribunal had rightly granted the right of recovery to the insurer. (Para-4 to 6)

For the appellant: Mr. Tara Singh Chauhan, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Vijay Bir Singh, Advocate, for respondent No. 2.
Ms. Shilpa Sood, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The appellant-owner-insured has questioned the judgment and award, dated 25.10.2008, made by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (for short "the Tribunal") in M.A.C. No. 31 of 2006, titled as Deepak Kumar versus M/s Jogindera Transport Co., whereby compensation to the tune of Rs.78,727/- with interest @ 9% per annum from the date of filing of the claim petition till its realization was awarded in favour of the claimant and the insurer was directed to satisfy the award at the first instance with right of recovery (for short "the impugned award").

2. The insurer, the driver and the claimant have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The owner-insured has questioned the impugned award only on the ground that the Tribunal has fallen in an error in exonerating the insurer and saddling it with liability.

4. Thus, the only question to be determined in this appeal is - whether the insurer came to be rightly exonerated or otherwise?

5. It is apt to record herein that the driver, namely Shri Sushil Kumar, was having fake licence and the owner-insured has not pleaded in its reply that it has exercised due care and caution while employing the driver or has perused the driving licence. Thus, the owner-insured has failed to discharge his duty and has committed willful breach.

6. In the given circumstances, the Tribunal has rightly granted the right of recovery to the insurer.

7. In terms of Section 140 of the Motor Vehicles Act, 1988 (for short "MV Act"), on the principle of 'No Fault Liability', Rs.25,000/- was to be paid by the insurer because the injured, who was minor at that point of time, has suffered permanent disability, which is evident from the photograph and the documents/medical certificate on the file.

8. Accordingly, I deem it proper to modify the impugned award by providing that Rs. 25,000/- is to be paid by the insurer under the head "No Fault Liability" in terms of Section 140 of the MV Act and rest of the amount is to be paid by the owner-insured. The impugned award is modified accordingly.

9. At this stage, Ms. Shilpa Sood, learned counsel for the insurer, stated at the Bar that they have filed suit for recovery before the Civil Court. The insurer is at liberty to withdraw the suit and file application before the Tribunal. The Tribunal is directed to get the amount recovered within four weeks thereafter and report compliance.

10. The appeal is disposed of accordingly.

11. 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.

Smt. Mani Devi ...Appellant.

Versus

Sh. Baldev and another ...Respondents.

FAO No. 663 of 2008
Decided on: 07.08.2015

Motor Vehicles Act, 1988- Section 166- Injured was 34 years of age at the time of the accident – she was a housewife and had suffered 45% disability- the injuries had shattered her physical frame and now she is dependent upon her family- it can be safely said by guess work that she was contributing not less than 6,000/- per month and by applying multiplier of '14', the claimant is entitled to Rs. 6,000/- x 12 x 14 = Rs. 10,08,000/- under the head 'loss of income' Rs. 50,000/- under the head medical treatment already undergone - Rs. 50,000/- under the head future treatment Rs. 2,00,000/- under the head pain and suffering in future Rs. 1,00,000/- under the head loss of amenities to life, Rs. 20,000/- under the head attendant charges and Rs. 10,000/- under the head transportation charges- thus the total amount of Rs. 16,38,000/- with interest @ 7.5 p.m. awarded to the petitioner.

(Para 12 to 42)

Cases referred:

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

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

United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174
Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674
State of Haryana and another vs. Jasbir Kaur and others, AIR 2003 Supreme Court 3696
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213
Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717
Ningamma & another versus United India Insurance Co. Ltd., AIR SCW 4916
Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800
Savita versus Bindar Singh & others, 2014 AIR SCW 2053
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. K.R. Thakur, Advocate.
For the respondents: Mr. Ajay Chauhan, Advocate, for respondent No. 1.
Mr. Narender Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award, dated 05.09.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, Himachal Pradesh (for short "the Tribunal") in M.A.C. No. 165-S/2 of 2005, titled as Smt. Mani Devi versus Sh. Baldev and another, whereby compensation to the tune of Rs.3,06,800/- with interest @ 9% per annum from the date of the claim petition till its realization was awarded in favour of the claimant-injured, against the respondent and the insurer came to be saddled with liability (for short "the impugned award").

2. The owner-cum-driver and the insurer of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The claimant-injured has questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is - whether the amount awarded is inadequate?

5. On the last date of hearing, learned counsel for the insurer was asked to seek instructions to settle the claim by paying Rs.10,00,000/- in lump-sum. Today, he stated, on instructions, that the appeal be decided on merits.

6. The claimant-injured, at the age of 34 years, became the victim of a motor vehicular accident, which was caused by the owner-cum-driver, namely Shri Baldev, while driving Mahindra Marshal Taxi, bearing registration No. HP-01A-3178, rashly and negligently on 22.05.2004, at about 3.15 P.M., near Kotlu, P.S. Karsog. FIR No. 71/2004

was lodged under Sections 279, 337 and 338 of the Indian Penal Code (for short "IPC"). She has claimed compensation as per the break-ups given in the claim petition.

7. The claim petition was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

8. Following issues came to be framed by the Tribunal on 25.04.2007:

> *"1. Whether the petitioner sustained the injuries due to the rash and negligent driving of Jeep No. HP-01A-3178 by the respondent No. 1 as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties*
>
> *3. Whether the petition is not maintainable as alleged? OPR-2*
>
> *4. Whether the vehicle was being plied in contravention of the terms and conditions of the insurance policy. If so, its effect? OPR-2*
>
> *5. Whether the respondent No. 1 was not holding and possessing a valid and effective driving licence to drive the vehicle at the desired time. If so, its effect? OPR-2*
>
> *6. Whether the petitioner is estopped from filing the petition by her act and conduct? OPR-2*
>
> *7. Whether the petitioner was a gratuitous passenger. If so, its effect? OPR-2*
>
> *8. Relief."*

9. Parties have led evidence.

Issue No. 1:

10. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant-injured has proved that the driver of the offending vehicle had driven the same rashly and negligent at the time of the accident and caused the accident. The findings returned on this issue are not in dispute because the driver-cum-owner and the insurer have not questioned the same. Accordingly, the findings returned by the Tribunal on issue No. 1 is upheld.

Issues No. 3 to 7:

11. The findings returned by the Tribunal on issues No. 3 to 7 are also not in dispute for the simple reason that it was for the insurer to discharge the onus, has not pressed into service all these issues before the Tribunal. The insurer has also not filed any appeal or cross-objections, thus, the findings returned on issues No. 3 to 7 are upheld.

Issue No. 2:

12. It is pleaded that the claimant-injured was 34 years of age at the time of accident, but the Tribunal has taken her age as 39 years, which finding is not legally correct. As per copy of the Pariwar Register, Ext. PW-2/A, the age of the deceased was 39 years on the date of the issuance of the said certificate, i.e. on 14.11.2006. Meaning thereby, at the time of accident, the age of the claimant-injured was 37 years.

13. The Tribunal has rightly applied the multiplier of '14' in view of the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

14. The Tribunal has also fallen in an error in assessing the income of the claimant-injured at Rs.3,000/- per month, which is legally and factually incorrect.

15. Admittedly, the claimant-injured, who was a house wife, was maintaining her house, the family and was the backbone of the matrimonial home and the entire family. She has suffered permanent disability to the extent of 45%, as given in the disability certificate, Ext. PW-4/A. Not only the claimant-injured is suffering and has to suffer throughout, but it has shattered her physical frame and affected her life. The house wife is the master of the house and foundation of the home. She makes the home as a heaven, but the injury has turned the tasks.

16. I deem it proper to record herein that the claimant-injured hails from rural area, is a rustic villager, is not knowing the basic purpose of legislation, thus, the amount cannot be restricted as claimed in view of the law laid down by the Apex Court.

17. 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?

18. 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:*
>
> *....."*

19. The mandate of Section 168 (1) (supra) is to 'determine the amount of compensation which appears to it to be just'.

20. 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.

21. 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."

22. 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."

23. 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)."

24. 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**.

25. 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.

26. 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.*

27. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **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."*

28. 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."

29. 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."

30. Having said so, the Tribunal/Appellate Court is within its powers to award the just compensation.

31. 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.

32. 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**.

33. Admittedly, the claimant-injured has suffered 45% disability, which is permanent in nature, has shattered her physical frame and virtually is dependent on her family. Thus, it can be safely said that the Tribunal has fallen in an error in assessing the loss of income.

34. If a person has to engage a labourer or a helper as domestic help or a cook, the minimum amount, which he/she will have to pay, is not less than Rs.10,000/- per month. However, by exercising guess work, it can be safely said that the claimant-injured would have been contributing towards her family not less than Rs.6,000/- per month.

35. Applying the multiplier of '14', the claimant-injured is held entitled to Rs.6,000/- x 12 x 14 = Rs.10,08,000/- under the head 'loss of income'.

36. Learned counsel for the claimant-injured stated at the Bar that the claimant-injured has spent a huge amount on her treatment and has also to spend a considerable amount on her future treatment. Further stated that the claimant-injured, being a rustic villager, has lost the medical bills qua the expenses incurred on her medical treatment.

37. Thus, keeping in view the facts of the case read with the judgments (supra), by exercising guess work, Rs.50,000/- is awarded under the head 'medical treatment already undergone' and Rs.50,000/- under the head 'future treatment'.

38. Admittedly, the 45% permanent disability suffered by the claimant-injured has made her life miserable and dependent on her family throughout her life. She had undergone a lot of pain & sufferings and has also to undergo the same in future. Thus, I deem it proper to award Rs.2,00,000/- under the head 'pain and sufferings suffered' and Rs.2,00,000/- under the head 'pain and sufferings in future'.

39. The claimant-injured has lost her amenities of life due to the permanent disability suffered by her, is not in a position to manage her matrimonial home, to do the domestic work. Thus, Rs.1,00,000/- is awarded under the head 'loss of amenities of life'.

40. The claimant-injured was taken to hospital at Karsog, was referred to IGMC Shimla, remained admitted in hospital for a considerable time, would have been attended upon by an attendant and would have spent some amount on transportation charges. Accordingly, Rs.20,000/- is awarded to the claimant-injured under the head 'attendant charges' and Rs.10,000/- under the head 'transportation charges'.

41. Viewed thus, the claimant-injured is held entitled to the enhanced compensation to the tune of Rs.10,08,000/- + Rs.50,000/- + Rs.50,000/- + Rs.2,00,000/- + Rs.2,00,000/- + Rs.1,00,000/- + Rs.20,000/- + Rs.10,000/- = Rs.16,38,000/- with interest @ 7.5% per annum from today till its realization.

42. Having said so, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

43. The enhanced amount be deposited before this Registry within eight weeks. On deposition of the amount, the same be released in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

44. Send down the record after placing copy of the judgment on Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Limited ....Appellant

Versus

Smt. Shyam Kali & another ...Respondents

FAO No. 558 of 2008
Date of decision: 07.08.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that the Tribunal had fallen in error in awarding compensation in favour of the claimants who are legal representative of the owner of the offending vehicle and the risk of the owner was not covered in the Insurance policy- held, that insurance policy was a package policy and it is the duty of the insurer to satisfy the award. (Para-4 to 6)

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents: Mr. Surender Saklani, Advocate vice Mr. Rakesh Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award, dated 21st June, 2008, made by the Motor Accident Claims Tribunal, Solan, Camp at Nalagarh (hereinafter referred to as "the Tribunal") in MAC Petition No. 6 NL/2 of 2006, whereby compensation to the tune of Rs.2,00,000/- 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 insurer-appellant, herein (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimants have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. Only, the insurer has questioned the impugned award.

4. The learned Counsel for the appellant-insurer argued that the Tribunal has fallen in an error in awarding compensation in favour of the claimants, who are legal representatives of the owner of the offending vehicle and risk of the owner was not covered in terms of the mandate of the Insurance Policy, Ext. RW-1/A.

5. The Tribunal has made discussion in para-11 of the impugned judgment.

6. I have gone through the said findings. The Tribunal has rightly recorded the findings and saddled the insurer with the liability, in view of the fact that the insurance policy, Ext. RW-1/A, is a package policy and risk is covered. Thus, it is held that the insurer has to satisfy the award.

7. Having said so, no interference is required. Accordingly, the impugned award is upheld and the appeal is dismissed.

8. The Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned award.

9. Send down the records after placing a copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO (MVA) No. 682 of 2008 a/w
FAO No. 72 of 2009.
Date of decision: 7th August, 2015

FAO No. 682/2008.	
Oriental Insurance Co. Ltd.	.....Appellant.
Versus	
Mahender Singh and others	...Respondents
FAO No. 72/2009.	
Mahender Singh	.....Appellant.
Versus	
Oriental Insurance Co. Ltd. And others	...Respondents

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that claimant was travelling in the vehicle as a gratuitous passenger- however, he had not led any evidence to this fact and had failed to discharge the onus- it was specifically asserted in the Claim Petition that claimant was employed by the owner and the driver- thus, plea of the insurer that claimant was a gratuitous passenger cannot be accepted. (Para-3 and 4)

For the appellant:	Mr. Lalit K. Sharma, Advocate, for appellant in FAO NO. 682/2008 and Mr. R.R. Rahi, Advocate, for appellant in FAO No. 72 of 2009.
For the respondents:	Mr. Lalit K. Sharma, Advocate, for respondent No.1 in FAO NO. 72/2009 and Mr. R.R. Rahi, Advocate, for respondent No.1 in FAO No. 682 of 2008. Mr. Bhupinder Pathania, proxy counsel for respondent No.2 in both the appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. R.R. Rahi, Advocate, stated at the Bar that claimant has died during the pendency of the appeal. His statement is taken on record.

2. These two appeals are directed against the judgment and award dated 19.9.2008, made by the Motor Accident Claims Tribunal, Kinnaur, Civil Division at Rampur, in MAC Case No. 34 of 2007, titled Mahender Singh *versus Oriental Insurance Co. Ltd. And others, for* short "the Tribunal", whereby compensation to the tune of Rs.3,80,000/- with 9% interest per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award."

3. Dr. Lalit Sharma, Advocate argued that findings returned by the Tribunal on issue No. 4 are not correct, therefore, the insurer was not to be saddled with the liability. Thus, the only question to be determined in this appeal is whether the Tribunal has rightly returned the findings on issue No.4?. Issue No. 4 reads as under:-

> *"4.whether the petitioner was traveling as gratuitous passenger at the time of the accident and is not entitled to any compensation? OPR."*

4. It was for the insurer to prove that the clamant was traveling in the offending vehicle as a gratuitous passenger, has not led any evidence, thus, failed to discharge the onus. So, the findings returned on this issue are upheld. However, I have gone through the impugned award, claim petition and the evidence led. It is specifically averred in the claim petition that the claimant was employed by the owner and the driver which has been recorded by the Tribunal in paras 22 and 23 of the impugned award.

5. Having said so, no interference is called for. The impugned award is upheld and the appeal being FAO No. 682/ 2008 is dismissed. The legal representatives of the claimant are at liberty to lay a motion for the release of the money, as per law applicable.

6. In FAO No. 72 of 2009, the claimant has sought enhancement of compensation. I have gone through the impugned award. The amount awarded cannot be said to be inadequate in any way. Thus, no interference is called for. The appeal is dismissed.

7. 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.

FAOs No. 580, 581, 589, 590 & 591 of 2008
Date of decision: 07.08.2015

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1. **FAO No. 580 of 2008**
Oriental Insurance Co. Ltd. ....Appellants
Versus
Smt. Sangeyum & others ....Respondents

2. **FAO No. 581 of 2008**
Oriental Insurance Co. Ltd. ....Appellant
Versus
Smt. Prem Kumari & another ....Respondents

3. **FAO No. 589 of 2008**
Oriental Insurance Co. Ltd. ...Appellant
Versus
Raj Bhagat & others ....Respondents

4. **FAO No. 590 of 2008**
Oriental Insurance Co. Ltd. ...Appellant
Versus
Charan Pyari & others ...Respondents

5.**FAO No. 591 of 2008**

Oriental Insurance Co. Ltd. ...Appellant

Versus

Jagdish & others ...Respondents

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that the driver was intoxicated - however no evidence was led by the insurer before the Tribunal to prove this fact- held that it is not permissible for the insurer to say in appeal that the driver of the vehicle was intoxicated at the time of the accident- further the plea of intoxication is not available to the insurer as the same is not covered by section 149 of Motor Vehicle Act- Appeal dismissed.

Cases referred:

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

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

Khem Chand versus Smt. Uma Devi and others, Latest HLJ 2010 (HP) 1

For the Appellant(s) : Mr. Narender Sharma, Advocate.

For the respondent(s): Ms. Ritta Goswami, Advocate, for respondents No. 1 & 2.
Ms. Kamlesh Shandil, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

A vehicular traffic accident has given birth to these five appeals, thus I deem it proper to deal with all these appeals by this common judgment.

2. Claimants have filed claim petitions seeking compensation as per the break-ups given in their respective claim petitions, on the grounds taken therein.

3. The respondents resisted the claim petitions on the grounds taken in their respective memo of objections.

4. The Tribunal, on the pleadings of the parties, framed common issues in all the claim petitions. It is apt to reproduce the issues framed in Claim Petition No. 56 of 2006:-

1. *Whether the accident had taken place due to rash and negligent driving of vehicle No. HP-02A-3010? ...OPP*
2. *If issue No. 1 is proved in affirmative, whether the petitioners are entitled to compensation and if so, to what extent at what rate of interest? ...OPP*
3. *Whether the vehicle in question was not driven by the authorized driver and the driver was not holding a valid and effective driving licence at the time of accident? ...OPR-2*
4. *Whether the vehicle in question was being driven under intoxication. If so, its effect?*

....OPR-2

5. *Whether the driver of the vehicle in question was not possessing valid fitness certificate and route permit etc. at the time of the accident. If so, its effect? …OPR-2*

6. *Whether there is violation of the terms and conditions of the insurance policy? If so, its effect? …OPR-2*

7. *Relief."*

5. The claimants have led evidence in all the claim petitions. The insurer, owner and driver have not led any evidence. Thus, the evidence led by the claimants has remained unrebutted.

6. There is ample evidence on the record to prove that on 06.07.2006 at about 6.20 p.m., near Sungra on National Highway No. 22 in Kinnaur District, the driver, namely, Sanjiv Kumar alias Kaka had driven the vehicle-Marshal taxi bearing registration No. HP-02A-3010, rashly and negligently and caused the accident. This issue is not disputed. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

7. Before dealing with Issue No. 2, I deem it proper to deal with Issues No. 3 to 6.

8. It was for the insurer to prove all these issues, has not led any evidence, thus has failed to discharge the onus. Accordingly, I am of the considered view that the Tribunal has rightly determined issues No. 3 to 6 against the appellant and in favour of the respondents.

9. Though, the Tribunal has awarded meager amount in all these appeals, the claimants have not questioned the same, are within their rights to question the adequacy of compensation in view of the ratio laid down by the apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** But, I deem it proper not to enhance the compensation, for so many reasons. The claimants are fighting for their rights since 2006, have not received the compensation so far, is against the concept of purpose of granting compensation Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

10. The insurer has not led any evidence on Issues No. 3 to 6. Thus, it can not lie in the mouth of the appellant-insurer that the driver was driving the offending vehicle in the state of intoxication. In terms of Section 149 of the Motor Vehicles, Act, 1988, the ground of intoxication is not available.

11. This Court in **Khem Chand versus Smt. Uma Devi and others,** reported in **Latest HLJ 2010 (HP) 1,** has laid down the same principle. It is apt to reproduce para-4 of the judgment**.**, *supra, herein:-*

> *"4. The law is very well settled that a claim which falls within the purview of an Act policy i.e. a liability falling within the ambit of Section 147 of the Motor Vehicles Act, 1988 (the Act) can only be contested by the Insurance Company on the grounds available to it under Section 149 of the Act. It is not permitted to contest the proceedings on any other grounds. Intoxication of the driver is not a ground available to the Insurance Company under Section 149 of the Act. Therefore, the liability, which is statutory under Section 147 of the Act, has to be satisfied by the insurer. It may be clarified that in case the insurer in addition to the liability which it is bound to cover*

under the Act covers other liability then in case of such extended liability, it may raise the defences available to it as per terms of the policy, but as far as statutory liability is concerned, the insurer has no authority to incorporate any term in the policy which is not contemplated in terms of Section 149 of the Act. Therefore, the Insurance Company could not have been permitted to raise this defence and it could not be permitted to recover the awarded amount from the insured."

12. The Tribunal has rightly made discussion in para-19 of the impugned award in Claim Petition No. 56 of 2006 and held that the driver was in a fit state of mind.

13. Having said so, no interference is required. Accordingly, the impugned awards are upheld and the appeals are dismissed.

14. The Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned awards.

15. Send down the records after placing a copy of the judgment on each of the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.348 of 2008 a/w
FAO No.512 of 2008
Date of decision: 07.08.2015

1.	**FAO No.348 of 2008**	
	Prem Singh	.....Appellant
	Versus	
	Uma Devi & others	..... Respondents
2.	**FAO No.512 of 2008**	
	United India insurance Company Ltd.	.....Appellant
	Versus	
	Uma Devi & others	..... Respondents

Motor Vehicles Act, 1988- Section 149- Claimant had nowhere pleaded that deceased was travelling in the vehicle as owner of the goods- respondents had also not pleaded that deceased was travelling in the vehicle as owner of the goods and, thus, deceased has to be treated as a gratuitous passenger- held, that Insurance Company is liable to indemnify the 3rd party and thus, Tribunal had rightly saddled the Insurance Company with liability with the right of recovery. (Para-2 and 3)

In FAO No.348 of 2008

For the appellant: Mr. Virender Singh Chauhan, Advocate.
For the respondents: Mr. Anil God, Advocate, for respondents No.1, 2 and 4.
Mr. Jagdish Thakur, Advocate vice Mr. G.D. Sharma, Advocate, for respondent No.3.

In FAO No.512 of 2008

For the appellant: Mr. Jagdish Thakur, Advocate vice Mr. G.D. Sharma, Advocate.
For the respondents: Mr. Anil God, Advocate, for respondents No.1, 2 and 4.

Mr. Virender Singh Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Both these appeals are the outcome of award, dated 15th May, 2008, made by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, H.P. (for short, "the Tribunal") in M.A.C. Petition No.95 of 2004, tilted Smt. Uma Devi & another vs. Sh. Prem Singh & others, whereby compensation to the tune of Rs.1,70,000/- alongwith interest at the rate of 7½% per annum came to be awarded in favour of claimant No.1 and against the insurer, with right of recovery from the insured-owner (for short the "impugned award").

2. FAO No.348 of 2008 has been filed by the insured-owner on the ground that the Tribunal has wrongly saddled him with the liability. The appeal is liable to be dismissed for the reason that the claimants have nowhere pleaded that the deceased was traveling in the offending vehicle as owner of the goods. In the written statements filed by the respondents to the claim petition before the Tribunal, they have also not pleaded that the deceased was traveling in the offending vehicle as owner of the goods. Accordingly, the plea, which is not taken before the Tribunal or which is not carved out from any other pleadings, cannot be pressed into service for the first time before this Court.

3. The insurer has questioned the impugned award by way of appeal, being FAO No.512 of 2008, on the ground that the Tribunal has fallen in an error in saddling it with the liability at the first instance, with right of recovery. The appeal is misconceived for the simple reason that the claimants were the third party and it is beaten law of land that the insurer has to satisfy the award in respect of third party. Thus, the Tribunal has rightly passed the impugned award.

4. Having said so, no interference is required. Hence both the appeals are dismissed and the impugned award is upheld. The Registry is directed to release the award amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned award, after proper identification. A copy of this judgment be also placed on the record of connected appeal.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Ramesh Chand .....Appellant
Versus
The Truck Co-operative and Operator Goods
Carrier Transport Society Limited & others ..... Respondents

FAO No.159 of 2008
Date of decision: 07.08.2015

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that he had suffered injury in the accident- MLC shows that injury was sustained by the claimant on left side of the body and not on the right side- claimant claimed that he had to undergo replacement of the right hip - held, that there was nothing on record show that claimant had sustained injury on the right side of the body- therefore, trial Court had rightly denied the compensation for the replacement of the right hip. (Para-2 and 3)

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. Ashok Sharma, Senior Advocate, with Mr. Ajay Chauhan, Advocate, for respondents No.1 and 2.
Mr. B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Appellant-claimant, by the medium of instant appeal, has questioned the award, dated 28th November, 2007, passed by the Motor Accident Claims Tribunal, Solan, (for short, the Tribunal), in Claim Petition No.54-S/2 of 2006, titled Romesh Chand vs. The Truck Co-operative and Operator Goods Carrier Transport Society Limited & others, whereby compensation to the tune of Rs.10,000/-, with interest at the rate of 9% from the date of filing of the Claim Petition till realization, was awarded in favour of the claimant, and the insurer was saddled with the liability, (for short, the impugned award).

The appellant-claimant has filed this appeal on the ground that the Tribunal has not correctly appreciated the averments contained in the claim petition and also failed to scan the evidence.

2. The claimant has specifically averred in paragraph 10 of the claim petition that he had suffered injuries in the accident, which was caused by the driver, namely, Sat Pal, while driving the offending vehicle i.e. Tata Sumo No.HP-19-7713 rashly and negligently on 11.6.2004. But, a perusal of the MLC Ext. PW-5/A shows that the injuries noticed for the first time immediately after the accident were on the left side of the claimant and not on the right side. In the MLC Ext.PW-5/A, it was also not recorded that the claimant had suffered any injury, either on the left or the right side of the hip.

3. Learned counsel for the appellant was asked whether she is in a position to show prima facie any evidence on the file, which may disclose that the claimant had sustained injuries on the hip, which had resulted in hip replacement of the claimant, in which she has failed. The learned counsel for the appellant-claimant also stated that she is not in a position to place any document on record to that effect.

4. Learned counsel for the appellant further stated that since the appellant was on leave, the department has recovered some amount from his salary for the reason that no leave was at his credit.

5. In the given circumstances, one comes to an inescapable conclusion that no interference is warranted in the impugned award. Accordingly, the same is upheld and the appeal is dismissed. However, the appellant-claimant is at liberty to seek appropriate remedy.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Reeta Chandel …Appellant.
Versus
The General Manager and others …Respondents.

FAO No. 631 of 2008
Decided on: 07.08.2015

Motor Vehicles Act, 1988- Section 166- Claim petition was dismissed on the ground that rashness or negligence of the driver was not proved- The FIR showed that accident was the outcome of rash and negligent driving of the bus- the tribunal had wrongly appreciated the evidence and had non-suited the claimant on a technical ground– the claimant had suffered injuries - he had produced the medical evidence and the receipt of taxi charges – a compensation of Rs. 1,00,000/- with interest @ 7.5 % p.a. from the date of filing of the claim petition awarded in favour of the petitioner. (Para 8-16)

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:	Kanwar Bhupinder Singh, Advocate.
For the respondents:	Mr. Jagdish Thakur, Advocate, for respondent No. 1.
	Ms. Nishi Goel, Advocate, for respondent No. 2.
	Mr. Surinder Saklani, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The unfortunate claimant-injured has been driven to this Court by the vehicular accident, which was caused by the driver, namely Shri Nand Lal, while driving bus, bearing registration No. HP-24-4583, rashly and negligently, on 08.07.2005, at about 2.45 P.M. at place Sungal on National Highway 21, on its way from Bilaspur to Ghagus, in which she sustained injuries, was taken to Zonal Hospital and, thereafter, was referred to IGMC, Shimla, where she remained admitted from 22.07.2005 to 02.09.2005, as a traffic accident case.

2. After the claimant-injured was discharged from the hospital, she invoked the jurisdiction of the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (for short "the Tribunal") by the medium of M.A.C. No. 14 of 2006, titled as Reeta Chandel versus The General Manager and others, for grant of compensation, as per the break-ups given in the claim petition

3. The claim petition was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 03.03.2007:

> *"1. Whether the petitioner sustained injuries in the accident which was caused due to the rash and negligent driving of respondent No. 2 of Bus No. HP-24-4583 as well as negligence of respondent No. 4 conductor of the said bus, as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from whom? OPP*

3. Whether the petition is not maintainable, as alleged? OPR-2

4. Relief."

5. Parties have led evidence. The Tribunal, in terms of the judgment and award, dated 30.08.2008, held that no rashness and negligence of the driver and conductor of the offending vehicle is made out and dismissed the claim petition (for short "the impugned award").

Issue No. 1:

6. The factum of accident is not in dispute. While going through the copy of he FIR, Ext. PW-2/A, one comes to an inescapable conclusion that the accident was outcome of the rash and negligent driving of the bus, bearing registration No. HP-24-4583, rashly and negligently, on 08.07.2005, at about 2.45 P.M. at place Sungal on National Highway 21, by its driver, in which she sustained injuries.

7. The medical certificate, discharge certificate and other documents on the file do disclose that the claimant-injured has sustained injuries, was admitted in the hospital and was bed ridden for a pretty long time, particularly, w.e.f. 22.07.2005 to 02.09.2005.

8. The Tribunal has succumbed to the hypertechnicalities and the mystic maybe's, which is not the aim and object of granting compensation. I wonder, why the claim petition was dismissed by the Tribunal on the ground that it is not known as to whether the claimant-injured has entered in the bus from the front door or from the rear door. On this count, issue No. 1 was decided against the claimant-injured and the claim petition was dismissed, is wrong appreciation of the evidence and the documents. Accordingly, the findings returned by the Tribunal on issue No. 1 are set aside and it is held that the driver had driven the offending vehicle rashly and negligently at the relevant point of time and caused the accident, in which the claimant-injured sustained injuries.

9. Before I determine issue No. 2, I deem it proper to determine issue No. 3.

Issue No. 3:

10. The claimant-injured has suffered injuries in the

accident, which was caused by the driver, while driving the offending vehicle rashly and negligently, thus, was within her rights to file claim petition. Accordingly, issue No. 3 is decided in favour of the claimant-injured and against the respondent.

Issue No. 2:

11. The claimant-injured has produced on the file the documents, which do disclose that she has spent a considerable amount on her treatment, remained admitted in the hospital w.e.f. 22.07.2005 to 02.09.2005, was attended upon by the attendant.

12. 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.

13. 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**.

14. The claimant-injured has placed on record the medical bills to the tune of Rs.11,529.48/- and receipts of taxi charges amounting to Rs.5,500/-.

15. By guess work, I deem it proper to award Rs. 20,000/- under the head 'medical expenditure', Rs. 5,000/- under the head 'transportation charges', Rs.10,000/- under the head 'attendant charges', Rs.10,000/- under the head 'special diet', Rs.30,000/- under the head 'pain and sufferings' and Rs. 25,000/- under the head 'loss of amenities of life'.

16. Having said so, the claimant-injured is held entitled to compensation to the tune of Rs. 20,000/- + Rs.5,000/- + Rs.10,000/- + Rs.10,000/- + Rs.30,000/- + Rs.25,000/- = Rs.1,00,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization and respondent No. 1 is directed to satisfy the award.

17. The awarded amount be deposited before the Registry within eight weeks. On deposition of the amount, the same be released in favour of the claimant-injured after proper identification.

18. The appeal is allowed and the impugned award is modified, as indicated hereinabove.

19. 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.

Roop Ram ...Appellant.
Versus
HRTC and another ...Respondents

FAO (MVA) No. 3 of 2009 a/w C.O. NO.373/2009.
Date of decision: 7th August, 2015

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in a motor vehicle accident and had suffered dislocation of the jaw- held, that loss of jaw, member/joint is permanent disability– this also amounts to disfigurement - inadequate compensation was awarded by the Tribunal - Compensation enhanced. (Para 6-10)

For the appellant: Mr. V.S. Chauhan, Advocate.
For the respondents: Mr.Jagdish Thakur, Advocate, for respondent No.1.
Mr. Dibender Gosh, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The claimant had invoked the jurisdiction of the Tribunal for the grant of compensation, by the medium of claim petition, as per the break-ups given in the claim petition, which was granted to him vide judgment and award dated 18.11.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Solan in Case No. 38 FTC/2 of 05/08,

titled *Sh. Roop Ram versus HRTC and another,* for short "the Tribunal", whereby compensation to the tune of Rs.86000/- with 6% interest per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award."

2. The claimant has questioned the impugned award on the ground of adequacy of compensation.

3. Owner, driver and insurer have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

4. Thus, the only question to be determined in this appeal is whether the amount awarded is adequate or otherwise?

5. The amount awarded, on the face of it, is inadequate for the following reasons.

6. The claimant has lost his six teeth in the accident which was caused by Jai Dev while driving the offending vehicle i.e. HRTC bus No. HP-42-0753 and there was dislocation of his jaw also. The loss of jaw, member/joint is permanent disability, in terms of Section 142 of the Motor Vehicles Act, for short "the Act which reads as under:-

> *"142. Permanent disablement :- For the purposes of this Chapter, permanent disablement of a person shall be deemed to have resulted from an accident of the nature referred to in sub-section (1) of section 140 if such person has suffered by reason of the accident, any injury or injuries involving:- (a) permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint; or (b) destruction or permanent impairing of the powers of any member or joint; or (c) permanent disfiguration of the head or face."*

7. Even loss of teeth is grievous hurt in terms of Section 320 of the Indian Penal Code. Thus, the claimant has lost vital parts of his body, which cannot be compensated otherwise and dislocation of jaw is also a disfigurement. But the Tribunal has not awarded compensation under the head "pain and suffering", has awarded Rs.6000/- for loss of income for one month, Rs.10,000/- for medical expenses, Rs.60,000/- for disfigurement of the face and Rs.10,000/- for denture. Total to the tune of Rs.86000/- in all. Thus, the claimant is, at least, also entitled to the compensation under the head "pain and suffering" which he has suffered and also entitled to loss of amenities of life because he is not in a position to chew food.

8. Thus, I deem it proper to award Rs.30,000/- for loss of amenities and Rs.20,000/- for pain and suffering. Total to the tune of Rs.50,000/ with interest as awarded by the Tribunal from the date of impugned award. Ordered accordingly.

9. Having said so, the appeal is allowed and the amount of compensation is enhanced as indicated hereinabove and Cross-Objections are accordingly disposed of.

10. Respondent No. 1 is directed to deposit the enhanced amount of Rs.50,000/- within eight weeks from today in the Registry of this Court. In default, the claimant is entitled to the interest at the rate of 7.5% per annum from the date of claim petition till its realization.

11. The Registry, on deposit of the amount, 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.

12. 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.

Surinder Kumar ...Appellant

Versus

Himachal Pradesh Road Transport Corporation ...Respondents

FAO No. 14 of 2009 &
Cross Objections No. 372 of 2009
Decided on : 07.08.2015

Motor Vehicles Act, 1988- Section 166- Collision between bus and motorcycle- injured claimant motorcyclist filed claim petition- in the meanwhile bus driver tried by the criminal court and acquitted of the charges- the Tribunal took this fact into consideration and concluded that petition u/s 166 M.V Act was not maintainable and proceeded to grant compensation under section163-A- held that the acquittal in criminal court has no effect on the proceedings before Tribunal and the tribunal is bound to assess the evidence led independently and come to the independent conclusion- appeal allowed and compensation of Rs.2,80,000/- awarded. (Para- 16 & 23 to 25)

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

Divisional Engineer Telecom Project (BSNL) & another versus Shri Chet Ram & another, ILR 2015 XLV (III) 790

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 appellant: Mr. Ajay Sharma, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondent No. 1.
Mr. Sanjeev Malotia, Advocate vice Mr. V.D. Khidtta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject mater of this appeal is the award, dated 10th November, 2008, made by the Motor Accident Claims Tribunal (I) Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in MAC Petition No. 91-K/II-2004, titled Shri Surinder Kumar versus

Himachal Road Transport Corporation & another, whereby compensation to the tune of Rs.1,50,000/- was awarded in favour of the claimant, in lump sum and the Himachal Pradesh Road Transport Corporation (for short 'HRTC') was saddled with liability (hereinafter referred to as the "impugned award").

2. The appellant, i.e. claimant-injured had filed claim petition before the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short 'the Act', for grant of compensation to the tune of 9,80,000/-, as per the break-ups given in the claim petition.

3. The respondents contested the claim petition on the grounds taken in their memo of objections.

4. Following issues came to be framed by the Tribunal:-

"1. Whether on 23.2.2004 the respondent No. 2 was driving bus No. HP-38-2481 rashly and negligently and had struck against the motor cycle No. HP-39A-2658 being driven by petitioner, resulting in injuries to the petitioner as alleged? ....OPP

2. If issue No. 1 is proved, to what amount of compensation the petitioner is entitled to and from whom? ...OP Parties.

3. Whether the accident is the result of rash and negligent driving of petitioner and is liable for the accident as alleged? ...OPR

4. Whether the petition is bad for non-joinder of necessary parties as alleged? ...OPR

5. Whether the petitioner is estopped by his act, conduct and acquiescence from filing the present petition as alleged? ...OPR

6. Relief."

5. The parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, has awarded compensation to the tune of Rs.1,50,000/- in favour of the claimant, in lump sum.

6. HRTC and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

7. The question of rashness and negligence and the factum that the claimant became victim of the accident, are not in dispute.

8. However, the respondents have filed cross objections for setting aside the impugned award, are not maintainable. Hence, dismissed

9. I have gone through the entire record.

10. The claimants have proved by leading evidence that on 23.02.2004, at about 4.00 p.m., near Village Chambi, Tehsil Shahpur, District Kangra, driver, namely, Arjun Singh has driven the offending vehicle, rashly and negligently, caused the accident, as a result of which, the claimant sustained injuries.

11. The Tribunal has fallen in an error in holding that the driver was acquitted by the Judicial Magistrate 1st Class, Dharamshala, vide judgment dated 26.08.2006 in Criminal Case No. 15-II/2004 and treating the claim petition under Section 163-A of the Motor Vehicles Act, 1988, for short 'the Act'. It appears that the Presiding Officer is not aware of the basic provisions of the Act and the purpose of granting compensation.

12. 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."*

13. 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."*

14. 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. ....."*

15. This Court in **FAO No. 274 of 2008**, titled **Divisional Engineer Telecom Project (BSNL) & another versus Shri Chet Ram & another**, decided on 29th May, 2015, has held that if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

16. It view of the ratio laid down by the apex Court and this Court in the aforesaid judgments, it is held that claim petition is maintainable under Section 166 of the Act. Accordingly, Issue No. 1 is decided in favour of the claimant.

17. Before I deal with Issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

18. The onus to prove these issues was upon the respondents.

19. However, I have gone through the evidence. Issue No. 3 is dependant upon issue No. 1. In view of the findings recorded on Issue No. 1, *supra,* Issue No. 3 is decided accordingly in favour of the claimant.

20 Respondents have not led any evidence on issues No. 4 & 5. Accordingly, the findings returned by the Tribunal on Issues No. 4 & 5 are upheld.

21. The Tribunal has awarded compensation to the tune of Rs.1,50,000/- in favour of the claimant in lump sum, which is not just and appropriate compensation for the following reasons.

22. The claimant-injured was 49 years of age at the time of accident. He suffered 43% disability, which has shattered his physical frame. His salary was Rs. 10,500/- at the time of accident. After retiring from the service, he would be dependent upon others due to his disability and will not be in a position to get re-employment. Accordingly, it is held that the claimant has lost source of dependency to the tune of Rs.2500/- per month.

23. Keeping in view the ratio laid down by the apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120,** the multiplier of '6' is applicable in this case**.** Accordingly, it is held that claimant is entitled to compensation to the tune of Rs. 2500 x 12 = 30,000/- x 6 = Rs.1,80,000/- under the head 'loss of income'.

24. The claimant is entitled to Rs.50,000/- under the head 'pain and sufferings', which he has suffered and has to suffer through out and Rs.50,000/- under the head 'loss of amenities of life'.

25. Thus, the claimant is entitled to compensation to the tune of Rs.1,80,000/- + 50,000/- + 50,000/-, total amounting to Rs.2,80,000/-.

26. Having said so, the impugned award is modified, as indicated hereinabove and the appeal is disposed of.

27. The insurer is directed to deposit the enhanced amount before the Registry within six weeks from today.

28. The Registry to release the amount already deposited and, on deposit, release the enhanced amount, strictly as per the terms and conditions contained in the impugned award, in favour of the claimant, through payee's account cheque.

29. 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.

United India Insurance Company Ltd. ...Appellant.
Versus
Sh. Gian Chand and others ...Respondents.

FAO No. 63 of 2009
Decided on: 07.08.2015

Motor Vehicles Act, 1988- Section 166- Claimant was riding a bicycle and had met with an accident with a scooter- the tribunal had awarded the interest @ 12% per month- held that the rate of interest should be awarded as per the prevailing rates – claim petition was dismissed on 29-07-2004 and was restored on 27-06-2008-thus the claimant/injured is not entitled to interest for the said period – the rate of interest reduced from 12% to 7.5% per month – interest awarded from the date of the claim petition till 29-07-2004 and from 27-06-2008 till realization. (Para 21-24)

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.
For the respondents: Mr. Vishal Panwar, Advocate, for respondent No. 1.
Mr. Anuj Gupta, Advocate, for respondent No. 2.
Mr. Rupinder Singh, advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The appellant-insurer has questioned the judgment and award, dated 30.09.2008, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 40-S/2 of 2001, titled as Gian Chand versus The United India Insurance Company and others, whereby compensation to the tune of Rs. 2,10,000/- with interest @ 12% per annum from the date of filing of the claim petition till its realization was awarded in favour of the claimant-injured and the appellant-insurer came to be saddled with liability (for short "the impugned award").

2. The claimant-injured, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has questioned the impugned award on the ground that Shri Raj Dabarwal was driving the offending vehicle at the time of the accident and the claimant-injured has wrongly arrayed Shri Sudershan Singh as respondent No. 3 in the array of respondents in the claim petition.

4. Learned Senior Counsel appearing on behalf of the appellant-insurer also argued that the amount awarded is excessive and the rate of interest is not in accordance with Section 171 of the Motor Vehicles Act, 1988 (for short "MV Act").

5. In order to determine this appeal, it is necessary to give flashback of facts of the case, the womb of which has given birth to the appeal in hand.

6. The claimant-injured has filed claim petition before the Tribunal for grant of compensation, as per the break-ups given in the claim petition, on the ground that he became the victim of the motor vehicular accident, which was caused by the driver, namely Shri Raj Dabarwal, while riding scooter, bearing registration No. HP-14-6577, rashly and negligently, on 24.06.2000 at about 11-11.30 P.M. near Shamti Indane Gas Store just ahead Degree College Solan, and dashed the same against the bicycle of the claimant-injured, in which he sustained injuries.

7. The claim petition was resisted by the respondents therein on the grounds taken in the respective memo of objections.

8. Following issues came to be framed by the Tribunal on 30.04.2002:

> *"1. Whether the petitioner sustained injuries due to rash and negligent driving of the respondent No. 2 as alleged? OPP*
>
> *2. If issue No. 1 proved in affirmative, to what amount of compensation, the petitioner is entitled and against whom? OPP*
>
> *3. Whether the present claim petition is not maintainable as the accident was caused due to rash and negligent riding of the cycle by the petitioner himself, as alleged, if so its effect? OPR-1*
>
> *4. Whether the driver of the scooter No. HP-14-6577 was not holding the valid and effective driving licence at the time of alleged accident, as alleged, if so its effect? OPR-1*
>
> *5. Whether the scooter did not have a valid registration certificate at the time of alleged accident and was driven in breach of standard policy condition and M.V. Act as alleged? OPR-1*
>
> *6. Whether there is collusion between the petitioner and respondent No. 2, as alleged? OPR-1*
>
> *7. Whether present petition is bad for non-joinder of necessary parties, as alleged? OPR-2*
>
> *8. Whether the vehicle was driven by the respondent No. 3 Shri Sudarshan Singh, as alleged, if so, its effect? OPR-2*

9. Whether scooter No. HP-14-6577 was duly insured with the Insurance company, as alleged, if so its effect? OPR-2

10. Relief."

9. It is apt to record herein that the claim petition was dismissed in default on 29.07.2004 and was restored on 27.06.2008.

10. Parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, held that Shri Sudershan Singh was driving the offending vehicle at the time of the accident and awarded compensation in terms of the impugned judgment.

Issue No. 1:

11. I have gone through the evidence led by the parties. There is clinching evidence led by the claimant-injured, supported by the witness of the owner-insured and the reply filed by the owner-insured, Shri Raj Dabarwal, that Shri Sudershan Singh had driven the offending vehicle at the relevant point of time. Having said so, the findings returned on issue No. 1 are upheld.

12. Before I determine issue No. 2, I deem it proper to determine issues No. 3 to 9.

Issue No. 3:

13. It was for the respondents in the claim petition to lead evidence and prove the said issue, have failed to prove the same. However, I have gone through the evidence led. Issue No. 3 is covered by the findings returned on issue No. 1. Thus, the findings returned by the Tribunal on issue No. 3 are also upheld.

Issues No. 4 and 5:

14. It was for the insurer to lead evidence to prove that the driver of the offending vehicle was not having a valid and effective driving licence and the offending vehicle was being driven without the requisite documents at the time of the accident, has not led any evidence to that effect. Accordingly, the findings returned by the Tribunal on issues No. 4 and 5 are upheld.

Issue No. 6:

15. The insurer has not led any evidence to prove that there was collusion between the claimant-injured and respondent No. 2 therein, i.e. the owner-insured. Thus, the findings returned by the Tribunal on the said issue are upheld.

Issue No. 7:

16. It was for the owner-insured to prove that the claim petition was bad for non-joinder of necessary parties. I wonder why this issue has been framed, as there is nothing on the file whereby it can be held that the claim petition was suffering from non-joinder and mis-joinder of necessary parties. Accordingly, the findings returned by the Tribunal on issue No. 7 are upheld.

Issue No. 8:

17. In view of the findings returned on issues No. 1 and 3, the findings returned on issue No. 8 are also upheld.

Issue No. 9:

18. The findings returned on this issue are not in dispute. Admittedly, the offending vehicle was insured at the relevant point of time. Having said so, the findings returned by the Tribunal on issue No. 9 are also upheld.

Issue No. 2:

19. The amount awarded is meager in view of the fact that the claimant-injured has suffered injuries and has remained admitted in hospitals for more than one month. The Tribunal has made discussions in paras 12 to 17 of the impugned judgment. In view of the findings returned and the fact that the claimant-injured has suffered injuries, I am of the considered view that the amount awarded is meager, however, the claimant-injured has not questioned the same, is reluctantly upheld.

20. I deem it proper to record herein that the Tribunal has fallen in an error in awarding interest @ 12% per annum.

21. It is beaten law of land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,* reported in *(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,* reported in *2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,* reported in *(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,* reported in *2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,* reported in *2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,* reported in *(2015) 4 Supreme Court Cases 433,* and *Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,* reported in *(2015) 4 Supreme Court Cases 434,* and discussed by this Court in a batch of FAOs, *FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,* being the lead case, decided on 19.06.2015.

22. It is also a fact that the claim petition was dismissed on 29.07.2004 and came to be restored on 27.06.2008, thus, the claimant-injured was not entitled to interest for the said period.

23. Having said so, I deem it proper to reduce the rate of interest from 12% per annum to 7.5% per annum from the date of the claim petition till 29.07.2004 and from 27.06.2008 till its realization.

24. Having glance of the above discussions, the appeal is disposed of and the impugned judgment is modified, as indicated hereinabove.

25. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

26. At this stage, learned counsel for the claimant-injured stated at the Bar that the claimant has died during the pendency of the appeal. The legal representatives are at liberty to lay a motion for release of the amount, as per the law applicable.

27. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Ltd. ...Appellant
Versus
Smt. Neelam Kumari & others ...Respondents

FAO No. 587 of 2008
Decided on : 07.08.2015

Motor Vehicles Act, 1988- Section 169- Insurer contended the Tribunal had not returned any findings on issue no. 5- the insurer had led the evidence to prove the issue but no finding was recorded by Tribunal - hence the case remanded to the Tribunal with the directions to provide opportunity to the insurer, owner and driver to lead further evidence and to return findings within three months. (Para 4-8)

For the appellant:	Mr. Ashwani K. Sharma, Senior Advocate with Mr. V.S. Chauhan, Advocate.
For the respondents:	Mr. Ajay Kumar Dhiman, Advocate, for respondent No. 1. Ms. Snehlata, Advocate vice Mr. Bhuvnesh Sharma, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award, dated 19.06.2008, passed by Motor Accident Claims Tribunal-(III), Kangra at Dharamshala, Himachal Pradesh, (for short, 'the Tribunal'), in M.A.C. Petition No. 48-K/2002, titled Neelam Kumari versus Ramesh Chand & others, whereby compensation to the tune of Rs. 2,00,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1 herein and the insurer-appellant, herein was saddled with liability (hereinafter referred to as the "impugned award").

2. The claimant, the driver and the owner have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

3. The insurer has questioned the impugned award on the ground that the Tribunal has not returned any findings on issue No. 5.

4. It is apt to reproduce issue No. 5 herein:-

> *"5. Whether the driver of the offending vehicle was not holding valid and effective driving licence at the time of accident, if so the effect thereof?*
> *...OPR*

5. It was for the insurer to prove that the driver was not having a valid and effective driving licence at the relevant time. Though, it has led evidence to prove this issue, but the Tribunal has not made any discussion in paras 10 & 14 of the impugned award. It is apt to reproduce the aforesaid paras of the impugned award herein:

> *"10. The respondent has examined RW1 Ramesh Chand respondent No. 1 who has deposed that he had filed his licence with the licence authority, Dehra vide receipt Ext. RW-1/a and thereafter it was produced before licencing authority Hoshiarpur as his licence has been valid upto*

12.12.2009 the copy of which is Ext. RW-1/C. The driver of the offending vehicle has claimed in his statement that he was falsely implicated in the case as he was acquitted in the criminal case vide copy of judgment Ext. RW-1/B. The respondent No. 2 Surinder Kumar has also stepped into the witness box as owner of the driver who has claimed that he has engaged respondent No. 1 as driver with his vehicle bearing registration No. HP-02-2008 after getting his tests and the driving licence which was valid and he has also claimed his vehicle to be insured at the time of accident. The respondent No. 3 has also tendered in evidence the copy of insurance policy Ext. RX.

12 & 13.....

14. The offending vehicle was insured with the insurer of the offending vehicle at the time of accident as per insurance Ext. RX produced and relied upon by the insurer of the offending vehicle and the petition is not bad for non-joinder of necessary parties as owner, driver as well as insurer of the offending vehicle being necessary parties have been impleaded in the present petition. The driver of the offending vehicle was holding valid and effective driving licence at the time of accident as per copy of driving licence Ext. RW1/C and the petition is maintainable in the present form. Hence, all these issues are held against the respondents and in favour of the petitioner."

6. While going through the aforesaid paras, one comes to an inescapable conclusion that the Tribunal has not returned the findings to the effect, whether-*the driver was having valid and effective driving licence with the required endorsement to drive the offending vehicle at the time of accident*?

7. In the given circumstances, I am of the considered view that the Tribunal has fallen in an error in saddling the insurer with the liability without deciding issue No. 5.

8. Accordingly, the case is remanded to the Tribunal, commanding the Tribunal to provide opportunities to the insurer, owner/insured and driver to lead further evidence, oral or documentary, in support of their case and to return findings within three months w.e.f. 24.08.2015.

9. It is made clear that in case the decision goes in favour of the insurer, he will have the right to recover the compensation amount from the owner.

10. Having said so, the impugned award is set aside, so far as issue No. 5 is concerned. The findings returned by the Tribunal on all the other issues are upheld.

11. The Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

12. Parties are directed to appear before the Tribunal on **24th August, 2015.**

13. Registry to send the record of the case alongwith a copy of this judgment forthwith so as to reach the Tribunal below well before the date fixed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Ltd. Co. ...Appellant.
Versus
Savita Devi and others ...Respondents.

FAO No. 615 of 2008
Decided on: 07.08.2015

Motor Vehicles Act, 1988- Section 149- Insurer Contended that the deceased was a gratuitous passenger and his risk was not covered– the claimant pleaded the deceased was travelling with the shuttering material which was loaded in the trolley of the tractor-the owner and driver had admitted in the reply the deceased was travelling in the vehicle with shuttering material- held, that the deceased was not a gratuitous passenger and his risk was covered. (Para 11-13)

For the appellant: Mr. Rajiv Jiwan, Advocate.
For the respondents: Mr. Sandeep Sharma, Advocate, vice Mr. Ashwani Pathak, Advocate, for respondents No. 1 to 4.
Respondents No. 5 and 6 already ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 30.08.2008, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, (H.P.) (for short "the Tribunal") in MACT Petition No. 97-K/II/2005, titled as Savita Devi and others versus Shri Raj Kumar and others, whereby compensation to the tune of Rs. 4,03,200/- with interest @ 9% per annum from the date of the impugned award till its realization was awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimants, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the ground that the risk of the deceased was not covered because he was a gratuitous passenger. Further argued that the driver of the offending vehicle had not driven the offending vehicle rashly and negligently and the claimants have not proved the said factum.

4. In order to determine this appeal, it is necessary to give flashback of the facts of the case, the womb of which has given birth to the instant appeal.

5. The claimants have invoked the jurisdiction of the Tribunal by the medium of the claim petition for grant of compensation, as per the break-ups given in the claim petition. The positive case of the claimants put forth before the Tribunal, as set up in paras X and XXIV of the claim petition, is that deceased-Pawan Kumar was travelling with shuttering material, which was loaded by him in the trolley of the tractor, bearing registration No. HP-39-5446, on 02.09.2005, at about 9.30 A.M. from Icchi to Gaggal, which

was driven by its driver, namely Shri Raj Kumar, rashly and negligently, as a result of which deceased-Pawan Kumar fell down, sustained injuries and succumbed to the injuries.

6. The claim petition was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal:

> *"1. Whether on 02.09.2005 the respondent No. 1 was driving tractor No. HP-39-5446 rashly and negligently as a result of which deceased Pawan Kumar fell down from the tractor and sustained injuries and died? OPP*
>
> *2. If Issue No. 1 is proved, whether the petitioners re entitled for compensation, if so, how much and from whom? OPP*
>
> *3. Whether the respondent No. 1 was not holding a valid and effective driving licence at the time of accident? OPR-2*
>
> *4. Whether the vehicle in question was not insured with respondent No. 2, as alleged? OPR-2*
>
> *5. Whether deceased was travelling as a gratuitous passenger i the tractor, as alleged, if so, its effect? OPR-2*
>
> *6. Whether the petition is collusive between petitioners and respondent Nos. 1 and 3, as alleged? OPR-2*
>
> *7. Relief."*

8. Parties have led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, has awarded compensation in terms of the impugned award.

Issue No. 1:

9. There is ample evidence on the file led by the claimants read with the copy of FIR No. 321/2005, Ext. PW-2/A, which do disclose that the driver of the offending vehicle had driven the same rashly and negligently and caused the accident on 02.09.2005, as a result of which deceased-Pawan Kumar fell down, sustained injuries and succumbed to the injuries. The Tribunal has rightly made discussions in para 7 to 9 of the impugned award. The driver and owner-insured of the offending vehicle has not questioned the findings returned by the Tribunal on issue No. 1, then how can it lie in the mouth of the appellant-insurer that the driver of the offending vehicle had not driven the offending vehicle rashly and negligently. Having said so, the findings returned by the Tribunal on issue No. 1 are upheld.

10. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issue No. 5:

11. The appellant-insurer has led evidence. The offending vehicle was a goods carrier, was insured and in terms of the insurance policy, Ext. RW-3/A and risk of '2+1' was covered. Only one claim petition was the outcome of the accident, thus, it cannot be said that the risk of the deceased was not covered in the given facts and circumstances of the case.

12. It was for the appellant-insurer to plead and prove that the deceased was travelling in the offending vehicle as a gratuitous passenger.

13. The owner-insured and the driver of the offending vehicle have admitted in their reply that the deceased was travelling in the offending vehicle with shuttering material, thus, was not a gratuitous passenger, and his risk was covered. Having said so, the findings returned by the Tribunal on issue No. 5 are upheld.

Issue No. 3:

14. It was for the appellant-insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence and the owner-insured has committed a willful breach, has not been pressed into service before this Court or before the Tribunal. However, I have gone through the evidence. The appellant-insurer has not pleaded and proved that the driver of the offending vehicle was not having a valid and effective driving licence, rather, was having a valid and effective driving licence, copy of which is on the file as Ext. RW-1/A. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

15. The factum of insurance is admitted and proved. Thus, the findings returned by the Tribunal on issue No. 4 are also upheld.

Issue No. 6:

16. It was for the appellant-insurer to plead and prove that there is collusion between the claimants and the owner-insured and driver, has not led evidence to this effect. Accordingly, the findings on issue No. 6 are also upheld.

Issue No. 2:

17. The amount awarded is very meager and cannot be said to be excessive in any way. But, the claimants have not questioned the same, is reluctantly upheld.

18. Having glance of the above discussions, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

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 award after proper identification.

20. Send down the record after placing copy of the judgment on Tribunal's file.

****

BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Ltd. ...Appellant

VERSUS

Manohar Lal and others ...Respondents.

FAO No.215 of 2008
Decided on: 07.08.2015.

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that he should be held liable to pay interest from the date when he was arrayed as party and not from the date of filing of the petition- held, that Motor Vehicle Act is a social legislation for the benefit of the claimants- claimants were not aware of the name of the insurer and the insurer was impleaded as party subsequently- moreover, purpose of insurance is to indemnify the

insured for the loss sustained by him which would include the liability to pay interest – allowing the application for impleading a party is that the party is impleaded from the inception of the claim petition and not from the date of impeladment- thus, Insurance Company cannot claim to be absolved from the liability on the ground that it was impleaded subsequently. (Para-6 to 13)

Cases referred:
Urmilla Pandey and others vs. Khalil Ahmad and others, 1994 ACJ 805
Oriental Insurance Co. Ltd. vs. Aminaben Rahimbhai Kadiwala and others, 2003 ACJ 175

For the Appellant:	Mr.Ashwani K. Sharma, Senior Advocate, with Ms.Monika Shukla, Advocate.
For the Respondents:	Mr.Lalit Sehgal, Advocate, for respondent No.1. Mr.J.R. Poswal, Advocate, for respondents No.2 and 3.

The following judgment of the court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

Appellant-insurer, by the medium of instant appeal, has questioned the award, dated 13th December, 2007, passed by the Motor Accident Claims Tribunal, Fast Tract Court, Shimla, (for short, the Tribunal), in Claim Petition No.54-S/2 of 2005/2000, titled Manohar Lal vs. Ranjna Rao and others, whereby compensation to the tune of Rs.1,72,000/-, with interest at the rate of 9% from the date of filing of the Claim Petition till realization, was awarded in favour of the claimant, and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimant, the driver and the owner have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the appellant-insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Senior Advocate appearing for the appellant-insurer, during the course of hearing, argued that the insurer is aggrieved by the impugned award only to the extent of saddling it with interest from the date of filing of the Claim Petition. He submitted that the insurer was to be saddled with the interest from the date of its impleadment in the Claim Petition. While projecting his argument, he has relied upon Sections 149(2) and 171 of the Motor Vehicles Act, 1988, (for short, the Act).

5. The argument, though very attractive, is devoid of any force for the following reasons.

6. Granting of compensation in Claim Petitions is a social legislation and is for the benefit of the claimants. Procedural laws, wrangles and tangles, technicalities and niceties have no role to play. The main aim and object of Chapter XII of the Act is that the claimants are compensated as early as possible so that they do not fall prey to social evils.

7. Claim Petition, in the instant case, was filed and the insurer was arrayed as party at later stage for the simple reason that it was not known to the claimant as to who was the insurer of the offending vehicle. The name of the insurer was disclosed by the insured during the pendency of the claim petition and only thereafter the insurer was arrayed as party respondent in the Claim Petition. Thus, how it can be said that the

claimant is not entitled for interest or interest is to be recovered from the owner prior to arraying of the insurer as a party respondent.

8. The purpose of mandate of the Insurance Act, read with the mandate of Sections 146 to 149 of the Act, is that the owner is under legal obligation to get the vehicle insured and the purpose of insurance is that third parties, as also the damage caused to the vehicle by the driver, are protected. Thus, by no stretch of imagination, it can be said that the liability of the insurer to pay interest starts from the date of its impleadment as party in the Claim Petition.

9. It is also well established that a person who is impleaded as party to a lis in terms of Order 1 Rule 10 of the Code of Civil Procedure (for short, CPC), he becomes party to the lis right from the date of institution of the lis, and thus, it cannot be claimed that the petition is barred by time and he should be saddled with the liability from the date of impleadment. If that ground was available to the insurer, it should have questioned the impleadment order, which it has not. The insurer has accepted the order of impleadment, had not made any murmur.

10. A reference may be made to the decision of the Apex Court in **Urmilla Pandey and others vs. Khalil Ahmad and others, 1994 ACJ 805,** wherein the claimants produced before the Apex Court the insurance cover note, for the first time, issued in 1969 i.e. 25 years ago and on such fact, the Apex Court while setting aside the judgment of the High Court and of the Tribunal, held the insurer liable to pay compensation and interest as well. It is apt to reproduce paragraphs 10 and 11 of the said decision hereunder:

> *"10. We are satisfied that the car with registration No. UPC-8527 was insured with the Premier Insurance Company Limited and Canara Motor and General Insurance Company Limited. The New India Assurance Company, respondent in the appeal herein, being the successor of the said companies is liable to pay the award money as an insurer.*
>
> *11. The Tribunal has grossly erred in computing the compensation amount. The Tribunal was not justified in assuming the life expectancy to be 58. It could not be less than 65 even at that point of time. The Tribunal also fell into error in making 33% deduction for the lump sum payment. As a matter of fact, no payment till date has been received by the unfortunate family. The amount of Rs. 40,600/- awarded by the Tribunal is quite low. Without going into various heads under which the appellants could be compensated, we are of the view, that in order to do complete justice between the parties, the appellants be awarded Rs. 1,20,000 (rounding off the figure of Rs. 1,17,747.70 paise as claimed by the appellants). We order accordingly. On the amount of Rs. 1,20,000,/- the, appellants shall be entitled to 12 per cent per annum interest from the date of the application before the Tribunal. The total amount shall be paid by the insurance company to Urmilla Pandey, the widow, on her behalf and on behalf of her two children within three months from today. In case the amount is not paid within the period of three months, the insurance company shall be liable to pay interest at the rate of 18 per cent per annum thereafter. The amount shall be paid by way of a demand draft in the name of Urmilla Pandey."*

11. The Gujarat High Court, in **Oriental Insurance Co. Ltd. vs. Aminaben Rahimbhai Kadiwala and others, 2003 ACJ 175**, has held as under:

> *"5. We have considered both these cases and the factual aspects of the case before us. It is undisputed that the accident took place on 2.3.1986. It is*

equally undisputed that the claim petition was preferred on 30.7.1986. There is no dispute regarding the fact that the appellant, insurance company, was impleaded on 29.3.1996 and thereafter, the Tribunal gave notice to the appellant on 30.4.1996. There was, thus, about ten years' delay in impleading the insurance company, appellant. However, since the impleadment was granted on 29.3.1996, it will relate back to the date of presentation of the claim petition, i.e., 30.7.1986 and it will be deemed by a fiction of law that the insurance company was already before the Tribunal on 30.7.1986. There seems to be no reason to distinguish compensation and interest and hold that the compensation is payable by the insurance company from the date of the petition but not the interest." Emphasis supplied.

12. Even otherwise, Section 171 of the Act deals with the awarding of interest. It is apt to reproduce Section 171 hereunder:

*"**171. Award of interest where any claim is allowed**. – Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."*

13. Thus, from the bare perusal of the above provision, it is clear that Section 171 of the Act mandates that the claimant is entitled to interest from the date of filing of the Claim Petition or from the date of the judgment and not earlier to that. Section 171 of the Act nowhere provides that in case a party is arrayed in the Claim Petition at a subsequent date, that party has to be saddled with the interest from the date of impleadment and not prior to that.

14. Having said so, no case is made out for interference. Accordingly, the impugned award is upheld and the appeal is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company ...Appellant.
Versus
Sh. Vijay Goel and another ...Respondents.

FAO No. 628 of 2008
Decided on: 07.08.2015

Motor Vehicles Act, 1988- Section 149- Injured had specifically averred in the claim petition that he had hired the offending vehicle, which fact was not denied by driver-cum-insured in his reply- the insurance policy disclosed that the offending vehicle was a private vehicle – held, that the vehicle could not have been used as a commercial vehicle – owner-insured had committed willful breach of the terms and the conditions of the insurance policy- the award modified and right of recovery granted to the Insurance Company.

(Para 4-11)

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Surender Sharma, Advocate, for respondent No. 1.
Mr. Lakshay Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award, dated 22.07.2008, made by the Motor Accident Claims Tribunal, Kullu, H.P. (for short "the Tribunal") in Cl. Pet. No. 81/06, titled as Vijay Goel versus Sh. Rakesh Seth, whereby compensation to the tune of Rs.1,00,000/- with interest @ 9% per annum from the date of the impugned award till its realization was awarded in favour of the claimant-injured and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimant-injured and the driver-cum-owner/insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The only ground of attack in this appeal is that the Tribunal has fallen in an error in saddling the appellant-insurer with liability for the reasons given in the memo of appeal.

4. Mr. B.M. Chauhan, learned counsel for the appellant-insurer argued that in para 24 (i) of the claim petition, the claimant-injured has specifically averred that he had hired the offending vehicle, Indica Car, bearing registration No. HP-34-2636, on 19.04.2005 from Shimla to Kullu, which factum has not been denied by the driver-cum-owner/insured in his reply.

5. It is apt to reproduce para 24 (i) of the claim petition herein:

> *"On the fateful day of 19.4.2005 the petitioner/injured hired the ill-fated Indica car No. HP-34-2636 from Shimla to Kulu, which was being driven by the respondent No. 1 in a rash and negligent manner that too in an excessive speed and when the said vehicle reached near Teen Piples at Pandoh, it crushed a cow lying on the road in an injured condition and after having crushed the said cow, vehicle of the respondent No. 1 also struck against another vehicle bearing No. DL-8CG-4893, which was coming from Kullu to Mandi side. This accident occurred due to rash or negligent driving of the respondent No. 1. In the accident, the petitioner sustained grievous injuries, fracture on his left side of the skull."*

6. It would also be profitable to reproduce relevant portion of the reply to para 24 (i) of the claim petition herein:

> *"24 (i) That this sub-para of the claim petition is correct only to the extent that on 19-04-2005, the petitioner was travelling in Indica Car No. HP-34-2636 from Shimla to Kullu and near Teen Piple at Pandoh the car met with an accident and petitioner suffered injuries in that accident, rest of the para is absolutely wrong and therefore denied. It is specifically denied that the respondent No. 1 was driving the car in a rash or negligent manner that to in an excessive speed and a cow was lying in injured condition and that the respondent No. 1 crushed the said cow....."*

7. Thus, it is pleaded and admitted that the claimant-injured had hired the offending vehicle at the relevant point of time.

8. The documents on the file in general and in particular, the insurance policy, Ext. RW-2/A, do disclose that the offending vehicle is a private vehicle, thus, cannot be used as a commercial vehicle.

9. Viewed thus, it can be safely said that the owner-insured has committed a willful breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act").

10. Having said so, the Tribunal has fallen in an error in directing the appellant-insurer to satisfy the award.

11. Having glance of the above discussions, the appeal merits to be allowed and the impugned award is to be modified by granting right of recovery to the appellant-insurer to recover the same from the driver-cum-owner/insured of the offending vehicle. The appellant-insurer has already deposited the awarded amount before the Registry. The Registry is directed to release the same in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

12. The appeal is disposed of and the impugned award is modified, as indicated hereinabove.

13. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Amrish Rana .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 326 of 2014
Reserved on: August 07, 2015.
Decided on: August 10, 2015.

Indian Penal Code, 1860- Sections 147, 148, 307, 323, 326 and **Indian Arms Act, 1959-** Section 25- Complainant was coming from Ghanahatti bazaar- when he had covered some distance, a Maruti Car came from back side- accused "G" came out from the car and fired at the complainant- gun shot hit right eye of the complainant - complainant grappled with the accused and snatched country made pistol- In the meantime, another occupant sitting on the driver seat came out of the vehicle and fired at the complainant, however the gun shot missed the complainant - complainant rushed towards the jungle and asked PW-2 to inform the jail authorities- the version of the complainant was supported by other witnesses – the medical officers had noticed an entry wound which could have been caused by a bullet – the complainant knew the accused prior to the incident and therefore it was not necessary to conduct test identification parade– held, that the prosecution had succeeded in proving its case and the accused were rightly convicted. (Para 24-37)

Cases referred:
Visveswaran vrs. State Rep. by S.D.M., AIR 2003 SC 2471
Malkhan Singh and others vrs. State of M.P., (2003) 5 SCC 746
Kulwinder Singh and another vrs. State of Punjab, (2015) 6 SCC 674
Om Parkash vrs. State of Punjab, AIR 1961 SC 1782
Liyakat Mian and others vrs. The State of Bihar, (1973) 4 SCC 39
Sarju Prasad Vrs. State of Bihar, AIR 1965 SC 843
Girija Shankar vrs. State of U.P., 2004 Cri. L.J. 1388
R. Prakash vrs. State of Karnataka, (2004) 9 SCC 27

For the appellant: Mr. Y.P.S. Dhaulta, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment/order dated 4/10.1.2014, rendered by the learned Sessions Judge (Forests), Shimla, H.P. in Sessions Trial No. 26-S/7 of 2012/11, whereby the appellant-accused Amrish Rana (hereinafter referred to as accused), alongwith other co-accused, was charged with and tried for offences punishable under Sections 147, 148, 307, 323, 326 IPC and Section 25 of the Arms Act and was convicted and sentenced alongwith co-accused Gurjant Singh to undergo rigorous imprisonment for 10 years and fine of Rs. 10,000/- and in default of payment of fine to further undergo one month's imprisonment under Section 307 IPC. They were sentenced to undergo 10 years rigorous imprisonment and fine of Rs. 5000/- and in default of payment of fine to further undergo imprisonment for one month under Section 326 IPC. They were sentenced to undergo one year rigorous imprisonment and fine of Rs. 1000/- and in default of payment of fine to further undergo imprisonment for one month under Section 323 IPC. They were sentenced to undergo one year imprisonment and fine of Rs. 1000/- and in default of payment of fine to further undergo imprisonment for one month under Section 147 IPC. They were also sentenced to undergo one year imprisonment and fine of Rs. 1000/- and in default of payment of fine to further undergo imprisonment for one month under Section 148 IPC. They were also sentenced to undergo imprisonment for one year and fine of Rs. 1000/- and in default of payment of fine to further undergo imprisonment for one month under Section 25 of the Arms Act.

2. The case of the prosecution, in a nut shell, is that complainant PW-11 Naresh Kumar on 19.3.2003 was coming from Ghanatti Bazar. He alighted from the bus at point which bifurcates to Kanda Jail. He had covered a distance of 2 meters approximately where he found a white Maruti Car coming from back. The car stopped at a short distance. Accused Gurjant Singh came out from the car and fired at the complainant Naresh Kumar. The complainant Naresh Kumar grappled with the accused and snatched country made pistol. The fire shot hit right eye of the complainant. In the meantime, another occupant sitting on the driver seat came out of the vehicle. He also fired at him with country made pistol. The fire shot missed and it did not hit him. Thereafter, the complainant rushed towards the jungle and reached the house of PW-2 Champa Devi who informed the jail authorities. Statement of complainant Ext. PW-11/A was recorded. The blood stained clothes were also taken into possession. The police visited the spot. Pistol Ext. P-6, pallet Ext. P-7 and blood stained stone Ext. P-4 were recovered. One barrel Ext. P-9 was also recovered from the spot. Maruti car was also taken into possession. FIR Ext. PW-14/A was

recorded. The case property was sent for chemical examination. On completion of the investigation, challan was put up in the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 21 witnesses. The accused were also examined under Section 313 Cr.P.C. Accused Gurjant Singh and Amrish Rana took defence that they were making complaints against the jail authorities about the ill-treatment of jail inmates. The complaint was inquired into by the learned Sessions Judge. Thereafter, the doctor was transferred and the Jail Authorities had enmity towards them. Due to this reason, they were falsely implicated. They were innocent. The learned trial Court convicted and sentenced accused Gurjant Singh and Amrish Rana, as noticed hereinabove. Accused Harjit Singh and Harmit Singh were acquitted and accused Rajesh Kumar had absconded. Hence, this appeal on behalf of appellant Amrish Rana.

4. Mr. Y.P.S. Dhaulta, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. Ramesh Thakur, Asstt. Advocate General, appearing on behalf of the State, has supported the judgment/order of the learned trial Court dated 4/10.1.2014.

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

6. PW-1 Jitender Kumar testified that he was posted as warder in Model Central Jail, Kanda. Naresh was also warder in the Jail at the relevant time. Gurjant Singh, was under trial prisoner in the jail at that time. On 27.1.2003, Gurjant Singh had assaulted Naresh in the jail and police case was filed. Because of this, Gurjant was inimical towards Naresh and he used to advance threats to him. Gurjant was lateron taken to Chandigarh in a court case and he fled away from the police custody. On the occasion of Holi in the year 2003, one Champa Devi telephonically informed the jail authorities that Naresh Kumar, employee of the jail had come to her house wounded by gun shots and was bleeding profusely. He alongwith 4-5 persons went to Champa Devi's house. They took Naresh first to Kanda jail and then to IGMC, Shimla. On way to hospital, he disclosed that he got down from the bus, on a bifurcation and then was coming towards Kanda jail, when a car came from behind and stopped near him and the occupants thereof assaulted him. He told that he was fired at with revolver by the occupants. Naresh Kumar had received injury near his eye. He had seen the injury. Naresh, however, did not tell about the names of the assailants. The police lifted one turban, one blood stained stone, one barrel and one country made pistol in their presence from the spot. Turban and blood stained stone were wrapped in a cloth parcel and sealed with seal "T" and taken into possession vide memo Ext. PW-1/A. He identified turban Ext. P-2 and stone Ext. P-4. On the same day, police alongwith them went to jungle and recovered from there one country made pistol. The place was about 150 meters down from the road. The pistol was wrapped in a cloth parcel and then sealed with seal impression "T". The pistol was checked and it was found loaded with one bullet. It was taken into possession vide memo Ext. PW-1/B. He identified pistol Ext. P-6 and bullet Ext. P-7. The police also recovered one barrel from the road where the incident happened. The barrel was also wrapped in a cloth parcel and sealed with seal "T". It was taken into possession vide memo Ext. PW-1/C. He identified one rusted steel barrel Ext. P-9. The sketch of Ext. P-9 was also prepared. Maruti car was also taken into possession. In his cross-examination, he deposed that the phone call from Champa Devi was received in the jail around 6-6:30 PM.

7. PW-2 Champa Devi deposed that her house is adjoining to Model Central Jail, Kanda. On 19.3.2003, she was in her house. She heard someone saying *"save me".*

When she came out of her house, she found one man outside her house. He told her that he had been hit with a bullet. He was in a bad condition. He requested her to telephonically inform about it in the Central Jail. He also disclosed the telephone number of the jail. As such, she rang up in the Central Jail. Thereafter, some persons came from the Central Jail and took the injured.

8. PW-3 Laiq Ram deposed that on account of assault, Naresh Kumar had received injuries. He was admitted in the IGMC, Shimla. He and Narotam were deputed in the IGMC for protection of Naresh Kumar on guard duty. On 23.3.2003, the police came to IGMC and took into possession the blood stained clothes, namely, kamiz and Pajama of Naresh Kumar.

9. PW-4 HC Santosh Kumar, deposed that on 31.3.2003, MHC Joginder of PS West gave him four sealed parcels, one envelope bearing seal of CMO and one forwarding letter for depositing with FSL, Bharari. He deposited them in the FSL on the same day. One another parcel sealed with seals was given to him for depositing in FSL Bharari. He also deposited the said parcel on that date and gave receipt to the MHC. He took these parcels to FSL vide RC No. 37/2003. He was declared hostile and cross-examined by the learned P.P. He admitted in his cross-examination that 5 parcels in which one country made pistol, another parcel in which barrel was said to be there and another parcel containing stone were sealed with seal "T". One parcel containing bullet sealed with seal of CMO, another parcel containing blood stained cloth and sealed with seal "K" were handed over by the MHC to him and he deposited them with FSL Bharari alongwith documents on that date vide RC No. 37/03.

10. PW-5 Prem Raj deposed that there was festival of Holi. At 5:15 PM, he came out of his quarter and found that many persons had assembled on the gate of jail. There Naresh Kumar, Warder was bleeding from his face and he disclosed that he had been fired at by one person when he was on Ghanatti-Kanda link road. He was also declared hostile and cross-examined by the learned P.P.

11. PW-6 ASI Jai Singh deposed that on 3.6.2003, he went to P.P. IGNOU Mehroli, Delhi with ASI Rajinder Singh. ASI Surinder Singh Dhaiya was in-charge of P.P. IGONU. The In-charge was requested to hand over the disclosure statements of Amrish Rana and Rajesh, which they had made, in respect of FIR No. 272/03 dated 1.6.2003 under Section 399, 402 IPC and 25 of the Arms Act of PS Mehroli. Memo Ext. PW-6/A was prepared to this effect.

12. PW-7 Roshan Lal deposed that on 11.10.2003, he was at Gahanatti Bazar with Ashok Kumar. The police came there. They asked them to join the investigation. One Harjit was also with the police and his name was disclosed to them by the police. The police took Harjit to Nehra road where Maruti car bearing No. HP-03-8537 was parked. He disclosed to the police that before coming to the spot for committing crime, they had put a fake number plate on that vehicle. He identified the place where the vehicle was parked. On the same day, the police took Harjit Singh on Kanda road where the incident had taken place. He disclosed that first Rajesh alias Guddu had fired at Naresh and when the victim was running from the spot, Amrish fired at him. He also said that Gurjant was also present there. Memos regarding identification of the places where the vehicle was parked and incident took place were prepared. He was also declared hostile and cross-examined by the learned P.P. In his cross-examination by the learned P.P. he deposed that since the incident occurred many years before, so he was not in a position to recollect this case clearly.

13. PW-8 Ashok Kumar deposed that on 11.10.2003, he was in Ghanatti Bazar with Roshan Lal, Pradhan, G.P. Ghanatti. The police came there. Harjit was in the custody of the police. They alongwith police and Harjit went in the vehicle to Nehra road. There, Harjit identified the place where they had parked the car and fled away. Harjit also disclosed that they had put fake number plate on the vehicle. Then they came to Kanda road and there Harjit told that Rajesh had fired at Naresh and Amrish also fired at him. The police prepared memos Ext. PW-7/A and PW-7/B in this regard.

14. PW-11 Const. Naresh Kumar deposed that on 19.3.2003, he had gone to Ghanatti bazaar for haircut. He boarded the bus at Ghanatti for his workplace. He alighted at point where road bifurcates to Kanda Jail. He had covered a distance of 20 meters from that point when he found white coloured Maruti car coming from his back side. He could read only HP-03 on its number plate. The vehicle crossed him and stopped after a short distance. Five persons were occupying the vehicle. Amrish Rana and Gurjant Singh were amongst the occupants of that vehicle. He knew both of them since they had been the inmates of Kanda jail during his posting. At the relevant time, they were absconding. In January, 2003, accused Gurjant Singh had hit him on his leg with some sharp object. Gurjant was sitting on a seat next to the driver. He came out of the vehicle and fired at him. He grappled with him and snatched country made pistol from him. The fire shot hit him near his right eye. In the meantime, the person on the driver seat also came out of the vehicle. He was also having country made pistol with him. He also fired at him but it did not hit him. The other three occupants of the vehicle were not known to him. Thereafter, he ran towards the jungle. He ran towards to the house of Champa situated just near the jail. The officials from Kanda jail came to Champa's house and took him to jail. He was taken to IGMC, Shimla from there by the staff for treatment. The police met him in IGMC, Shimla in the same evening. Police recorded his statement Ext. PW-11/A. The police took his clothes on 22.3.2003, which were being worn by him on the date of incident. He identified the gray coloured shirt and pajama. He also identified the pistol Ext. P-6 and rusted barrel like object Ext. P-9. He identified Gurjant and Amrish Rana in the Court. He was also declared hostile by the learned P.P. He denied the suggestion that in order to save Harjeet, Harmeet and Rajesh, he was deposing falsely. In his cross-examination by the Advocate appearing on behalf of the accused, he deposed that he grappled with Gurjant for about half a minute.

15. PW-12 Dr. G.C.Rajput, has noticed following injuries on the person of Naresh Kumar:

> "1. There was entry wound 1 cm below inner canthus of right eye with inverted edges.
>
> 2. Multiple soot particles with pin pointed black spots seen over the peri orbital region on the right side of face and near the inner canthus of left eye."

He issued final opinion Ext. PW-12/C. According to him, the injury No. 1 was bullet injury and the same could be dangerous to life. Injury No. 2 was simple injury.

16. PW-13 R.L.Chaudhary has proved disclosure statement made by Amrish Rana mark A-1 and A-2 and disclosure statement made by Rajesh vide mark A-3.

17. PW-15 Dr. Rajesh Kumar has proved his report Ext. PW-15/A. According to his opinion, item No. 1 was fire worthy and it was recently fired. The chamber of item No. 1 (i.e. country made pistol) was made for 8 mm (.315) cartridge. The caliber of item No. 1 i.e. the spent cartridge was 8 mm. Evidence of firing was also found in item No. 3 i.e. the broken barrel. The caliber of item No. 4 i.e. the mutilated bullet was also 8 mm (.315).

18. PW-16 SI Rajinder Kumar deposed that he was informed by Prem Raj Sharma from Central jail, Kanda that Naresh Warder was fired upon near Ghanatti. In this regard, rapat was recorded. The statement of Naresh Kumar was recorded vide Ext. PW-11/A. FIR Ext. PW-14/A was also registered. Naresh Kumar was medically examined. His clothes were also taken into possession. He also recorded the statements of witnesses under Section 161 Cr.P.C.

19. PW-17 SI Sita Ram deposed that during the course of investigation, he visited the spot on 11.10.2003. He got the spot identified where the vehicle was left behind by the accused. Memo Ext. PW-7/A was prepared to this effect. The accused persons identified the place from where they had fired at Naresh Kumar vide memo Ext. PW-7/B.

20. PW-18 Insp. Surinder Kumar Dahiya deposed that he was posted as Incharge Indira Gandhi Open University under PS Mehroli. On 1.6.2003, accused Amrish Rana, Rajesh, Nazeen and Prem Kumar were arrested in case No. 272/2003 under Sections 399, 402 IPC and Sections 25,54 and 59 Arms Act, at PS Mehroli. Accused Amrish and Rajesh had disclosed in their statements that in the month of March, 2003 they had committed some crime at Shimla with Gurjant, Kewal, Harmeet and Harjeet. The disclosure statement made by Amrish Rana was reduced into writing at his dictation and was written by one of the members of the raiding party. The statement was recorded under Section 27 of the Evidence Act vide Ext. PW-18/A. Similarly statement of accused Rajesh was recorded under Section 27 of the Evidence Act vide Ext. PW-18/B.

21. The statements made by accused Amrish Rana under Section 27 of the Evidence Act Ext. PW-18/A and accused Rakesh alias Guddu Ext. PW-18/B were proved by PW-19 Naveen.

22. PW-20 Dr. Rohit Sharma has examined and operated upon Naresh Kumar. The following findings were recorded by him:

> "1. Edema over maxillary region on right side.
>
> 2. Irregular lacerated wound on right maxillary region 2 cm in length margins of which were inverted about 1.5 to 2 cm below inferior orbital plate.
>
> 3. There were multiple small black spots in the forehead (tattooing) on right side nose, lower half of face extending on medial aspect of face. Oropharynx-NAD."

He issued summary vide Ext. PW-20/A. According to him, the injuries could be caused by a person from a distance of approximately within five meters. He also admitted in his cross-examination that the injuries were possible with pellets.

23. PW-21 Dr. Ravinder Shamra, has issued opinion on the back side vide Ext. PW-12/A.

24. The most material witness is injured Naresh Kumar (PW-11). He has categorically stated that when he was coming back from Ghanatti bazaar and when he got down at bifurcation, a car came from behind and crossed him. It stopped at some distance from him. Accused Amrish Rana and Gurjant were amongst the occupants of the vehicle. He knew them since they had been inmates of Kanda Jail during his posting, though at the relevant time they were absconding. Accused Gurjant Singh had hit him on his leg with some sharp object in the month of January, 2003. Gurjant Singh came out of the vehicle and fired at him. He grappled with him and snatched the country made pistol from him. The fire shot hit him near his right eye. In the meantime, the person on the driver seat also came out of the vehicle. He was also having country made pistol with him. He also fired at

him but it did not hit him. The other three occupants of the vehicle were not known to him. He did not identify them at that time. Thereafter, he ran towards the jungle and reached the house of Champa Devi situated just near the jail. The officials from Kanda jail came to Champa's house and took him to jail. He was then taken to IGMC, Shimla from there for treatment. The statement of PW-11 Naresh Kumar was corroborated by PW-1 Jitender Kumar on all material aspects, including the manner in which the incident has happened on 19.3.2003 and also that Gurjant had assaulted Naresh Kumar on 27.1.2003.

25. PW-2 Champa Devi has also supported the version of PW-11 Naresh Kumar. According to her, on 19.3.2003, she was in her house. She heard someone crying "save me". When she came out of her house, she found one man outside her house. He told her that he had been hit with a bullet. He was in a bad condition. He requested her to telephonically inform about it in the Central Jail. He also disclosed the telephone number of the jail. She rang up in the Central Jail and some persons came from there and took the injured. Pistol is Ext. P-6 and bullet Ext. P-7. These were identified by PW-1 Jitender Kumar. PW-1 Jitender Kumar also identified rusted steel barrel Ext. P-9. PW-7 Roshan Lal and PW-8 Ashok Kumar deposed the manner in which the accused have got the place identified where the car was parked and firing had taken place.

26. PW-12 Dr. G.C.Rajput has issued final opinion Ext. PW-12/C. He has noticed entry wound 1 cm below inner canthus of right eye with inverted edges. He also noticed multiple soot particles with pin pointed black spots seen over the peri orbital region on the right side of face and near the inner canthus of left eye. According to him, injury No. 1 was bullet injury and the same could be dangerous to life. Injury No. 2 was simple. PW-20 Dr. Rohit Sharma has operated upon Naresh Kumar. He has noticed edema over maxillary region on right side, irregular lacerated wound on right maxillary region 2 cm in length margins of which were inverted about 1.5 to 2 cm below inferior orbital plate. He also noticed multiple small black spots in the forehead on right side nose, lower half of face. PW-21 Dr. Ravinder Sharma has given opinion on back side of PW-12/A. The prosecution has conclusively proved that it was accused Amrish Rana alongwith Gurjant who had fired at Naresh Kumar. Naresh Kumar was injured. He was taken to IGMC Shimla. His clothes were taken into possession. PW-15 Dr. Rajesh Kumar has issued report Ext. PW-15/A. He has opined that item No. 1 was fire worthy and it was recently fired. The chamber of item No. 1 (i.e. country made pistol) was made for 8mm (.315) cartridge. The caliber of item No. 1 i.e. the spent cartridge was 8mm. Evidence of firing was also found in item No. 3 i.e. the broken barrel. The caliber of item No. 4 i.e. the mutilated bullet was also 8 mm (.315).

27. In the instant case PW-11 Naresh Kumar knew the accused when he was serving as warder in the jail where the accused were lodged. He has given the name of one accused Gurjant in the FIR and identified Gurjant and accused Amrish Rana in the Court. Thus, it would not be material that name of other co-accused were not given in the FIR.

28. Their lordships of the Hon'ble Supreme Court in the case of ***Visveswaran vrs. State Rep. by S.D.M.,*** reported in ***AIR 2003 SC 2471,*** have held that identification of accused in Court or test identification parade is not a sine qua non for conviction. Commission of crime can be proved by circumstantial evidence. It has been held as follows:

> "11. It is unfortunate that despite the aforesaid facts, the test identification parade was not held. An important aspect of the case is that the appellant had beard and moustaches when PW1 and PW2 were examined as witnesses for the prosecution. It was not so at the time of the occurrence. PW1 and PW2, therefore, it is evident, could not identify him in Court and stated in their deposition that the said person is not in Court. It does not

mean that the acquittal is to follow as a natural corroboratory from the statements of PW1 and PW2. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt."

29. Their lordships of the Hon'ble Supreme Court in the case of ***Malkhan Singh and others vrs. State of M.P.,*** reported in ***(2003) 5 SCC 746,*** have held that failure to hold test identification parade would not make inadmissible the evidence of identification in Court. Test Identification does not constitute substantive evidence. The substantive evidence is the evidence of identification in Court and the TI parade provides corroboration of the sworn testimony of the witness in Court as to the identity of accused. In appropriate cases, the Court may accept the evidence of identification in Court even without insisting on such or other corroboration. It has been held as follows:

"[7] It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration, AIR 1958 SC 350; Vaikuntam Chandrappa and others v. State of Andhra Pradesh, AIR 1960 SC 1340; Budhsen and another v. State of U.P., AIR 1970 SC 1321 and Rameshwar Singh v. State of Jammu and Kashmir, (1971) 2 SCC 715.

[16] It is well settled that the substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the witness in Court, if required. However, what weight must be attached to the evidence of identification in

> Court, which is not preceded by a test identification parade, is a matter for the Courts of fact to examine. In the instant case the Courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in Court as she was found to be implicitly reliable. We find no error in the reasoning of the Courts below. From the facts of the case it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely implicate them by naming them at any stage. The crime was perpetrated in broad day light. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the facts of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity. The occurrence took place on March 4, 1992 and she deposed in Court on August 27, 1992. The prosecutrix appears to be a witness on whom implicit reliance can be placed and there is no reason why she should falsely identify the appellants as the perpetrators of the crime if they had not actually committed the offence. In these circumstances, if the Courts below have concurrently held that the identification of the appellants by the prosecutrix in Court does not require further corroboration, we find no reason to interfere with the finding recorded by the Courts below after an appreciation of the evidence on record."

30. Their lordships of the Hon'ble Supreme Court in the case of ***Kulwinder Singh and another vrs. State of Punjab,*** reported in ***(2015) 6 SCC 674,*** have held that failure to hold TIP would not make inadmissible evidence of identification in the Court. Weight to be attached to such identification should be a matter of fact for Courts. It has been held as follows:

> "10. First, we shall deal with the facet of test identification parade. There is no dispute that the test identification parade has not been held in this case. The two witnesses, namely, PW-2 and PW-3 have identified the accused-appellants in court. As per their evidence they had seen the accused-appellants in torch light and they had also seen them running away. It has also come in the evidence that they chased them but they could not be apprehended. Learned trial Judge as well as the High Court has taken note of the fact that it was 4:00 a.m. in the month of April and, therefore, it was not all that dark and with the help of torch light, they could have identified the accused persons. The suggestion given to these witnesses is absolutely vague. Nothing really has been elicited in the cross-examination to discard the testimony of these witnesses.
>
> 11. In **Matru** v. **State of U.P**., it has been held that the identification test does not constitute substantive evidence and it is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation of an offence is proceeding on the right lines.

12. In **Santokh Singh v. Izhar Hussain**, it has been observed that the identification can only be used as corroborative of the statement in Court.

13. In **Malkhan Singh & Others v. State of M.P.**, it has been held thus:-

> ".....7. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."

14. In this context, a reference to passage from **Visveswaran v. State**, would be apt. It is as follows:-

> "...11. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."

15. In the case at hand, as the witnesses have identified the accused-appellants in the Court and except giving a bald suggestion that they have not seen the accused persons, there is nothing in the cross-examination we are disposed to accept the identification in Court. Hence, the submission canvassed by the learned counsel for the appellants on this score pales into insignificance."

31. In the instant case, accused Amrish Rana had fired at Naresh Kumar. The causing of injury was not necessary since he had the necessary intention to use the firearm to kill Naresh Kumar.

32. Their lordships of the Hon'ble Supreme Court in the case ***Om Parkash vrs. State of Punjab,*** reported in ***AIR 1961 SC 1782,*** have held that a person commits an offence under Section 307, when he has an intention to commit murder and, in pursuance of that intention, does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. Their lordships have further held that in cases of attempt to commit murder by fire arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Their lordships further held that till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence under Section 307 is made out. It has been held as follows:

> "9. Section 307 of the Indian Penal Code reads:
>
> "Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. When any person

> offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death."

Section 308 reads:

> "Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

Both the sections are expressed in similar language. If s. 307 is to be interpreted as urged for the appellant, s. 308 too should be interpreted that way. What-' ever may be said with respect to s. 307, being exhaustive or covering all the cases of attempts to commit murder and s. 511 not applying to any case of attempt to commit murder on account of its being applicable only to offences punishable with imprisonment for life or imprisonment, the same cannot be said with respect to the offence of attempt to commit culpable homicide punishable under s. 308. An attempt to commit culpable homicide is punishable with imprisonment for a certain period and therefore but for its being expressly made an offence under s. 308, it would have fallen under s. 511 which applies to all attempts to commit offences punishable with imprisonment where no express provisions are made by the Code for the punishment of that attempt. It should follow that the ingredients of an offence of attempt to commit culpable homicide not amounting to murder should be the same as the ingredients of an offence of attempt to commit that offence under s. 511. We have held this day inAbhayanand Mishra v. The State of Bihar (1) that a person commits the offence of attempting to commit a particular offence, when he intends to commit that particular offence and, having made preparations and with the intention to commit that offence does an act towards its commission and that such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing such offence. It follows therefore that a person commits an offence under s. 308 when he has an intention to commit culpable homicide not amounting to murder and in pursuance of that intention does an act towards the commission of that offence whether that act be the penultimate act or not. On a parity of reasoning, a person commits an offence under s. 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in s. 300. The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression 'whoever attempts to commit an offence' in s. 511, can only mean 'whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence'. The same is meant by the expression 'whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder' in s. 307. This simply

means that the act must be done with the (1) [1962] 2 S.C.R. 241.,intent or knowledge requisite for the commission of the offence of murder. The expression by that act' does not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time.

16. It may, however, be mentioned that in cases of attempt to commit murder by fire arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence under s. 307 is made out. Expressions, in such cases, indicate that one commits an attempt to murder only when one has committed the last act (1) (1932) I.L.R. 56 Bom 434., necessary to commit murder. Such expressions, however, are not to be taken as precise exposition of the law, though the statements in the context of the cases are correct."

33. Their lordships of the Hon'ble Supreme Court in the case of ***Liyakat Mian and others vrs. The State of Bihar,*** reported in ***(1973) 4 SCC 39,*** have held that absence of names of accused persons in the first information report is not necessarily fatal. The person lodging the first information report may be in such a frame of mind as to discuss about the names of the culprits before he leaves for the police station. Their lordships have further held that non-mention of names of culprits may on the other hand inspire confidence that the informant was not out to implicate his enemies. It has been held as follows:

"7. On appeal the High Court was impressed by the fact that P.W. 15 Hardeo Mahaton had made no attempt to implicate the appellants falsely because if he had wanted to do so there was nothing to prevent him from mentioning in his first information report that he had learnt from the womenfolk of the family that Liayakat and Jashim son of Jainul Mian were amongst the dacoits. In this connection it may be pointed out that in the first information report all that Hardeo Mahaton had said was that the dacoits had been identified by the ladies in the house and they were in a better position to state about the identity of the dacoits. The High Court also believed the testimony of P.W. 11 (Burhan Mahaton) who as a result of the injuries inflicted on him had remained somewhat unconscious for considerable time. In the opinion of the High Court nothing had been elicited in his cross-examination which could induce it to disbelieve his Statement about Liayakat and Sahajud son of Jainul being the two persons who had a scuffle with him. His dying declaration was considered by the High Court to be trustworthy and acceptable which fully corroborated his evidence in Court. His evidence against the appellants was also considered to be free from blemish. While dealing with the absence of the names of the dacoits in the first information report the High Court observed "neither P.Ws. 3 and 13 nor P.W. 15 could have been in such a frame of mind as to discuss about the names of the culprits before P.W. 15 had left for Jori Hospital with Barho in an unconscious condition". The criticism about the test identification parades also did not impress the High Court and it came to a positive conclusion that the test identification parades had been fairly held and that the claims of identification of the accused persons including Jashim Mian alias Sahajad Mian could safely be relied upon. It was on these findings that the High Court dismissed the appeal."

34. Their lordships of the Hon'ble Supreme Court in the case of ***Sarju Prasad Vrs. State of Bihar,*** reported in ***AIR 1965 SC 843,*** have held that the fact that no vital organ of A has been cut would not by itself be sufficient to take the act of accused out of the purview of S. 307. It has been held as follows:

> "6. All these decisions were considered by this Court in Om Prakash v. State of Punjab, and though Cassidy's case, 4 Bom HC (Cr.) 17 was not expressly dissented from the actual view taken by this Court is more in consonance with the view taken by Beaumont C. J. in Gogte's case, ILR 56 Bom 434 : (AIR 1932 Bom 279) and the view taken by the Allahabad High Court in Niddha's Case, ILR 14 All 38 than that taken in Cassidy's case, 4 Bom HC (Cr.) 17. In Gogte's case, ILR 56 Bom 434: (AIR 1932 Bom 219) no injury was in fact occasioned to the victim Sir Earnest Hotson, the then acting Governor, due to a certain obstruction. Even so, the assailant Gogte was held by the court to be jointly (sic) under Section 307 because his act of firing a shot was committed with a guilty intention and knowledge and in such circumstances that but for the intervening fact it would have amounted to murder in the normal course of events. This view was approved by this Court. Therefore, the mere fact that the injury actually inflicted by the appellant did not cut any vital organ of Shankar Prasad is not by itself sufficient to take the act out of the purview of Section 307.
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> 7. Having said all this we must point out that the burden is still upon the prosecution to establish that the intention of the appellant in causing the particular injury to Shankar Prasad was of any of the three kinds referred to in Section 300, Indian Penal Code. For, unless the prosecution discharges the burden the offence under Section 307, I. P. C. cannot possibly be brought home to the appellant The state of the appellant's mind has to be deduced from the surrounding circumstances and as Mr. Kohli rightly says the existence of a motive to cause the death of Shankar Prasad would have been a relevant circumstance. Here, the prosecution has led no evidence from which it could be inferred that the appellant had a motive to kill the victim of his attack. On the other hand he points out that as the appellant had no enmity with Shankar Prasad that neither of them even knew each other and that as the appellant inflicted the injury on Shankar Prasad only to make him release the wrist of Sushil while Sushil was in the act of stabbing Madan Mohan he cannot be said to have had the motive to kill Shankar Prasad and, therefore, no intention to cause murder or to cause any injury which may result in death could be inferred. Now, it is the prosecution case that about a week before the incident Sushil, for certain reasons, had given a threat to Madan Mohan to the effect that he would be taught a lesson and according to the prosecution Sushil and the appellant Sarju were lying in wait for Madan, Mohan in the chowk on the day in question with chhuras with the intention of murdering him. The prosecution wants us to infer that these two persons also had the intention of murdering any one who went to the rescue of Madan Mohan. It seems to us that from the facts established it cannot be said that the appellant had the intention of causing the death of Shankar Prasad or of any one who went to Madan Mohan's rescue. If such were his intention then another significant fact would have possibly, though not necessarily, deterred him and that is that Madan Mohan and Shankar Prasad were not the only persons there at that time but were accompanied by some other persons. Moreover the incident occurred in broad day light in a chowk which must be a well-frequented area. It is not easy to assume that

in such circumstances the appellant could have intended to commit a crime for which the law has provided capital punishment.

10. In this state of the evidence we must hold that the prosecution has not established that the offence committed by the appellant falls squarely under Section 307, I. P. C. In our opinion, it amounts only to an offence under Section 324, I. P. C."

35. Their lordships of the Hon'ble Supreme Court in the case of ***Girija Shankar vrs. State of U.P.,*** reported in ***2004 Cri. L.J. 1388,*** have held that to justify conviction under S. 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. It has been held as follows:

"12. That brings us to the question regarding the legality of conviction under Section 307 IPC read withSection 34 IPC. PW-3 has sustained, as noted in the injury report, serious injuries on different parts of his body. It has been established by the evidence of PW-3; an injured witness and other eyewitnesses that he was assaulted by the appellant and the other accused persons. Learned counsel for the appellant submitted that the injuries which can be attributed to the appellant were not of very serious nature, and the most serious injury was the one which PW-3 sustained on account of the firing by A-1. We find that PW-3 had sustained 11 injuries. Though injury no.1 was attributed to fire arm, there were two other injuries which were considered to be very serious.

15. When the factual background is considered in the background of true ambit of Section 307, the inevitable conclusion is that the appellant has been rightly convicted under Section 307 read with Section 34 IPC."

36. Their lordships of the Hon'ble Supreme Court in the case of ***R. Prakash vrs. State of Karnataka,*** reported in ***(2004) 9 SCC 27,*** have reiterated that it is not essential that bodily injury capable of causing death should have been inflicted while proving case under Section 307 IPC. Their lordships have further held that intent coupled with some overt act in execution thereof, is sufficient. Their lordships have held as follows:

"9. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overtact in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Sections makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, it is not correct to acquit an accused of the charge under Section 307 IPC merely because the injuries inflicted on the victim were in the nature of a simple hurt."

37. In the instant case, accused Gurjant has also assaulted Naresh Kumar on 27.1.2003. Accused Gurjant and Amrish Rana were bearing grudge against Naresh Kumar since complaint was filed against them. Accused Gurjant had absconded from the police custody while taken to Chandigarh. Accused Amrish Rana and Gurjant were present in the car. They came out and fired at Naresh Kumar near Kanda Jail. Accused Amrish and Gurjant were identified by Naresh Kumar. In his statement recorded under Section 154

Cr.P.C., Naresh Kumar has mentioned the name of accused Gurjant. He has identified Gurjant and Amrish Rana, since they were also inmates of the Central Jail, where Naresh Kumar was working as warder. Thus, it cannot be said, as argued by Mr. Y.P.S.Dhaulta, Advocate that Naresh Kumar did not identify the accused. Thus, the conviction of accused under Sections 307, 326, 323, 147 and 148 IPC and under Section 25 of the Arms Act stands proved and is upheld. There is no occasion for this Court to interfere with the well reasoned judgment/order the learned trial Court dated 4/10.1.2014.

38. Consequently, there is no merit in this appeal and the same is dismissed.

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

Mark Attila Hegedus .....Appellant

Versus

State of Himachal Pradesh .....Respondent

Cr. Appeal No. 281/2014
Reserved on: 6.8.2015
Decided on: 7.8.2015

N.D.P.S. Act, 1985- Section 20- Accused found in possession of 1.970 kgs. charas by the police-trial court on appraisal of the evidence collected during trial found the accused guilty – held, that police had complied with the mandatory provisions of the law – sample was sealed at the spot as per rules-the trial Court had rightly appreciated the evidence and had come to a proper conclusion-appeal dismissed. (Para-16 to 18)

For the appellant : Mr. Karan Singh Kanwar, Advocate.
For the respondent : Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal is instituted against Judgment dated 1.5.2013 rendered by learned Special Judge, Kullu, Himachal Pradesh in Sessions Trial No. 74/2012, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake) who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1.00 Lakh and in default of payment of fine, to further undergo imprisonment for one year.

2. Case of the prosecution, in a nutshell, is that on 11.5.2012 police party under the leadership of ASI Dheeraj Singh (PW8) consisting of Constable Pritam Singh (PW7), HC Brij Bhushan and Constable Bhim Sen left police station towards Reuni Nallah. At about 5.00 pm, when they were present at Reuni Nallah they noticed accused coming from Katagla side towards Chowki side. He was stopped. His antecedents were enquired. His

passport was checked. He was carrying a trolley bag on his back. On checking of the trolley, two denim pants one half pant, one book, one pair of socks, one mattress and one pair of shoes were found in it. The base of the trolley was stitched with machine and having a hole. The accused could not explain about the hole when inquired about it. This raised suspicion in the mind of the police. PW8 ASI Dheeraj Singh checked the hole. He found brown and black coloured cello tape below raxin. On removal of said tape, Charas in the shape of Chapatinuma was recovered concealed in it. Charas was weighed and it was found to be 1 kg 970 GMS. Charas was repacked and sealed with a cloth parcel Ext. P1 with seal of letter 'H'. Sample seal Ext. PW-6/A was drawn. NCB form Ext. PW-5/A was filled and same was handed over to HC Brij Bhushan. Case property was taken into possession vide seizure memo Ext. PW-6/B. Rukka Ext. PW-6/C was prepared and sent to police station Kullu, through constable Pritam Singh. FIR Ext. PW-6/D was prepared. Case property was produced before SI/ SHO Om Chand, PW-5 for resealing who resealed the parcel with six seals of letter 'O', filled relevant columns of NCB form, sample seal 'O' was drawn vide Ext. PW-5/A. Thereafter, he deposited case property alongwith NCB form, sample seal and other relevant documents with MHC PW-2. Relevant entry was made and abstract of Malkhana Register is Ext. PW-1/A. Contraband was sent to Forensic Science Laboratory Junga. Report of Forensic Science Laboratory is Ext. PA. Matter was investigated. Challan was put up in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 8 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Trial Court convicted and sentenced the accused as noticed above. Hence, this appeal.

4. Mr. Karan Singh Kanwar, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. M.A. Khan, Additional Advocate General, has supported the judgment of conviction.

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

7. PW-1 Ram Krishan testified that on 12.5.2005 SI-SHO Om Chand deposited a parcel sealed with six seals of seal 'H' and resealed with six seals of seal 'O' stated to be containing contraband. He made entries qua deposit in the Register No. 19 at Sr. No. 47. He proved abstract of Register Ext. PW-1/A. On the same day, ASI Dhiraj Singh deposited a parcel stated to be containing personal articles alongwith the trolley bag of the accused. He made entry at Sr. No. 46 of the Malkhana register. In his cross-examination, he has deposed that Ext. P1 was deposited with him at 2.50 pm.

8. PW-2 Jai Singh deposed that parcel Ext. P1 of the case was handed over to constable Sangat Ram alongwith NCB form in triplicate, copy of FIR, copy of seizure memo, samples of seal 'O' and 'H', with the direction to take the same to Forensic Science Laboratory Junga vide RC No. 97/2012 dated 1.5.2015 vide Ext. PW-2/A. Sangat Ram deposited the case property and handed over receipt to him. In his cross-examination, he has admitted that docket was prepared by SHO and sent with case property.

9. Statement of PW-2 Jai Singh, has been corroborated by PW-3 Sangat Ram. He deposed that on 13.5.2012, MHC PS Kullu handed over a parcel sealed with six seals of 'H' and six seals of 'O', stated to be containing 1.970 kg Charas, alongwith copy of FIR, copy of seizure memo, copy of RC, docket and copy of NCB form, sample seals 'H' and 'O', with the direction to deposit the same with Forensic Science Laboratory Junga vide RC Ext. PW-2/A. He deposited the parcel with the relevant documents at Forensic Science Laboratory

Junga on 14.5.2012 and returned the RC and receipt to MHC. So long the case property remained with him, it was kept safe and un-tampered.

10. PW-4 Balbir Sharma is a formal witness.

11. PW-5 SI Om Chand deposed that he was posted as such at police Station. ASI Dhiraj Singh at 2.00 pm produced a cloth parcel sealed with six seals of seal 'H' stated to be containing 1 kg 970 GMS of Charas alongwith NCB form in triplicate. He resealed them with seal 'O' six in number. He filled in relevant columns of NCB form. Specimen seal was put on NCB-1 form. Thereafter, case property was deposited with MHC Ram Krishan alongwith relevant documents.

12. PW-6 Pritam Singh deposed that at 5.00 pm, he was present alongwith Dheeraj Singh and HC Brij Bhushan and C. Bim Sen at Reuni Nallah. They noticed accused coming from Katagla side towards Chowki. Passport of accused was checked. Since it was a forest path, accused was inquired about his presence on forest path at 5.00 pm. He could not give a satisfactory answer. Accused was carrying a bag. He offered search of his bag and laptop and other articles. There was a hole in the base of bag. Accused was inquired about the whole. He got perplexed and stated the he did not know. His activities raised suspicion. IO on checking found black raxin was affixed on the hole with the help of fevi quick on teakply. On removal of raxine, they found black and khaki coloured cello tape. On opening Cello Tape, three chapatti shaped black coloured substance was found. IO found that it was Charas. Charas was weighed. It weighed 1.970 kg. Chapattis were folded and kept in cloth parcel. The parcel was sealed with six seals of 'H'. Parcel was taken into possession vide Ext. PW-6/B. Thereafter IO prepared Rukka vide Ext. PW-6/C. He delivered Rukka in police station, on the basis of which FIR Ext. PW-6/B was registered.

13. PW-7 Munish Kumar is a formal witness.

14. PW-8 ASI Dheeraj Singh has also deposed the manner in which accused was apprehended and codal formalities of seizure, sampling and sealing were completed at the spot. He filled in NCB form in triplicate. He prepared Rukka Ext. PW-6/C. He also prepared site map Ext. PW-8/A. He produced case property before SI /SHO Om Chand on the next day alongwith NCB form and other relevant documents. He prepared special report Ext. PW-4/A.

15. Ms. Karan Singh Kanwar, Advocate has argued that as per the statement of PW-1, it was 12.5.2005 when Om Chand deposited a parcel sealed with six seals of seal 'H and resealed with seal 'O' containing 1.970 kg chars. It is a typographical mistake since it has come on record that case property was handed over to PW-1 HC Ram Krishan on 12.5.2012. He then argued that PW-2 has not produced copy of docket. PW-2 Jai Singh deposed that parcel Ext. P1 of the case was handed over to Constable Sangat Ram alongwith NCB I form in triplicate, copy of FIR, copy of seizure memo, sample seals 'O' and 'H' with the direction to deposit the same at Forensic Science Laboratory vide RC No. 97/12 dated 1.5.2012. PW-3, as noticed above, has corroborated the statement of PW-2 that he has taken case property to FSL Junga vide Ext. PW-2/A.

16. Mr. Karan Singh Kanwar, Advocate, has further argued that prosecution has not associated any independent witnesses. Accused was apprehended on a forest road in the evening at 5.00 pm. It was a secluded and isolated place. Statement of PW-6 Pritam Singh and PW-8 Dheeraj Singh, inspire confidence and have rightly been relied upon by the trial Court. The mandatory provisions of the Act have been complied with at the time when accused was apprehended, search, seizure and sealing process was completed at the spot. Resealing is as per the procedure laid down in law. Rukka was prepared. It was taken to

police station, on the basis of which FIR was registered. PW-8 Dheeraj Singh has produced case property before PW-5 Om Chand. He resealed the same with seal 'O'. Necessary entry was made in the Malkhana Register at Sr. No. 47. Case property was thereafter sent to FSL Junga, through Sangat Ram, PW-3. He deposited the same and returned RC to MHC. FSL Report is Ext. PA. It has come in the report that the microscopic examination indicated presence of Cystolithic hair and Charas was resinous mass which on testing was found present in the exhibit. Quantity of resin as found in exhibit stated as Charas was 37.94% w/w. Six seals of seal 'H' and six seals of seal 'O' were found intact and tallied with the specimen seal sent by forwarding authority and seal impressions impressed on NCB form I.

17. Mr. Karan Singh Kanwar, Advocate has further argued that record of entry No. 46 was not annexed with challan form. However, the same was taken on record while recording statement of PW-1 and no objection was taken then. Contraband was deposited with PW-1 Ram Krishan on 12.5.2012 at Sr. No. 47. Abstract of the same is proved by PW-1 vide Ext. PW-1/A. Ext.PW-1/B only pertains to items other than Charas, which were recovered from the possession of the accused. Non-production of the seal by the prosecution could not, in any way, dilute the case of the prosecution in view of the overwhelming evidence and manner in which sealing and resealing was completed and sample has reached FSL Junga intact with seals 'H' and 'O'.

18. Prosecution has duly proved its case that case property was recovered from the conscious possession of accused. There is no reason for us to interfere with the well reasoned judgment of the trial Court.

19. In view of the discussion and analysis made herein above, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

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

Pawan Kumar ..... Petitioner

Vs.

Pradeep Kumar ..... Respondent

CMPMO No. 233 of 2015.
Judgement reserved on: 7.8.2015.
Date of decision: 10.8.2015.

Code of Civil Procedure, 1908- Order 26 Rule 9 and Section 26– Plaintiff filed a civil suit for mandatory injunction directing the defendant to ascertain the boundaries of his land by lawful demarcation-held that such suit is not maintainable-appointment of local commissioner in such a case by the court amounts to gathering the evidence for the party moving the application-the plaintiff must prima-facie show the right before availing the remedy. (Para 4 to 8)

For the petitioner : Mr. Nimish Gupta, Advocate.
For the respondent : None

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India is directed against the order, dated 17th April, 2015, passed by the learned trial Court whereby it

allowed the application of the respondent and ordered appointment of Local Commissioner to demarcate the suit property.

2. The respondent filed a suit for mandatory injunction, directing the defendant to ascertain the boundaries of his land through lawful demarcation and if after demarcation some structure is found over the land of the plaintiff, the same be ordered to be demolished.

3. I wonder as to how the suit, in the first place, could be maintained. After all it is for the plaintiff to first establish his right and then seek remedy.

4. Another strange aspect of the case is that the plaintiff thereafter moved an application under Order 26 Rule 9 read with Section 151 of the Civil Procedure code for the appointment of a Local Commissioner on the ground that it is the duty of the defendant-respondent to ascertain boundaries before raising construction of his house and, therefore, the revenue department through any official of the revenue department, not below the rank of Tehsildar or Naib Tehsildar be appointed as Local Commissioner. This again was a strange prayer made by the plaintiff-respondent, who without establishing his right wanted the Court to collect evidence for him.

5. Interestingly, the respondent succeeded in his endeavour as the trial Court ordered the appointment of Local Commissioner and the only reason given for such appointment was that since the plaintiff-respondent had filed a suit for injunction and the Musabi provided to him was not legible, therefore, it was the duty of the petitioner herein to ascertain the boundaries before raising construction of his house.

6. I am not only surprised but rather shocked in the manner in which the case has proceeded. A party without being able to prima facie establish any right, title or interest over the property, which is in possession of the opposite party, has filed the suit and thereafter is using the Court to gather evidence in its favour so as to make out a case against the opposite party.

7. This is not at all permissible as it is more than settled that the plaintiff has to stand on his own legs and cannot take advantage of the weakness of the defendant's case. It is first the capability of the plaintiff to stand on his legs and conduct the litigation and it is only thereafter that the trial can proceed and in case the plaintiff has no legs to stand, then the suit must be dismissed.

8. It is not only desirable, but imperative that the trial Courts take care to look into not only the frame, but maintainability of the suit or else they will continue being used for collecting evidence on behalf of the party, which is not legally permissible.

9. Having said so, the impugned order cannot be sustained and the same is accordingly set-aside. This petition is allowed in the aforesaid terms. The pending applications, if any, also stand disposed of.

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

Sita Ram ...Appellant.

Versus

State of Himachal Pradesh and another ...Respondents.

LPA No. 25 of 2015
Decided on: 10.08.2015

Constitution of India, 1950- Article 226- Petitioner was appointed as Water Carrier on daily wages and thereafter as part time contingent paid Sweeper- he filed a writ petition seeking the benefit of the services rendered by him on daily wages- petitioner was engaged purely on temporary basis as a stop gap arrangement out of the College amalgamated funds against leave vacancy with the condition that services will be terminated on joining of the regular employee- held, that petition was rightly dismissed by the writ Court. (Para-2 to 4)

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

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and order, dated 04.11.2014, made by the Writ Court in CWP No. 2872 of 2012, titled as Sita Ram versus State of H.P. and another, whereby the writ petition filed by the writ petitioner-appellant herein came to be dismissed (for short "the impugned judgment").

2. It appears that the writ petitioner-appellant, who was initially appointed as Water Carrier in the Rajiv Gandhi Government Degree College, Chaura Maidan, Shimla on daily wage basis on 21.07.1997, and thereafter as part time contingent paid Sweeper through Employment Exchange on 29.09.1997, had sought writ of mandamus commanding the respondents to grant him the benefits of the service, which he had rendered right from 21.07.1997 to 29.09.1997.

3. It is apt to record herein that the writ petitioner-appellant was engaged purely on temporary basis as a stop gap arrangement out of the College amalgamated funds against leave vacancy on 21.07.1997 with the condition that services of the writ petitioner-appellant will be terminated on the joining of the regular employee.

4. The Writ Court has rightly made discussions in paras 1 to 7 of the impugned judgment, needs no interference.

5. Having said so, the impugned judgment is upheld and the appeal is dismissed.

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

State of Himachal Pradesh and another ...Appellants.
Versus
Inder Mohan Sharma ...Respondent.

LPA No. 137 of 2009
Decided on: 10.08.2015

Constitution of India, 1950- Article 226- Petitioner filed an application before the Tribunal seeking a direction to the respondents to treat the petitioner eligible for promotion for the post of Principal, to consider his case for the said post and to release all the consequential benefits- petition was allowed and the respondents were directed to consider the case of the petitioner for promotion to the post of Principal from the due date and it was not determined by the writ Court - whether the writ petitioner was eligible and whether relaxation granted at the entry level can be granted at the time of promotion- appeal allowed and the order remitted to Administrative Tribunal for a fresh decision. (Para-2 to 9)

Case referred:
The Distt. Registrar Palghat and others versus M.B. Koyakutty and others, (1979) 2 Supreme Court Cases 150

For the appellants:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.
For the respondent:	Ms. Ranjana Parmar, Senior Advocate, with Ms. Komal Kumari, Advocate.

The following judgment of the Court was delivered:

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

Challenge in this appeal is to the judgment and order, dated 09.03.2009, made by the Writ Court in CWP (T) No. 2586 of 2008, titled as Inder Mohan Sharma versus State of H.P. and another, whereby the writ petition filed by the writ petitioner-respondent herein came to be allowed (for short "the impugned judgment").

2. The writ petitioner-respondent herein has filed Original Application No. 1412 of 1995 before the erstwhile H.P. State Administrative Tribunal and has sought the following reliefs amongst others:

> *"(i) That the order dated July 10, 1995 may be quashed and set aside. The respondents may be directed to treat the applicant eligible for promotion to the post of Principal taking into consideration the relaxation given by the State of Himachal Pradesh in consultation with the Public Service Commission.*
>
> *(ii) That after declaring the applicant eligible for the post of Principal, the respondents may be directed to consider the applicant for the post of Principal from the waiting cadre with effect from March 01, 1994, as the applicant is senior-most Lecturer in the 'waiting cadre' or from any other date this Hon'ble Tribunal deems fit.*
>
> *(iii) That the respondents may be restrained from "equating suitability" with eligibility criteria and further directions may be issued to the respondents not to hold the applicant unsuitable for the post of Principal on the ground of educational qualifications.*
>
> *(iv) That the respondents may be directed to release all consequential benefits to the applicant as a result of the*

promotion to the post of Principal if he is found fit by the Departmental Promotion Committee."

3. On abolition of the erstwhile Tribunal, the Original Application was transferred to this Court, came to be diarized as CWP (T) No. 2586 of 2008.

4. We have gone through the impugned judgment and have perused the record and are of the considered view that the impugned judgment, on the face of it, is illegal and not tenable in the eyes of law for the following reasons:

5. Learned Single Judge/Writ Court has not issued the writ of certiorari and has directed the respondents to consider the case of the writ petitioner-respondent herein for promotion to the post of Principal from due date on the basis of the judgment rendered by the Apex Court in a case titled as **The Distt. Registrar Palghat and others versus M.B. Koyakutty and others,** reported in **(1979) 2 Supreme Court Cases 150.** The ratio laid down by the Apex Court in the judgment (supra) is not applicable to the instant case. It is apt to reproduce para 30of the judgment herein:

"30. The last point for consideration is whether it was proper for the High Court to issue a positive direction requiring the appellant to promote the respondent to the Upper Division and thereafter to determine his rank in the cadre of Upper Division Clerks. Ordinarily, the court does not issue a direction in such positive terms; but the peculiar feature of this case is that it has not been disputed that Koyakutty respondent satisfies the twofold criterion for promotion laid down in the statutory Rule 28 (b) (ii). Indeed, the District Registrar, Palghat, who was impleaded as respondent 3 in the writ petition, expressly admitted in paragraph 8 of his counter-affidavit filed before the High Court, "that the seniority of service is the basis of promotion from the ranks of Lower Division Clerks to the ranks of Upper Division Clerks provided they are fully qualified by passing the departmental tests for the purpose." It was never the case of the Registrar that Koyakutty was not otherwise fit for promotion. Indeed, even in the grounds of appeal to this Court, incorporated in the Special Leave Petition, it is not alleged that Koyakutty did not satisfy the criterion of seniority-cum-fitness prescribed by Rule 28 (b) (ii). The position taken by the appellant, throughout, was that this rule should be deemed to have been "supplemented" by the impugned Government Notification. It is not correct that the impugned Notification merely "supplements" or fills up a gap in the statutory rules. It tends to supersede or superimpose by an Executive fiat on the statutory rules something inconsistent with the same. Since the existence of both the criteria viz. seniority and fitness for promotion to the Upper Division prescribed by the statutory Rule 28 (b) (ii), in the case of Koyakutty was not disputed, the High Court was justified in issuing the direction it did."

6. Learned Senior Counsel appearing on behalf of the writ petitioner-respondent herein frankly conceded that the judgment rendered by the Apex Court is not applicable, however, she argued that the writ petitioner-respondent herein was eligible for promotion to the post of Principal.

7. Learned Single Judge/Writ Court has not determined as to whether the writ petitioner-respondent herein was eligible and whether relaxation granted at the entry level can again be granted to the writ petitioner-respondent herein while considering his case for promotion to the post of Principal.

8. Learned Single Judge/Writ Court has not discussed the facts and merits of the case and has also not made even a whisper about the reliefs sought.

9. Having said so, the impugned judgment, on the face of it, is illegal and merits to be set aside. Accordingly, the appeal is allowed, the impugned judgment is set aside, the writ petition is revived and transferred to the H.P. State Administrative Tribunal for decision afresh.

10. Parties are directed to cause appearance before the H.P. State Administrative Tribunal on **24th August, 2015.**

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

Cr. Appeal No. 360/2014
with Cr. Appeal No. 361/2014
Reserved on: 7.8.2015
Decided on: 10.8.2015

1.	**Cr. Appeal No. 360/2014**	
	Sunil Kumar	..... Appellant
	Versus	
	State of Himachal Pradesh	.....Respondent
2.	**Cr. Appeal No. 361/2014**	
	Surender Pal	..... Appellant
	Versus	
	State of Himachal Pradesh	.....Respondent

N.D.P.S. Act, 1985- Section 20- Accused persons intercepted with 1500 gms Charas being carried in a reddish coloured bag in a Santro car by the police patrolling party-during recovery from the car personal search of the accused was also conducted- however, no memo was prepared-provision of section 50 also not complied with-mandatory requirement of law not followed-Malkhana register not properly maintained-doubt about the case property writ large on the record-conviction cannot be sustained-appeals allowed and the accused acquitted. (Para 17 to 23)

Cases referred:
Dilip v. State of M.P. (2007) 1 SCC 450
Union of India v. Shah Alam (2009) 16 SCC 644
State of Rajasthan v. Parmanand (2014) 5 SCC 345

For the appellant(s) : Mr. B.L. Soni, Advocate, in both the appeals.
For the respondent : Mr. P.M. Negi, Deputy Advocate General, in both the appeals.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

Both the Criminal Appeals arise out of the same Judgment. As such, both were taken up together and are being disposed of by a common judgment.

2. The present criminal appeals have been instituted against Judgment dated 20.9.2014 rendered by learned Special Judge-IV, Kangra at Dharamshala in Sessions Case No. 30-D/VII/2013, whereby appellants-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), have been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1.00 Lakh each, and in default of payment of fine, to further undergo simple imprisonment for a period of two years.

3. Case of the prosecution, in a nutshell, is that on 23.4.2013 police party headed by Inspector Prem Chand was on patrolling duty alongwith Inspector Lal Singh, SI Geeta Parkash, HC Rakesh Kumar, HHC Jagrup Singh, C. Gurbachan Singh and C. Ajeet Singh. Police party was present at by pass road at Charan Khadd at 9.30 pm when a Santro Car bearing registration No. HP-76-0632 occupied by accused was stopped for checking. Driver of the vehicle disclosed his name as Sunil Kumar son of Shri Sadhu Ram and another person disclosed his name as Surender Pal son of Dila Ram. The place was isolated as such independent witnesses could not be associated. On suspicion, Santro Car was searched in the presence of SI Geeta Parkash and HC Rakesh Kumar. One reddish colour bag was recovered which was kept near the gear between the driver seat and front seat. Bag was checked and it was found containing Charas in the shape of sticks and balls weighing 1500 grams. The Charas so recovered was sealed in a cloth parcel with seven seals of seal impression 'K'. The case property was taken into possession vide seizure memo. IO Prepared Rukka and handed over the same to Gurbachan Singh to carry to the Police Station, State Vigilance & Anti Corruption Bureau, Dharamshala for registration of case. Consequently, FIR was registered. Investigating Officer also prepared site plan. Case property was produced before Additional Superintendent of Police, State Vigilance & Anti Corruption Bureau, Dharamshala. He resealed the case property with 4 seal impressions of 'P'. Impression of seal 'P' was taken on separate piece of cloth. The Additional Superintendent of Police also filled in relevant columns of NCB form in triplicate. Reseal certificate was obtained. Case property alongwith NCB form was sent to Director State Forensic Science Laboratory, Junga for chemical opinion. On receipt of FSL report, it was found that exhibit is Charas. Investigation was completed. Challan was put up in the Court after completing all codal formalities. Hence, this appeal.

4. Prosecution has examined as many as 8 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Trial Court convicted and sentenced the accused as noticed above.

5. Mr. B.L. Soni, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. P.M. Negi, Deputy Advocate General, has supported the judgment of conviction.

7. We have heard the learned counsel for the parties and also gone through the record carefully.

8. PW-1 Geeta Parkash deposed that on 23.4.2013, he was on patrolling duty with Inspector Prem Chand, Inspector Lal Singh and other police officials towards Chamunda Nagri and Palampur. At 9.30 pm, they were present at By Pass road Charan Khadd. A car occupied by two persons approached from Dari side. Vehicle was stopped. Inspector told the occupants of the Car for its search. Inspector Prem Chand before searching accused, gave search to HC Rakesh Kumar. He alongwith Rakesh Kumar signed memo Ext. PW-1/A Thereafter Inspector Prem Lal searched the car. A bag of reddish colour (Gajri) was found lying between the front seat near the gear. On checking the said bag, stick and ball shaped Charas wrapped in poly wrappers was recovered. It was weighed. It weighed 1500 GMS. No local witness could be associated as witness despite efforts as the area was not populated. The Charas was put in the same and sealed in cloth parcel by affixing 7 seal impressions of seal 'K'.Case property was taken into possession vide Seizure Memo Ext. PW-1/C. Case property was produced by the learned Public Prosecutor when statement of PW-1 SI Geeta Parkash was recorded. In the cross-examination, the witness has admitted that personal search of the accused was conducted in his presence. He also deposed that IO did not try to call for any independent witness on the spot.

9. PW-2 Gurbachan Singh has also deposed the manner in which accused were apprehended and codal formalities of seizure and sampling were completed at the spot. He has taken Rukka Ext. PW-1/F to the Police Station.

10. PW-3 Constable Sanjay Kumar has deposed that on 24.4.2013 at about 10.10 am, constable Gurbachan Singh brought special report before him. He entered the same in the concerned register.

11. PW-4 Jograj, Additional Superintendent of Police has deposed that on 23.4.2013, he received a Rukka in the police station at 10.10 pm. He registered case FIR Ext. PW-4/A. On 24.4.2013 at 1.30 am, Inspector Prem Chand deposited case property i.e. 1500 grams Charas sealed in a parcel with seven seals of seal impression 'K' alongwith specimen seal impression, NCB form in triplicate. He checked the parcel. He resealed the parcel with four seals of seal impression 'P'. He also filled up columns No. 9 to 11 of the NCB form. He issued resealing certificate Ext. PR-4/D and handed over the case property alongwith relevant documents to MHC Dinesh Kumar.

12. PW-6 Sanjay Kumar deposed that on 25.4.2013, MHC Dinesh Kumar handed over one parcel sealed with seven seal impressions of seal 'K' and four seal impressions of seal 'P', vide RC No. 12/21 alongwith documents i.e. FIR, envelope, to be deposited with FSL Junga. He deposited the same on 26.4.2013 at Forensic Science Laboratory Junga and handed over receipt to Dinesh Kumar on his return.

13. PW-7 Inspector Prem Chand also deposed the manner in which accused were apprehended and codal formalities of seizure and sampling were completed at the spot. In his cross-examination, he has admitted that spot is situated on State Highway. He could not disclose whether memo qua personal search of the accused was prepared or not. He also admitted that both the accused were personally searched by him on the spot. In his further cross-examination, he has admitted that he did not send any constable to call for any Gazetted Officer on the spot before personal search of the accused.

14. PW-8 HC Dinesh Kumar deposed that on 23.4.2013 at about 1.35 mid night, Additional Superintendent of Police deposited one parcel sealed with seal impressions of 'K' and 'P', which was resealed with four seal impressions of seal 'P' alongwith NCB form and sample seal impressions of 'K' and 'P'. He made entry in the Malkhana Register and abstract of the same is Ext. PW-8/A. He also filled in column NO. 12 of the NCB form Ext. PW-4/C. He sent the parcel, sample seal to FSL on 25.4.2013 through constable Sanjay Kumar vide RC No. 12/21 dated 25.4.2013. In his cross-examination, he has admitted that the register brought by him was not paginated and there was no certificate appended when the register was opened.

15. Precise case of the prosecution is that police party was on patrolling duty. Car was signalled to stop at 9.30 pm. Charas was recovered from the car. It weighed 1500 GMS. It was sealed. Rukka was prepared and was sent to police station. Resealing was completed. Case property was deposited in the Malkhana Register. Recovery is at 9.30 pm on State Highway. According to PW-1, no local witness could be associated despite efforts as the area was not populated. However, in his cross-examination, he has admitted that IO did not try to call for any independent witness on the spot. PW-7 Inspector Prem Chand has also admitted that spot is situated on State Highway. Thus, police has not made any efforts to associate any independent witness to inspire confidence regarding the manner in which accused was apprehended and contraband was recovered.

16. PW-4 Jograj resealed the case property and deposited with PW-8 Dinesh Kumar. Dinesh Kumar made entry in the Malkhana Register vide Ext. PW-8/A. He has admitted in his cross-examination that the register brought by him was not paginated and there was no certificate appended when the register was opened. Register is required to be maintained as per Punjab Police Rules. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P. reads as under:

> **"22.70. Register No. XIX-** This register shall be maintained in Form 22.70.
>
> With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.
>
> The register may be destroyed three years after the date of the last entry."

17. The register is to be maintained in Form 22.70. It reads as under.

> "**FORM NO. 22.70.**
>
> POLICE STATION_____ ____DISTRICT
>
> Register No. XIX.-Store-Room Register (Part-I)
>
> Column 1.- Serial No.
>
> 2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.
>
> 3. Date of deposit and name of depositor.
>
> 4. Description of property.
>
> 5. Reference to report asking for order regarding disposal of property.
>
> 6. How disposed of and date.
>
> 7. Signature of recipient (including person by whom dispatched).
>
> 8. Remarks.
>
> (To be prepared on a quarter sheet of native paper)."

18. We have also seen Ext. PW-8/A. There is no pagination. It is only a plain paper on which separate columns have been made. Case property is required to be deposited in the Malkhana by making entry in the prescribed proforma and when case property is taken out, entry is to be made in the prescribed Malkhana register. Case property was produced when statement of PW-1 Geeta Parkash was recorded. Case property was produced by the learned Public Prosecutor in the Court. The person who has brought the case property to the Court has not been examined. Prosecution has not proved when case property was taken out from the Malkhana. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case. It is also mandatory that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana.

19. Contraband was recovered from the Car, however, despite that PW-7 has conducted personal search of the accused. PW-7 has admitted that personal search of accused was carried on the spot. PW-1 has corroborated his statement. Police has not prepared any memo of personal search. If personal search of the accused was carried out, accused were required to be told about their legal right to be searched before a Gazetted Officer or a Magistrate. PW-7 Prem Chand has admitted that he has not sent any constable for bringing any Gazetted Officer at the spot. Provisions of Section 50 of the Act are mandatory. These were not followed in the present case while conducting their personal search.

20. Their Lordships of the Hon'ble Supreme Court in **Dilip v. State of M.P.** reported in (2007) 1 SCC 450 have held that before the seizure of the contraband from the scooter, personal search of the appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with so far the search of scooter is concerned, but keeping in view the fact that the person of the appellants was also searched, it was obligatory to comply with the said provisions. Their Lordships have held as under:

> **"12 . Before seizure of the contraband from the scooter, personal search of the appellants had been carried out and, admittedly, even at that time the provision of Section 50 of the Act, although required in law, had not been complied with.**
>
> **16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions."**

21. In this case also, personal search of the accused was not necessary since contraband was recovered from the Car but despite that personal search of the accused was carried out. It ought to have been in conformity with Section 50 of the Act.

22. Their Lordships of the Hon'ble Supreme Court in **Union of India v. Shah Alam** reported in (2009) 16 SCC 644 have held that since heroin was recovered from the bag carried by respondents, thereafter personal search was carried out and it was said that since personal search did not lead to any recovery, there was no need of complying Section 50 of the Act. It was held that since provisions of Section 50 of the Act were not complied with, the High Court was right in acquitting the respondents on that ground.

22. In this case, though personal search did not lead to any recovery but Section 50 was required to be complied with and accused were to be apprised of their legal right to be searched before a Gazetted Officer or a Magistrate.

23. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held as under:

> **"15. Thus, if merely a bag carried by person is searched without there being any search of this person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Corut mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application. "**

24. Accordingly, both the appeals are allowed. Judgment dated 20.9.2014 rendered by learned Special Judge-IV, Kangra at Dharamshala in Sessions Case No. 30-D/VII/2013 is set aside. Accused are acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. They be released forthwith. Fine amount, if any deposited, be also refunded to the accused. Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent Jail, concerned, forthwith.

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

Anita. ...Appellant.

Vs.

Nirmal Verma. ...Respondent.

FAO No. 180/2006
Reserved on: 10.8.2015
Decided on: 11.8.2015

Hindu Marriage Act, 1955- Section 13- Wife left the matrimonial home but did not return-husband filed a petition for Restitution of Conjugal Rights in which wife stated that she was willing to join the society of the husband and in view of her statement, petition was dismissed- wife resided with the husband till July, 1988 but left again - she filed a petition for maintenance and for custody of the children- she also lodged a complaint against the husband and his mother for cruelty- husband pleaded that wife had subjected him to cruelty- it was duly proved on record that husband and his family members never demanded dowry- wife remained with the husband for some days but left- respondent had proved his plea of desertion – wife had made false allegations against the character of the husband due to which his mental health was adversely affected –wife had also filed false complaints against the husband- held that acts of wife amount to cruelty and in these circumstances, divorce was rightly granted. (Para-17 to 20)

Cases referred:
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal, (2012) 7 SCC 288
K. Srinivas Rao vs. D.A. Deepa, (2013) 5 SCC 226

For the Appellant : Mr. Dalip K. Sharma, Advocate.
For the Respondent : Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment and decree dated 17.3.2006 rendered by the Additional District Judge (Presiding Officer Fast Track Court), Solan in Case No. 21FT/3 of 2005/2004.

2. "Key facts" necessary for the adjudication of this appeal are that the respondent has filed a petition under section 13 of the Hindu Marriage Act for dissolution of marriage by a decree of divorce against the appellant. Marriage between the parties was solemnized in the month of May, 1981. In the month of Shravan, appellant left her matrimonial home for staying with her parents. However, the appellant did not return despite many efforts and requests made by the respondent. She refused to join his company. He filed petition under section 9 of the Hindu Marriage Act bearing Petition No. 13-S/3 of 1982. Appellant gave a statement in the court of learned District Judge Solan on 23.2.1983 that she was ready and willing to join his society. In view of this, petition was dismissed. However, appellant failed to join his company. His family members also went to bring her back but to no avail. In the month of April/May, 1985, appellant made a conditional offer to join his society. They resided in Shimla upto July, 1988. She again left in the month of August, 1988. His relations made various efforts to resolve the matter. Appellant filed two successive petitions under section 125 of the Code of Criminal Procedure. He also filed a petition for custody of children in the court of District Judge, Solan bearing No. 2-A/2 of 1991. They both started living in Shimla. However, in the month of July, 1996, his mother was taken from their village to Shila for medical treatment. He left appellant at village Manol. She stayed there for 8-10 days and thereafter she came to Shimla. Thereafter, she lodged a false complainant against him and his mother for offence under sections 498-A, 323 and 506/34 of the Indian Penal Code. He and his mother were acquitted vide judgment dated 31.1.2002. These acts of appellant amounted to cruelty. Appellant also made false allegations against him in the society. His mental and physical health was affected. She used to misbehave with him in front of his friends. She also used to say that he and his family members were greedy. She has also levelled allegations of illicit relations with lady, named Champa Devi.

3. Petition was contested by the appellant. Appellant has denied the averments made in the petition. She has admitted that respondent had filed petition under section 9 of the Hindu Marriage Act and during the trial of such proceedings she made statement that she was ready and willing to join the company of respondent. However, respondent did not permit her to join his company. She filed petition under section 125 of the Code of Criminal Procedure. She has denied making of a conditional offer of living in Shimla.

4. Issues were framed by the District Judge, Solan. He allowed the petition on 17.3.2006. Hence, the present appeal.

5. Mr. Dalip K. Sharma, learned counsel for the appellant, has vehemently argued that respondent has failed to prove that he was subjected to physical or mental cruelty. He then contended that the ingredients of cruelty have not been proved.

6. Mr. K.D. Sood, learned Senior Advocate has supported the judgment and decree dated 17.3.2006.

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

8. Respondent Nirmal Verma has led his evidence by way of affidavit. He has reiterated the averments contained in the petition. According to the averments made in the affidavit, marriage was solemnized in the month of May, 1981. Appellant went to her maternal home but did not come back after one month. He was constrained to file petition under section 9 of the Hindu Marriage Act. Appellant made statement that she was ready and willing to join his company. However, she failed to join his company. In the month of April/May, 1985, appellant made conditional offer to join his society. They lived together upto July, 1988. Thereafter, appellant again left his company. She filed two successive petitions under section 125 of the Code of Criminal Procedure. Conciliation was attempted by the learned District Judge in custody proceedings. She agreed to join the company of respondent. However, she again left in the year 1996. She also filed FIR against him under sections 498-A, 323 and 506/34 of the Indian Penal Code. They were acquitted by the trial court on 31.1.2002. Appellant was making false allegations against him to the extent that he was having illicit relations with Champa Devi. She used to misbehave with him in front of his friends. Efforts were made by his family members to bring her back, but of no avail. In his cross-examination, he has deposed that appellant left for her parents house in the month of August, 1981. Elder son was borne in the year 1982. His father went to the house of appellants' maternal home in the year 1981 and also in the year 1982. However, she refused to join him. He has denied the suggestion that he did not permit the appellant to stay in his house. He has denied the suggestion that on 5.8.1996 he gave beatings to the appellant and confined her in his house.

9. PW-2 Ramesh Thakur has led his evidence by filing affidavit. According to the averments made in the affidavit, in the year 1988, appellant withdrew from the society of respondent. There was no custom of demanding or giving dowry in their area. In the year 1996, appellant came to village and after 20-25 days went to village Sujailla and thereafter lodged a false complaint against the respondent. Appellant has levelled false allegations against the respondent and his mother. The allegations according to his knowledge were false. Appellant has subjected the respondent to cruelty. Propaganda made by appellant has adversely affected the mental and physical health of respondent. Thus, it was not possible for him to live with appellant.

10. PW-3 Kripal Singh has also led his evidence by filing affidavit. He has corroborated the statement of PW-2 Ramesh Thakur. He was also cross-examined. He belongs to village Bahwan. It was at a distance of 13 KMs from the village of respondent. He knew respondent since 1982. He had no personal knowledge during which period appellant had been staying with the respondent since her marriage. However, he has gained knowledge about these facts from the brother of respondent, namely, Rajesh.

11. PW-4 Jai Singh has also led his affidavit by way of affidavit. It is averred in the affidavit that marriage between the parties was solemnized in the month of May, 1981. They were having two children. Respondent has visited village Sujailla to bring appellant. However, appellant refused to join the society of respondent. Appellant made statement in

the court that she was ready and willing to join the society of respondent. In view of this, petition was dismissed. They lived together from 1985 to 1988. In the year 1988, appellant withdrew from the society of the respondent. In the month of July, 1996 appellant came to village and after 20-25 days went to village Sujailla. Thereafter, appellant lodged a false complaint against the respondent and his mother. He was also cross-examined. He was not aware for how much period, parties lived together at Shimla.

12. PW-5 Amar Singh is the brother of respondent. He has led his evidence by filing affidavit. He has supported the version of his brother PW-1 Nirmal Singh.

13. PW-6 Bhoop Ram has also led his evidence by filing affidavit. He was also cross-examined. He knew the respondent being the member of the Hotel Workers Union.

14. Appellant Anita has appeared as RW-1 and has led her evidence by filing affidavit. She has specifically averred in the affidavit that she used to abide the commands of her in-laws. Respondent never wanted to keep her in his company. He used to taunt her. She never refused to stay with respondent in the year 1981. She made statement before the Court in proceedings under section 9 of the Hindu Marriage Act that she was ready and willing to live with respondent. However, her husband did not take her with him. She herself went to her in-laws house. The family members of respondent never come to take her with them. She has never pressurized her husband to stay at Shimla. Her husband compelled her to leave the matrimonial house. He has refused to pay the maintenance. His parents started harassing her for bringing insufficient dowry. She has never made any false allegations against her husband. She has never indulged in character assassination. She did not know Champa. In her cross-examination, she could not narrate the date on which she was given beatings by her husband. She has admitted about the filing of cases under section 125 of the Code of Criminal Procedure. She has admitted that she has filed a case against her husband and his mother.

15. Appellant's father Paras Ram has appeared as RW-2. He has led his evidence by filing affidavit Ex.RW-2/A and has supported the version of RW-1 Anita.

16. RW-3 Baldev Singh has also led his evidence by filing affidavit Ex.RW-3/A. He has also supported the version of RW-1 Anita.

17. What emerges from the evidence discussed hereinabove is that marriage between the parties was solemnized in the month of May, 1981. Appellant remained in the company of respondent for few months and thereafter she went to her parents' house. She did not come back. Respondent filed a petition under section 9 of the Hindu Marriage Act. In these proceedings, appellant made a statement that she was ready and willing to live with respondent. They stayed together from 1985 to 1988. Thereafter, appellant also stayed with respondent upto 1996. Appellant had filed a case against the respondent under sections 498-A, 323 and 506/34 of the Indian Penal Code. Respondent and his mother were acquitted by the trial court on 31.1.2002. Appellant had also filed a petition under section 125 of the Code of Criminal Procedure against the respondent. Family members of the respondent had also gone to the parental house of appellant from time to time. It has come on record that appellant used to make false allegations and also indulged in character assassination against the respondent. According to the appellant, she was given beatings by the respondent but she could not substantiate this plea. Respondent was always ready and willing to keep the appellant with him. It is the appellant, who has refused to live with him under one pretext or the other. Respondent and his mother have been acquitted by the trial court, as noticed hereinabove. It has come on record that family of respondent has never demanded any dowry. Appellant has remained in the company of respondent for few

days in the year 1981. They lived together from 1985 to 1988. She again left the company of respondent without cogent reason. Respondent has proved the plea of desertion by leading tangible evidence. Appellant has subjected the respondent to physical and mental cruelty. She used to misbehave and humiliate respondent in front of his friends and family members. She has also alleged false allegations against the character of respondent. It has also come on record that physical and mental health of respondent was adversely affected.

18. Their Lordships of the Hon'ble Supreme Court in ***Vishwanath Agrawal*** vs. ***Sarla Vishwanath Agrawal***, (2012) 7 SCC 288 have held that the conduct of wife in publicizing in newspapers that her husband was a womanizer and a drunkard, wild allegations about an extramarital relationship, effort to prosecute him in criminal litigation under sections 494 and 498-A of the Indian Penal Code, which ultimately resulted in acquittal, caused deep mental pain, agony, suffering and frustration to appellant husband and mental cruelty is sufficient to make out ground for divorce under section 13 (1) (1-a) of the Hindu Marriage Act. Their Lordships have held as under:

> **"22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.**
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> **23. In Sirajmohamedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan and another, 1981 4 SCC 250a two-Judge Bench approved the concept of legal cruelty as expounded in Sm. Pancho v. Ram Prasad, 1956 AIR(All) 41 wherein it was stated thus: -**
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> **"Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.**
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> **Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife."**
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> **It is apt to note here that the said observations were made while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty.**
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> **[24] In Shobha Rani v. Madhukar Reddi, 1988 1 SCC 105while dealing with 'cruelty' under Section 13(1)(ia) of the Act, this Court observed that the said provision does not define 'cruelty' and the same could not be defined. The 'cruelty' may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. Thereafter, the Bench proceeded to state as follows: -**
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> **"First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the**

spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

[25] After so stating, this Court observed about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that when a spouse makes a complaint about treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance.

26. Their Lordships referred to the observations made in Sheldon v. Sheldon, 1966 2 AllER 257 wherein Lord Denning stated, "the categories of cruelty are not closed". Thereafter, the Bench proceeded to state thus: -

"Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Ried observed in Gollins v. Gollins, 1963 2 AllER 966:

In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman."

[27] In V. Bhagat v. D. Bhagat (Mrs.), 1994 1 SCC 337a two-Judge Bench referred to the amendment that had taken place in Sections 10 and 13(1)(ia) after the Hindu Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him/her to live with the other one is no longer the requirement. Thereafter, this Court proceeded to deal with what constitutes mental cruelty as contemplated in Section 13(1)(ia) and observed that mental cruelty in the said provision can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. To put it differently, the mental cruelty must be of such a nature that the parties cannot reasonably be expected to live

together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was further observed, while arriving at such conclusion, that regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinized in the context in which they are made. Be it noted, in the said case, this Court quoted extensively from the allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty.

[21] In Praveen Mehta v. Inderjit Mehta, 2002 AIR(SC) 2582it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.

52. Immense emphasis has been given on the fact that after publication of the notice, the husband had filed a caveat in the court. The factual matrix would reveal that the husband comes from a respectable family engaged in business. At the time of publication of the notice, the sons were quite grown up. The respondent-wife did not bother to think what impact it would have on the reputation of the husband and what mental discomfort it would cause. It is manifest from the material on record that the children were staying with the father. They were studying in the school and the father was taking care of everything. Such a publication in the newspaper having good circulation can cause trauma, agony and anguish in the mind of any reasonable man. The explanation given by the wife to the effect that she wanted to protect the interests of the children, as we perceive, is absolutely incredible and implausible. The filing of a caveat is wholly inconsequential. In fact, it can decidedly be said that it was mala fide and the motive was to demolish the reputation of the husband in the society by naming him as a womaniser, drunkard and a man of bad habits.

[53] At this stage, we may fruitfully reminisce a poignant passage from N.G. Dastane v. S. Dastane, 1975 3 SCR 967wherein Chandrachud, J. (as his Lordship then was) observed thus: -

"The court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures."

[54] Regard being had to the aforesaid, we have to evaluate the instances. In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent-wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious.

55. It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable. The husband felt humiliated both in private and public life. Indubitably, it created a dent in his reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. Thus analysed, it would not be out of place to state that his brain and the bones must have felt the chill of humiliation. The dreams sweetly grafted with sanguine fondness with the passage of time reached the Everstine disaster, possibly, with a vow not to melt. The cathartic effect looked like a distant mirage. The cruel behaviour of the wife has frozen the emotions and snuffed out the bright candle of feeling of the husband because he has been treated as an unperson. Thus, analysed, it is abundantly clear that with this mental pain, agony and suffering, the husband cannot be asked to put up with the conduct of the wife and to continue to live with her. Therefore, he is entitled to a decree for divorce."

19. Their Lordships of the Hon'ble Supreme Court in ***K. Srinivas Rao*** vs. ***D.A. Deepa***, (2013) 5 SCC 226 have held that false complaint/criminal proceedings, indecent/ defamatory statements made in complaint singly and cumulatively amount to mental cruelty warranting grant of divorce. Their Lordships have further held that when the complaint under section 498 of the Indian Penal Code alleging ill-treatment and harassment for dowry was found falsely lodged, indicates that she made all attempts to ensure that husband and his parents were put in jail. This certainly constituted cruelty. Their Lordships have held as under:

"[16] Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, 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 spouse's life miserable. This is what has happened in this case.

[30] It is also to be noted that the appellant-husband and the respondent- wife are staying apart from 27/4/1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in Samar Ghosh, if we refuse to sever the tie, it may lead to mental cruelty.

[31] We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.

[32] In V. Bhagat this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind.

33. In Naveen Kohli, where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband, this Court observed that the marriage had been wrecked beyond the hope of salvage and public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. It is important to note that in this case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

[34] In the ultimate analysis, we hold that the respondent-wife has caused by her conduct mental cruelty to the appellant-husband and the marriage has irretrievably broken down. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the respondent-wife expressed that she wants to go back to the appellant-husband, but, that is not possible now. The appellant-husband is not willing to take her back. Even if we refuse decree of divorce to the appellant-husband, there are hardly any chances of the respondent-wife leading a happy life with the appellant-husband because a lot of bitterness is created by the conduct of the respondent-wife.

[35] In Vijay Kumar, it was submitted that if the decree of divorce is set aside, there may be fresh avenues and scope for reconciliation between parties. This court observed that judged in the background of all surrounding circumstances, the claim appeared to be too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. In the facts of this case we feel the same.

[36] While we are of the opinion that decree of divorce must be granted, we are alive to the plight of the respondent-wife. The appellant-husband is working as an Assistant Registrar in the Andhra Pradesh High Court. He is getting a good salary. The respondent-wife fought the litigation for more than 10 years. She appears to be entirely dependent on her parents and on her brother, therefore, her future must be secured by directing the appellant-husband to give her permanent alimony. In the facts and circumstance of this case, we are of the opinion that the appellant-husband should be directed to pay a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only) to the respondent-wife as and by way of permanent alimony.

37. In the result, the impugned judgment is quashed and set aside. The marriage between the appellant-husband - K. Srinivas Rao and the respondent-wife - D.A. Deepa is dissolved by a decree of divorce. The appellant-husband shall pay to the respondent-wife permanent alimony in the sum of Rs.15,00,000/-, in three instalments. The first instalment of Rs.5,00,000/- (Rupees Five Lakhs only) should be paid on 15/03/2013 and the remaining amount of Rs.10,00,000/- (Rupees Ten Lakhs only) should be paid in instalments of Rs.5,00,000/- each after a gap of two months i.e. on 15/05/2013 and 15/07/2013 respectively. Each instalment of Rs.5,00,000/- be paid by a demand draft drawn in favour of the respondent-wife "D.A. Deepa".

20. The court below has correctly appreciated the evidence led by the parties and there is no need to interfere with the well reasoned judgment rendered by the District Judge, Solan.

21. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Ashok Kumar ..... Petitioner.

Vs.

State of Himachal Pradesh & ors. ..... Respondents

Cr.MMO No. 28 of 2015.
Judgement reserved on: 6.8.2015
Date of decision: 11.8.2015

Code of Criminal Procedure, 1973- Section 319- Injured filed an application for arraying respondents No. 2 and 3 as co-accused on the basis of statement of the witnesses recorded during trial- application was dismissed on the ground that there was no material on record to prima facie establish the complicity or the involvement of respondents No. 2 and 3 in the crime- held, that persons not named in the FIR or named in the FIR but not charge-sheeted can be summoned under Section 319 Cr.P.C provided that it appears from the evidence that such person can be tried with the accused already facing trial- Court must have reasonable satisfaction from the evidence already collected- respondent No. 3 was at a distant place and could not have given any instruction to open fire- application was filed after much delay - in these circumstances, order of dismissal of the application cannot be faulted. (Para-7 to 21)

Code of Criminal Procedure, 1973- Section 482- An order rejecting an application for summoning the accused filed under Section 319 of Cr.P.C cannot be said to be an interlocutory order as the order decides certain rights of the parties and would be assailable only by revision and not by filing a petition under Section 482 of Cr.P.C. (Para-5)

Case referred:
Mohit alias Sonu and another vs. State of U.P. and another 2013 (7) SCC 789

For the petitioner	:	Mr. B.S. Chauhan, Advocate.
For the respondent	:	Mr. V.K.Verma and Ms. Meenakshi Sharma, Additional Advocate Generals, for respondent No.1. Mr. A.P.S. Deol, Senior Advocate with Mr. Pawan Gautam, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under section 482 Cr.P.C. read with Article 227 of the Constitution of India seeks quashing of order dated 15.1.2015 passed by the learned Sessions Judge (Forest), Shimla whereby he dismissed the application filed by the petitioner under section 319 Cr.P.C. for arraigning the respondents No. 2 & 3 as accused.

2. It has been averred that on 30.6.2008, Union of workers working in M/s Virgo Appliances Pvt. Ltd. decided to protest in front of its gate in the industrial area of Shoghi. About 300 workers gathered there and few of the workers even tried to enter the gate of the premises of M/s Virgo Appliances with their demands, but were thrashed by the guards appointed by the company. In the meanwhile, a group of 15-20 workers entered inside the gate of M/s Virgo Appliances, where the security guards opened fire resulting in injuries to the petitioner and S/Sh. Pankaj Chaudhari, Ravi Kant and Sunil and death of Amarjeet. FIR No. 162 of 2008 was registered under sections 302, 307, 109 and 34 IPC

alongwith section 25(5)(4) of Arms Act at the instance of one Khem Chand an injured. On the basis of the FIR, initially there were nine accused including respondents No. 2 and 3, but after completion of the investigation, their names were dropped and only seven accused were named to face trial.

3. The petitioner is alleged to be one of the injured, who preferred an application under section 319 Cr.P.C. praying therein for arraying the respondents No. 2 and 3 as co-accused on the basis of the statements of the witnesses recorded during trial. The application came to be dismissed by the learned trial court by observing that there was no material on record, which could prima facie establish the complicity or the involvement of respondents No. 2 and 3 in the crime.

4. This order has been assailed on the ground that despite respondent No. 2 and 3 being specifically named in the FIR and in the statements recorded under sections 161 Cr.P.C., they were not made accused when the report under section 173 Cr.P.C. was filed by the investigating agency. It is further contended that during trial the names of respondents No. 2 and 3 have again surfaced, as all the eye witnesses i.e. PWs 1, 2, 3, 5, 13 and 16 have categorically stated in the examination-in-chief that the security guards had fired at the protesting workers on the instructions of respondents No. 2 and 3. In support of such allegations, the petitioners have also appended their statements as Annexure P-4.

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

5. The learned counsel for the respondents has raised preliminary objection regarding the very maintainability of this petition by placing reliance upon the judgement of Hon'ble Supreme Court in **Mohit alias Sonu and another** vs. **State of U.P. and another 2013 (7) SCC 789** wherein it has been specifically held that order rejecting of application for summoning of the accused filed under section 319 Cr.P.C. cannot be held to be an interlocutory order within the meaning of sub-section (2) of section 397 as the order decides certain rights of the parties and would be assailable only by revision and not under section 482 Cr.P.C. It was further held that when there is a specific remedy provided by way of an appeal or revision, the inherent powers under section 482 Cr.P.C. cannot and should not be resorted to.

6. The petitioner has not contested this position and has drawn my attention to the application filed by him, under section 482 Cr.P.C. registered as Cr.MP. No. 622 of 2015 for converting and treating this petition to that of criminal revision under section 397 read with section 401 Cr.P.C. Though this application has been vehemently contested, however, I feel that interest of justice demands that the same be allowed. After all when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred.

7. Reverting to the facts of the case, the learned counsel for the petitioner has drawn my attention to the statements of the witnesses, more particularly, the statements of PWs 1, 2, 3, 5, 13 and 16 to canvass that these witnesses have categorically stated in their examination-in-chief that the security guards had fired at the protesting workers on the instructions of respondents No. 2 and 3 and once these persons have been named in the examination-in-chief, they ought to be impleaded as co-accused as it was not necessary to look into the cross examination or else it would amount to a mini trial.

8. This court in **Cr.MMO No. 142 of 2014** titled **Surjit Singh Pathania** vs. **State of Himachal Pradesh decided on 29.8.2014** has held as follows:-

> "6. The object, nature and scope of Section 319 Cr.P.C., does not remain in the realm of guesswork in view of the Constitutional Bench judgment in

Hardeep Singh Vs. State of Punjab and others, (2014) 3 Supreme Court Cases 92,wherein the Hon'ble Supreme Court formulated five questions for determination and then answered them in the following manner:-

"Questions (i) and (iii)

-What is the stage at which power under Section 319 CrPC can be exercised?

AND

-Whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

Answer

117.1. In Dharam Pal case , the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193 CrPC and the Sessions Judge need not wait till "evidence" under Section 319 CrPC becomes available for summoning an additional accused.

117.2. Section 319 CrPC, significantly, uses two expressions that have to be taken note of i.e. (1) inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

117.3. In view of the above position the word "evidence" in Section 319 CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii) -Whether the word "evidence" used in Section 319(1) CrPC could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination -in-chief of the witness concerned?

Answer

117.4. Considering the fact that under Section 319 CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question (iv)-What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Answer

117.5. Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge *. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v) -Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

Answer

117.6. A person not named in the FIR or a person though named in the FIR but has not been charge - sheeted or a person who has been discharged can be summoned under Section 319 CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh."

9. It cannot be disputed that even in case a person not named in the FIR or a person though named in the FIR, but has not been charge-sheeted even then he can be summoned under section 319 Cr.P.C. provided that from the evidence it appears that such person can be tried with the accused already facing trial. It is also more than settled that the court has discretionary power to summon a person as additional accused under section 319 Cr.P.C. However, it is not enough that the court entertains only some doubt about the involvement in the offence, the court must have reasonable satisfaction from the evidence already collected, but suspicion in itself is not sufficient that there is a reasonable satisfaction of convicting such person.

10. The legal position has been correctly summed up by the Sessions Judge in the following terms:-

"7. Section 319 of the Code of Criminal Procedure empowered a Court to proceed against any person not shown to be an accused if it appears from the evidence that such person has also committed an offence for which he can be tried together with the accused. The Section 319 of the Cr.P.C. reads as under:-

"**Power to proceed against other persons appearing to be guilty of offence…….**

S. 319. (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a)the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

8. The power exercisable under S. 319 is an extraordinary power conferred on the Court to do real justice, it should be used with caution and only if compelling reasons exist for proceeding against a person against whom action has not been taken.

9. The power of summoning an additional accused under S. 319 Cr.P.C. should be exercised sparingly. The key words in Section are "it appears from the evidence"...."any person"...."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person the discretion under S. 319 Cr.P.C. would be used by the Court. The Court has to use the power under S. 319, Cr.P.C. sparingly and primarily to advance the cause of criminal justice but not as a handle at the hands of the complainant to cause harassment to the person who is not involved in the commission of the crime.

10. Recently a reference was made to the Hon'ble Supreme Court and the constitution of Bench of the Hon'ble Supreme Court in **Hardeep Singh v. State of Punjab (2009) 16 SCC 785** has formulated five questions i.e.:-

(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) whether the word "evidence" used in Section 319(1), Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence

collected during investigation or the word "evidence" in limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

The law laid down by the Hon'ble Supreme Court qua question No. (iv) is material to the facts and circumstances of the present case. While dealing with question (iv) i.e. what is the decree of satisfaction required for invoking the power under Section 319 Cr.P.C.?, the Hon'ble Supreme Court has held:-

"93. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

94. In Pyare Lal Bhargava v. The State of Rajasthan, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word 'appear'. The court held that the appropriate meaning of the word 'appears' is 'seems'. It imports a lesser degree of probability than proof. In Ram Singh & Ors. v. Ram Niwas & Anr., (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word 'appear' as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in Vikas v. State of Rajasthan, (2014) 3 SCC 321, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

96. In Rajendra Singh v. State U.P. (2007) 7 SCC 378, the Court observed:

> "16. Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."
>
> 97. In Mohd. Shafi Vs. Mohd. Rafiq (2007) 14 SCC 544 this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. "
>
> "105. Power under Section 319 Cr.P.C. is a discretionary and an extra- ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.
>
> 106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused. "

The aforesaid legal position has not even been disputed by the learned counsel for the petitioner.

11. PW 1 Khem Chand an injured in his examination-in-chief deposed that V.K.Tripathi and R.K.Malhotra had asked the guards to open fire on the labourers, whereas PW 19 Budhi Parkash, who was the security officer has nowhere stated so, rather he deposed that the accused fired 1-2 rounds as a result whereof 1-2 persons sustained injuries and one of the workers also died.

12. PW 2 Pankaj Chaudhari and PW 3 Ravi Kant have alleged that incident occurred due to the instructions given by the owner and the CEO of the company, but they did not specifically name any of the person, who in fact had given such directions.

13. PW 3 Ravi Kant has stated that he had informed the police that security personnel openly claimed that they were authorized by respondent No. 2 to fire on the mob, but when confronted with his statement this fact was not so recorded.

14. Further, it is not in dispute that the premises where the incident took place is the factory premises of M/s Virgo Appliances and at a distant place the company was/ is also having its office known as Tikaksha and it has come on record that respondent No. 3 on the fateful day was in fact in Tikaksha office, which is at a distant place and possibly therefore could not have given instruction to fire.

15. The learned counsel for the petitioner would then argue that the complicities of respondents No. 2 and 3 are established from the observations made by this court at the time of granting bail to these petitioners.

16. This contention is equally without any force for the simple reason that it has been specifically recorded in the bail order that *"any observation made hereinabove is strictly for the purpose of deciding the instant petition and it shall not be construed to have any bearing on the merits of the case."* That apart, it is settled law that any observation made while adjudicating upon a bail petition cannot be read as evidence during the course of trial.

17. Now, I proceed to decide the question of delay, which is not only interlinked to the maintainability of the application filed under section 319 Cr.P.C. by the petitioner but also to the conduct of the petitioner.

18. No doubt, the petitioner is not the complainant, yet being one of the injured he would probably still have the locus-standi to file and maintain the present petition. But, then why the petitioner whose statement had been recorded as far back as on 30.7.2012 chose to file the application under section 319 Cr.P.C. only on 10.12.2014 when even the statements under Section 313 Cr.P.C of the accused had been recorded on 16.6.2014 is not forthcoming.

19. Why only at the stage of final arguments, was this application filed, is also not forthcoming. Significantly, the statements as sought to be relied upon by the petitioner had already come to be recorded by 15.10.2012. The entire prosecution evidence had been recorded over a period of six years and the prosecution had closed its evidence after examining 28 witnesses in the year 2013, yet the petitioner waited for complete one year after the completion of the trial to file this application. This only reflects upon the lack of bonafides of the petitioner.

20. The learned counsel for the petitioner would lastly argue that once the names of respondents No. 2 and 3 were specifically mentioned in the FIR as also in the statements recorded under section 161 Cr.P.C. during the course of investigation, therefore, they should now be impleaded as co-accused.

21. This contention of the petitioner is not tenable, because after the report under section 173 Cr.P.C. has been filed and trial has commenced, it is the evidence recorded by the court which alone can be looked into to establish the complicity of the accused and it is not permissible then to fall back either on the contents of the FIR or the statements recorded under section 161 Cr.P.C during the course of investigation.

22. Having said so, I find no merit in this petition and the same is accordingly dismissed.

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

Braham Dass & anr. .....Appellants.

Versus

Bhoomi Chand .....Respondent.

RSA No. 387 of 2003.
Reserved on: 03.08.2015.
Decided on: 11.08.2015.

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession by way of demolition of the construction pleading that defendant had encroached upon 2 marlas of the land without his consent –a Local Commissioner was appointed who submitted his report- however, copy of Musabi was not proved to be genuine – further, this copy was not legible- it was also proved that original document was torn and could not be read, hence, report of Local Commissioner was not acceptable - no encroachment was detected in the demarcation conducted after the preparation of new Musabi- held, that plaintiff had failed to prove his case. (Para-12 to 17)

Cases referred:

Bibhuti Bhushan Bank and another vrs. Sadhan Chandra Sheet and others, AIR 1965 Calcutta 199

Goalakrishnan vrs. P. Shanmugam, AIR 1995 Madras, 274

For the appellant(s): Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.
For the respondents: Mr. Rajnish K. Lall, Advocate, vice counsel.

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 26.5.2003, passed in Civil Appeal No.103 of 1998.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs) have instituted suit against the respondent-defendant (hereinafter referred to as the defendant) for possession by way of demolition of construction on land marked A,B,C and D, measuring 2 marlas comprised in Khata No. 73, Khatauni No. 131, Kh. No. 136 measuring 1 kanal 11 marlas as per jamabandi for the year 1973-74, situated in Up-Mahal Gandhi Nagar (Gaura Khurd), Tappa Bajuri, Tehsil and Distt. Hamirpur, corresponding Khata No. 60, Khatauni No. 302 to 305, plots 8 area 613 meters 33 centimeters, as per missal haquiat bandobast for the year 1984-85. According to the plaintiffs, the defendant has encroached 2 marlas of the land marked as mark A, B, C and D by re-constructing the boundary wall and latrine in the absence of plaintiffs and without their consent in November, 1977. The defendant has also

manipulated the revenue entries. The plaintiffs requested the defendant to vacate the possession of the suit land encroached upon by him by demolishing a boundary wall and latrine reconstructed by him over the suit land, but to no avail.

3. The suit was contested by the defendant. According to the defendant, the retaining wall was reconstructed prior to the year 1977 on his own land and the latrine was also constructed prior to the year 1977. The plaintiffs have previously filed a civil suit No. 137 of 1992 qua the suit land before the Sub Judge, Hamirpur. It was withdrawn by the plaintiffs on 6.10.1977.

4. The replication was filed by the plaintiffs to the written statement filed by the defendant. The learned Sub Judge (II), Hamirpur, H.P., framed the issues and dismissed the suit on 25.4.1998. The plaintiffs filed an appeal against the judgment and decree dated 25.4.1998. The learned District Judge, Hamirpur, dismissed the same on 26.5.2003. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 12.7.2004:

> "1. Whether the oral, as well as, documentary evidence produced by the appellants has neither been considered, nor appreciated and the findings are vitiated in accordance with law?"

6. Mr. G.D.Verma, learned Senior Advocate, for the appellants has vehemently argued that the report of the Local Commissioner LC-1 could not be disbelieved. On the other hand, Mr. Rajnish K. Lall, Advocate, appearing on behalf of the defendant has supported the judgments and decrees passed by both the Courts below.

7. Initially, Civil Suit was dismissed by the learned Sub Judge on 22.4.1988. The appeal was preferred against the judgment and decree dated 22.4.1988 in Civil Appeal No. 98/88. The learned District Judge, Hamirpur vide judgment dated 31.10.1994 remanded the matter and ordered fresh trial of the case in accordance with law. Previously, one Mr. M.L.Sharma DRO Hamirpur was appointed as Local Commissioner. He submitted his report dated 3.2.1986 in the Court. The report was confirmed by the Court vide order dated 1.7.1987. However, the learned District Judge, Hamirpur, set aside the same on 31.10.1994. Thereafter, Sh. Ram Rattan, retired C.O. was appointed as new Local Commissioner on 28.3.1995. He submitted his report dated 24.7.1995 alongwith Tatima, field book and also the statements of the parties. The objections against the report, preferred by the defendant, were dismissed on 7.4.1997. Civil Revision No. 122 of 1997 was preferred against the order. It was directed by this Court that after completion of the evidence, the entire evidence on record, including the report of the Local Commissioner, Tatima and other documents shall be taken into consideration.

8. Plaintiff Braham Dass has appeared as PW-1. According to him, the defendant started raising construction of the wall in the year 1979 over the suit land. The wall was 100 ft. in length and 5-6 feet in height. Thereafter, the defendant also constructed one latrine and store. The plaintiff has neither disclosed the khasra number nor has he stated that on which date and month, the wall was constructed. He has also not given the date or month when the latrine and store were constructed. PW-1 Braham Dass has admitted in his cross-examination that he had earlier filed a suit in the year 1972 and it was withdrawn as dismissed on 6.10.1977. He has reported the matter to the police, however, no report made by the plaintiffs has been placed on record. He was not aware whether or not certified copy of the Musabi was obtained qua which an entry had been made at Sr. Nos. 2,4, 8 and 3. According to him, Musabi could not be procured as the same was torn. He

denied the suggestion that wall, store and latrine were constructed in the year 1969. PW-2 Angat Ram was not aware in which ward number, the suit land was situated. He was also ignorant in which year, month or date the wall and other construction was raised. PW-3 Krishan Lal, Jr. Assistant, D.C.Office, Dharamshala, could not produce the requisitioned record as the same was not available.

9. Defendant Bhumi Chand has appeared as DW-2. According to him, the construction of the wall was carried out with the consent of the plaintiffs in the year 1968-69. Thereafter, neither any wall nor latrine was constructed. He has not encroached upon any portion of the land of the plaintiffs. Sh. Ram Rattan, LC did not take their statements qua the fixation of pacca points before carrying out the demarcation. No triangle and perpendiculars were drawn. The demarcation was carried out with ropes. Sadar Musabi was not available. The Musabi which was submitted by the plaintiffs was having erased Karukans. On the spot, no Bannas were shown or fixed by the Local Commissioner. He was not found to have encroached upon any portion of the suit land. It was the plaintiffs who have encroached upon his land. DW-2 Bhumi Chand in his cross-examination has denied that he raised construction of the wall in the year 1979. He denied that the bannas were fixed by the LC who found that encroachments have been made.

10. The defendant has also examined DW-3 Uttam Chand and DW-4 Tilak Raj. According to them, the wall in question was constructed in the year 1968-69. The defendant has not encroached upon any portion of the land of the plaintiffs. DW-5 Krishan Lal, Jr. Assistant, D.C.Office, Dharamshala, could not produce the requisitioned record as the same was not available. DW-6 Amar Nath, Copying Agent, D.C. Office, Hamirpur deposed that in CD register pertaining to the year 1971, no application filed by the plaintiffs has been entered upto 13.4.1971. The application dated 5.10.1974 has been filed by Sh. S.L.Sharma, Advocate. The other application bearing No. 2483 dated 28.11.1974 was stated to be filed by Khiali Ram for supplying the copy of Khasra Girdawri. DW-7 Kesha Dutt has produced the record of previous suit bearing No. 137/72. He deposed that the same was withdrawn as dismissed vide order Ext. DW-7/A. DW-8 Ram Rattan is the Local Commissioner appointed by the learned trial Court. He has inspected the spot and carried the demarcation on 23.7.1995 and 24.7.1995. DW-9 Prithi Chand, Patwari has produced the Musabi for the year 1910-11. He deposed that the same was in bad shape and the entries therein were not legible. DW-10 Sadar Kanungo, on seeing the condition of the Aks Musabi Mark "A" has deposed that it could not be said as to whether the same was the copy of the Latha Momo or Musabi.

11. The plaintiffs have relied upon jamabandi Ext. P-1 for the year 1973-74, copy of missal hakiat bandobast for the year 1984-85, Ext. P-3 and copies of khasra Girdawari Ext. P-2 and P-4. The defendant has placed reliance upon Ext. D-1, D-2 and D-3. It is evident from Ext. D-1, D-2 and Ext. D-3 that settlement record prepared during the course of settlement proceedings has been upheld till the Court of the Financial Commissioner (Appeals), H.P. and the appeals as well as the revisions filed by the plaintiffs have all been dismissed.

12. According to DW-8 Ram Rattan, Local Commissioner, he visited the spot on 23.7.1995 and 24.7.1995. He submitted the report to the trial Court. The plaintiff has placed strong reliance upon Mark D. Mark D has not been proved in accordance with law. Neither of the party was able to produce copy of the old musabi before him. No evidence has been proved by the plaintiffs as to when the copy was applied and the same was supplied to them. No efforts have been made by the plaintiffs to prove Musabi Mark A to be the real and genuine document. It is also not born out from the record as to which copying agent has issued the copy. DW-5 Krishan Lal, Jr. Assistant, D.C.Office, Dharamshala, stated that the

record was sent to Hamirpur through someone in the year 1972-73. In the CD register produced for the year 1972-73, there is no application for supplying the copy of musabi. DW-6 Amar Nath has produced the CD-II Register and as per the entries therein, no application till 13.4.1971, was filed by the plaintiff Braham Dass in the Copying Agency for supplying the copies pertaining to the year 1974-75 and as per the record, only two applications were received. One was made by Sh. S.L. Sharma, Advocate which was entered at Sr. No. 2034 and the other by Khiali Ram on 28.11.1974 entered at Sr. No. 2483, for supplying the copies of Khasra Girdawri. The learned Courts below have rightly come to the conclusion that Mark A was not legible. DW-9 Prithi Chand who had produced the original record stated that the same was in bad shape and no numbers were legible. It is intriguing to note that how certified copy could be prepared when the original was not legible.

13. According to DW-10 Suresh Kumar, on seeing the musabi Mark A, he could not say that the same was a copy of Latha, Mommy or Musabi. Karukans were also missing. Since the demarcation has been carried out on the basis of old musabi mark A, the findings of the Local Commissioner regarding alleged encroachment to the extent of 30.61 sq. meters on the land of the plaintiffs is not factually sustainable. However, it would also be pertinent to note that when the demarcation was carried out with the help of new musabi after settlement of 1984-85, the defendant had not encroached upon the suit land or any portion thereof. In view of the peculiar facts and circumstances of the case, the musabi prepared after the settlement of the year 1984-85, was to be given preference vis-à-vis old musabi, which was not legible. It was also not proved that it was true copy of the original since original itself was not legible. Karukans were also not legible. DW-8 Ram Rattan, Local Commissioner has admitted that measurement was not carried out with the ruler but Jareb. However, the fact of the matter is that the measurements were carried out with the help of rope. He did not prepare even the diagonals nor laid any perpendiculars. He has not even recorded the statements of the parties before starting the demarcation with the help of old musabi.

14. In the case of ***Bibhuti Bhushan Bank and another vrs. Sadhan Chandra Sheet and others,*** reported in ***AIR 1965 Calcutta 199,*** the learned Single Judge of the Calcutta High Court has held that if the Court rejects a Commissioner's report after proper exercise of discretion and holds other evidence on the record sufficient for the disposal of the case, it is not obligatory or compulsory on the Court to order another investigation. It has been held has follows.

> "6. In my judgment, on construing Order 26, Rules 9 and 10 read with Section 100(c) of the Code of Civil Procedure, 1908, there is no warrant for absolute proposition of law that disregard of the Commissioner's report, made after local investigation, under the provisions of Order 26, Rules 9 and 10 of the Code of Civil Procedure, constitutes an error or defect in the procedure within the meaning of Clause (c) of Section 100 of the Code; or that such disregard affects "the merits of the case" within the said Section 100 as to justify interference in a Second Appeal. If there is no defect in the conduct of a case, if the decision does not involve any principle of law and if the only error, which if it is committed, consists in the Court's drawing a wrong conclusion from evidence, that would not, in my opinion, constitute a substantial error or defect in the procedure. The acceptance or rejection of the Commissioner's report is entirely within the Court's competence. It has full discretion in the matter but the said discretion is to be exercised properly and not capriciously. If the Court rejects a Commissioner's report after proper exercise of discretion, it is not obligatory or compulsory on the Court to order for another investigation.

> As the problem, in spite of the strenuous arguments, remained in short, to ascertain the boundary, the appellant in order to set aside the decision of the Court of appeal below, should come forward to show clearly where it is wrong and what other course is right and that merely lack of precision in the materials in boundary cases of this type docs not in my view relieve the Court of the duty of settling a line upon the evidence before it."

15. In the instant case, while rejecting the report of the Local Commissioner, the Court has also gone into the oral as well as documentary evidence including revenue entries.

16. In the case of ***Goalakrishnan vrs. P. Shanmugam,*** reported in ***AIR 1995 Madras, 274,*** the learned Single Judge of the Madras High Court has held that mechanical and indiscriminate appointment of more than one Commission, merely because the Court thinks the other party to the proceedings may not be prejudiced or that the expenses for the commissions are going to be borne by the applicant for the purpose, would create an unhealthy practice of not only more than one report on records, but also would lead to the vice of a person or party to the proceedings not being satisfied with the Commissioner's report seeking for the appointment of successive Commissioners, till he is able to get a report of his choice. It has been held as follows:

> "5. The learned counsel for the respondent herein vehemently contended that there were some defects noticed in the earlier report of the Commissioner and it is, therefore, the respondent felt that the earlier Commissioner may not impartially discharge his duties, and that is why, the request for a different Commissioner came to be made and countenanced by the Court below. Though, from the pleading and that too the affidavit of his own client the learned counsel for the respondent wanted to contend that the earlier report submitted by the surveyor was defective and has been scrapped, there is absolutely no material whatsoever, on the basis of which this Court can accept such a plea. If a report has been found fault with and has been scrapped, there should have been a specific judicial order in this regard and in the absence of any such order, the mere assertion of either of the parties in their respective pleadings constitute no justification or sufficient material or basis for this Court to accept and countenance such a claim. That apart, I am of the view that merely because on an earlier occasion, the Commission has been re-issued, per is not a justification also to assume that the earlier report submitted by the Surveyor Commissions was bad or perfunctory or deserve to be scrapped. It might have been re-issued for getting some additional particulars and that from the fact of re-isssue of commission alone it cannot be contended that the earlier report was bad or that it was scrapped. Further, the very mere fact that the earlier report was not to the liking of the respondent, at whose instance the Commission was ordered earlier was also not a ground to assume that the said Commissioner will not perform his duties impartially when he is asked to re-do the Commission. Such allegations cannot be countenanced liberally for the mere making of them in the absence of any specific or concrete instance furnished or pointed out disclosed lack or want of impartially on the earlier Commissioner. Mechanical and indiscriminate appointment of more than the Commission, merely because the Court thinks the other party to the proceedings may not be prejudiced or that the expenses for the commissions are going to be borne by the applicant for the purpose would create an unhealthy practice of not only more than one report on records, but also would lead to the vice of a person or party to the proceedings not being satisfied with the

Commissioner's report seeking for the appointment of successive Commissioners till he is able to get a report of his choice. Permitting such things to happen in the course of trial would lead, not only to the mis-trial of the suit, but also will result in grave miscarriage of justice. For all the reasons stated above, I do not appreciate and cannot approve of the plea taken for the respondent that the second Commission through a different Commissioner is justified in this case, for the reason just pleaded by the learned counsel for the respondent in this Court."

17. In view of this, the Courts below have rightly rejected the demarcation report dated 23/24.7.1995. Thus, it was not necessary for the Courts below to order appointment of new Local Commissioner to demarcate the land to ascertain the encroachment. The learned courts below have touched each and every aspect of the merits of the case, including the manner in which the Local Commissioner has carried out the demarcation on the basis of old musabi. The detailed reasons have been assigned as to why the report of the Local Commissioner was not accepted. The substantial question of law is answered accordingly.

18. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Chief Executive Officer-cum-Secretary ...Petitioner.
Versus
Dayal Singh and others ...Respondents.

Civil Revision No. 6 of 2015.
Date of decision: 11.08.2015

Land Acquisition Act, 1894- Section 34- Claimants instituted an execution petition seeking interest on the solatium- petition was allowed by the trial Court relying upon the judgment of Supreme Court of India **Gurpreet Singh vs. Union of India *2007(1) Apex Court Judgements 751 (SC)***- held, that interest on solatium can be granted by the Court only if the execution petition was pending- in the present case, no execution petition was pending and, therefore, it was not permissible for the claimants to seek interest on solatium by filing execution petition- appeal allowed and order set aside. (Para-2)

Case referred:
Gurpreet Singh vs. Union of India 2007(1) Apex Court Judgements 751 (SC)

For the petitioner: Mr. C.N.Singh, Advocate.
For the respondents: Already Ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The instant civil revision petition is directed against the impugned order rendered by the learned Additional District Judge, Solan on 9.10.2014 in an execution petition preferred before it, by the respondents herein.

2. The learned Additional District Judge, Solan while adjudicating upon the execution petition preferred before it by the respondents-claimants proceeded to allow the claim ventilated therein by the respondents-claimants, by applying the ratio of the judgement of the Hon'ble Apex Court reported in Gurpreet Singh vs. Union of India *2007(1) Apex Court Judgements 751 (SC).* The relevant para 44 stands extracted hereinafter:-

> 44. One other question also was sought to be raised and answered by this Bench though not referred to it. Considering that the question arises in various cases pending in Courts all over the country, we permitted counsel to address us on that question. That question is whether in the light of the decision in Sunder (supra), the awardee/decree holder would be entitled to claim interest on solatium in execution though it is not specifically granted by the decree. It is well settled that an execution court cannot go behind the decree. If, therefore, the claim for interest on solatium had been made and the same has been negatived either expressly or by necessary implication by the judgment or decree of the reference court or of the appellate court, the execution court will have necessarily to reject the claim for interest on solatium based on Sunder (supra) on the ground that the execution court cannot go behind the decree. But if the award of the reference court or that of the appellate court does not specifically refer to the question of interest on solatium or in cases where claim had not been made and rejected either expressly or impliedly by the reference court or the appellate court, and merely interest on compensation is awarded, then it would be open to the execution court to apply the ratio of Sunder (supra) and say that the compensation awarded includes solatium and in such an event interest on the amount could be directed to be deposited in execution. Otherwise, not. We also clarify that such interest on solatium can be claimed only in pending executions and not in closed executions and the execution court will be entitled to permit its recovery from the date of the judgment in Sunder (September 19, 2001) and not for any prior period. We also clarify that this will not entail any re-appropriation or fresh appropriation by the decree-holder. This we have indicated by way of clarification also in exercise of our power under Articles 141 and 142 of the Constitution of India with a view to avoid multiplicity of litigation on this question."

An expostulation exists therein of the Executing Court being empowered to award interest on solatium when the award of the Reference Court or that of the Appellate Court omits to explicitly or expressly bespeak the factum of awarding of interest on solatium or when the aforesaid claim is unventilated therein besides it having been rejected neither expressly or impliedly by both the Reference Court or the Appellate Court, whereas merely interest on compensation stands awarded. The empowerment of the Executing Court to award interest on solatium in the wake of occurrence of the afore referred eventualities is not plenary

rather is trammeled by the existence of a rider thereon imposed by the relevant portion of the judgement of the Hon'ble Apex Court extracted hereinabove, inasmuch as the entitlement of the claimants to canvass for the awarding of interest on solatium before the Executing Court would be barred or thwarted, in the event of non existence of the eventualities aforesaid or in the event of a claim for interest on solatium when ventilated having stood negated either expressly or by necessary implication by the awards of both the Reference Court or the Appellate Court. Besides, in the wake of the execution petition having stood terminated it would be impermissible for the Executing Court to award interest on solatium even when the contingencies spelt out by the Hon'ble Apex Court in the relevant portion of its judgement which stands extracted hereinabove prevail or exist for constraining the Executing Court to award interest on solatium. In other words, the claim aforesaid would be open to be canvassed by the claimants only during the pendency of an execution petition. In the instant case, the learned counsel for the petitioner has drawn the attention of this Court to the factum of the petitioner herein in satisfaction of the renditions of both the Reference Court and of the Appellate Court having tendered a sum of Rs.3,61,083/- (Annexure A-1). In sequel, the renditions by both the Reference Court and Appellate Court stood satiated besides fully satisfied hence executed. In the face of the petitioner herein having satisfied the renditions of the Reference Court as well as of the Appellate Court, as such, having executed the awards of both the Reference Court as well as of the Appellate Court, there was no occasion for the claimants to have instituted an execution petition claiming therein the award of interest on solatium in tandem with the verdict of the Hon'ble Apex Court. In other words, the deposit by the petitioner of the entire awarded amount of compensation determined by both the Reference Court and by the Appellate Court is construable to be constituting execution by it of the awards of both the Reference Court and the Appellate Court. Moreover, with the factum of deposit by the petitioner in compliance with the renditions of both the Reference Court and the Appellate Court of the entire awarded amount of compensation assessed in favour of respondents-claimants, the relief as canvassed by the petitioner herein, fell rather within the ambit of the trammel or fetter to the empowerment created in the executing Court by the afore referred verdict of the Apex Court, to the awarding of interest by it on solatium in the event of its having been not claimed besides necessarily neither standing rejection impliedly or expressly by both the Reference Court and the Appellate Court, inasmuch as it stood encompassed within the domain of the exception to it, constituted in the executing Court being disempowered to accord the relief as afforded by it in favour of the respondents-claimants in the impugned order, in the event of execution of the award of both the Reference Court and the Appellate Court for reasons aforesaid no longer subsisting. Now, in the face of the petitioner herein having by its act of depositing the entire awarded amount of compensation in pursuance to the renditions of the Reference Court and the Appellate Court, hence executed the awards aforesaid in entirety, the launching of an execution by the claimants for award of interest on solatium on the strength of the principle mandated in the judgement of the Hon'ble Apex Court, would tantamount to not only sequelling infraction of the mandate of the verdict of the Hon'ble Apex Court interdicting its being awarded in favour of the claimants when the execution of the award stood hence satisfied besides closed besides would result in the reopening of the amount awarded by both the Reference Court and the Appellate Court, which would be grossly impermissible. In coming to the conclusion that once the petitioner herein has deposited the entire amount of compensation as comprised in the awards of both the Reference Court and of the Appellate Court it constitutes execution by it of the awards aforesaid hence estopping the respondents-claimants besides barring them to seek reopening of the amount assessed, determined and deposited by the petitioner herein, this Court gains succor from paragraph 28 of the judgement of the Hon'ble Apex Court reported in Gurpreet Singh (Supra), which stands extracted hereinafter:-

28. Going by this principle and for the moment keeping out the scheme of the Land Acquisition Act, it appears to us that on payment or deposit of the amount awarded by the Collector in terms of Section 11 read with Section 31 of the Act, the claimant cannot thereafter claim any interest on that part of the compensation paid to him or deposited for the payment to him once notice of deposit is given to him. Thereafter, when the reference court enhances the compensation with consequential enhancement in solatium and interest under Section 23(1A) of the Act and further awards interest on the enhanced compensation in terms of Section 28 of the Act, the claimant/decree holder can seek an appropriation of the amounts deposited pursuant to that award decree, only towards the enhanced amount so awarded by the reference court. While making the appropriation, he can apply the amount deposited, first towards the satisfaction of his claim towards interest on the enhanced amount, the costs, if any, awarded and the balance towards the land value, solatium and the payment under Sections 23 (1A) of the Act and if, there is a shortfall, claim that part of the compensation with interest thereon as provided in Section 28 of the Act and as covered by the award decree. Once the sum enhanced by the reference court, along with the interest is deposited by the State, there will be no occasion for the claimant/awardee to seek a reopening of the amount awarded by the Collector, substituted by the amount awarded by the reference court and seek to have a re-appropriation of the amount towards what is due. Same would be the position in a case where the amount awarded by the reference court, including the interest is deposited, but the amount is further enhanced in appeal by the High Court. Again, the same principle would apply. The principle would continue to apply when the Supreme Court awards further enhancement in a further appeal to that Court. But if after the award by the reference court the amount is not deposited by the State, interest would run on the compensation in terms of Section 28 of the Act on that amount as provided in Section 28. The same would be the position regarding the enhancement given in appeal by the High Court and in the enhancement given in appeal by the Supreme Court. The mandate of Section 34 and Section 28 that interest would run from the date the Collector takes possession till the particular amount is deposited as provided in those sections ensures that the claimant is recompensed adequately. Section 28 ensures such recompense at each stage of enhancement of compensation.

3. For the foregoing reasons, there is merit in the petition. The same is allowed and the impugned order is set-aside.

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

Sh. Kamal Parkash and another ...Petitioners

Versus

State of Himachal Pradesh. ...Respondent

Criminal Revision No. 117 of 2015
Judgment reserved on 7.8.2015.
Date of decision: 11.8.2015

Indian Evidence Act, 1872- Section 146- Petitioners are accused of the commission of offence punishable under Section 354-A IPC read with Section 34- they filed an application for summoning the case file from various courts to prove long standing civil and criminal litigation initiated by petitioner no. 1 against the prosecutrix – the application was dismissed on the ground that prosecutrix can be confronted with certified copies of the record, which is per se admissible under Section 76 of Indian Evidence Act – further, the petitioner will have an opportunity to lead the defence - no previous statement of the prosecutrix was to be proved with which the prosecutrix was to be confronted – held, that cross-examination is an effective mean for extracting the truth- a person is required to put his case in cross-examination otherwise the version of the witness has to be taken as accepted- the prosecutrix could not have been confronted in the defence and in case her testimony was not confronted with the documents, her testimony would go unchallenged- an opportunity has to be given to the party to confront a witness and merely because the record speaks for itself can be no ground for denying the cross-examination of a witness - Petition allowed and the order passed by Magistrate set-aside. (Para-3 to13)

Cases referred:

Rajinder Pershad Vs. Darshana Devi (2001) 7 SCC 69

Laxmibai (dead) through LRs and another Vs. Bhagwantbuva (dead) through LRS and another (2013) 4 SCC 97

For the Petitioners: Mr.Suneet Goel, Advocate.

For the Respondent: Mr.V.K. Verma and Ms. Meenakshi Sharma, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This Criminal Revision Petition has been preferred against the order passed by the learned Judicial Magistrate, Ist Class, Nahan on 24.3.2015, whereby he dismissed the application preferred by the petitioners under Section 146 of the Indian Evidence Act, 1872 (for short "Act").

2. The petitioners are accused of having committed offence under Sections 354 A read with Section 34 of the Indian Penal Code. The petitioners after pleading innocence

are facing trial. During the course of proceedings, petitioners filed an application under Section 146 of the Act for summoning case files from various Courts as enumerated under paras I (1) to (10) of the application in order to test the veracity of the prosecutrix by confronting her with the records so as to shake her credibility and position in life. This according to the petitioners had been necessitated as there was long standing civil and criminal litigations initiated by petitioner No. 1 against the prosecutrix and had prompted her to falsely implicate him in the instant criminal case.

3. The learned trial Magistrate vide order dated 24.3.2015 dismissed the application on the ground that the documents with which the witness is to be confronted can be done by placing on record certified copies of the record, which as per provisions of Section 76 of the Act are per se admissible.

4. The other ground for rejection of the application was that under Section 105 of the Act, the defence had an opportunity to bring its case within the provisions of general exceptions or proviso of the relevant sections, with which he is charged and thereby it could be inferred that the record could be summoned by the defence counsel when opportunity is granted after recording the statement under Section 313 Cr.P.C to lead evidence.

5. Lastly, it was observed that Section 146 of the Act, although deals with shaking of credibility of witness and is subjected to cross-examination, but the confrontation can be with regard to the previous writings or statements given by the witness, which are already on record, as recorded under Section 161 Cr.P.C and filed along with the final report (challan) by the police.

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

6. Section 146 of the Indian Evidence Act reads thus:-

> *"Section 146- Questions lawful in cross-examination*
>
> *When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-*
>
> *(1) to test his veracity.*
>
> *(2) to discover who he is and what is his position in life, or*
>
> *(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."*

7. Indisputably, the object of cross-examination is to obtain from the witness admissions favourable to the other party on whose behalf the cross-examination is directed or to discredit the witness. Cross-examination, is therefore, most effective of all the means for extracting truth and exposing falsehood. It is the duty of the Court to consider the entire evidence of the witness brought on record in examination-in-chief, cross-examination and re-examination. Matter of cross-examination is not a mere empty formality, but one is required to put his own case in cross-examination, otherwise the version of the witness has to be taken as unchallenged. It is the duty to put one's own version to open end in cross-examination, otherwise the deposition of the witness cannot be discredited.

8. It is more than settled that credibility of a witness depends upon:

(i) his knowledge of facts to which he satisfies;

(ii) his integrity;

(iii) his disinterestedness;

(iv) his veracity; and

(v) his being bound to speak the truth on oath or on affirmation or declaration.

9. Adverting to the facts, it would be seen that in the application filed under Section 146 of the Act, the petitioners have sought judicial record from the various Courts for the purpose of cross-examination/confronting the complaint with her earlier version and to test her veracity. Obviously, this could not have been done by leading evidence in defence, as has been observed by the learned trial Magistrate. Moreover, in case the complainant was not confronted with these documents, then her testimony would go totally unchallenged.

10. The learned trial Magistrate appears to be under an mistaken impression that the petitioners had only sought to place on record the certified copies of the record, which according to it was per se admissible under Section 76 of the Act, little realizing that the record sought to be summoned by the petitioners was in fact for the purpose of confronting the complainant by cross-examining her in order to test her veracity and shake her credibility.

11. In ***Rajinder Pershad Vs. Darshana Devi (2001) 7 SCC 69,*** the Hon'ble Supreme Court has held that in order to dispute correctness of statement of a witness, opportunity must be given to him in cross-examination to explain his statement by drawing his attention to that part of it, which is objected to as untrue.

12. Similar observations were made by Hon'ble Supreme Court in ***Laxmibai (dead) through LRs and another Vs. Bhagwantbuva (dead) through LRS and another (2013) 4 SCC 97*** and it is apt to reproduce the observations made in para 40, which reads thus:-

> *"40. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See Khem Chand Vs. State of H.P. 1994 Supp (1) SCC 7, State of U.P. Vs. Nahar Singh (1998) 3 SCC 561, Rajinder Pershad Vs. Darshana Devi*

(2001) 7 SCC 69 and Sunil Kumar Vs. State of Rajasthan (2005) 9 SCC 283.)"

13. In view of the aforesaid proposition of law, there can be no denial of the fact that the petitioners had every right to summon the records as it was then alone that the petitioners could have confronted the prosecutrix in order to test her veracity and shake credibility of her statement. The mere fact that the official record was admissible under Section 76 of the Act was of no avail, as the record which the petitioners had sought to confront the prosecutrix would not speak for itself.

14. Having said so, I find merit in this petition. Accordingly, Revision Petition is allowed and the order passed by learned Magistrate on 24.3.2015 in case No. 91/4 of 2014 titled State of Himachal Pradesh Vs. Sh. Kamal Parkash etc. is quashed and set aside, consequently the application filed by the petitioners under Section 146 of the Act is allowed. The parties are directed to appear before the trial Magistrate on **20.8.2015**.

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

Pinjar Singh ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 9748 of 2014
Decided on: 11.08.2015

Constitution of India, 1950- Article 226- Petitioner was posted on secondment basis with respondent No. 3- services of the writ petitioner stood repatriated to the parent department- he was posted in the Office of Deputy Commissioner, Mandi on secondment basis- held, that writ petitioner is an employee of the State and the State has discretion to send him on deputation and to repatriate his services- petition dismissed. (Para-1 and 2)

For the petitioner: Ms. Ranjana Parmar, Senior Advocate, with Ms. Komal Kumari, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.

Mr. K.S. Banyal, Senior Advocate, with Mr. Vijender Katoch and Arun Sharma, Advocates, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

It appears that the writ petitioner was posted on secondment basis with respondent No. 3 vide office order, dated 04.03.2014 (Annexure P-2). Thereafter, vide office order, dated 18.12.2014 (Annexure P-3), the services of the writ petitioner stand repatriated

to the parent department and he has been posted in the office of Deputy Commissioner, Mandi, on secondment basis, which is subject matter of this writ petition.

2. We have examined the pleadings and are of the considered view that the writ petitioner has no case. The writ petitioner is the employee of the State and the State has the discretion to send him on deputation or to repatriate his services. The writ petitioner has no right to question the same.

3. Accordingly, the writ petition is dismissed alongwith all pending applications. Interim directions, if any, are vacated.

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

Mrs. Seema Sahai ...Applicant.
Versus
Sh. Daljit Singh Sahi and others ...Non-applicants/Respondents.

OMP No. 4314 of 2013 &
OMP No.106 of 2015 In C.S. No.38 of 2004
Reserved on: 7.8.2015.
Date of order: August 11, 2015.

Indian Penal Code, 1860- Sections 191 and 192- An application was filed for initiation of Court complaint before appropriate Court against the plaintiff, defendant no.1 and defendant no. 5 for furnishing fabricated documents, making false statements etc.- it was contended on behalf of the respondents that application under C.P.C. is not maintainable and the application was to be filed under Cr.P.C. – the document was not forged when it was custodia legis- held that mere wrong provisions or non mentioning of provisions of law will not vitiate the exercise of powers when the power can be traced to a source available in law - when the document was not forged after its production in the Court, there is no embargo on the power of Court to take cognizance on the basis of the complaint and the Court would not act as a complainant– no allegations was made that the documents was forged when it was in the custody of the Court hence, application dismissed with liberty to the petitioner to avail other remedy as may be available in law. (Para 3-12)

Cases referred:
Iqbal Singh Marwah and another vs. Meenakshi Marwah and another (2005) 4 SCC 370
Patel Laljibhai Somabhai vs. State of Gujarat (1971) 2 SCC 376
Raghunath vs. State of U.P. (1973) 1 SCC 564

For the Applicant : Mr. Sumeet Raj Sharma, Advocate.
For the Non-Applicants/ Resps. : Mr.K.D.Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondent No.1.
Mr. Ajay Mohan Goel, Advocate, for resps. No. 2 & 3.

The following order of the Court was delivered:

Tarlok Singh Chauhan, Judge

The applicant Smt. Seema Sahai has preferred this application under Sections 191, 192 and 193 of the Indian Penal Code, 1860 read with Section 151 of the Code

of Civil Procedure for initiation of Court complaint under Sections 191 and 192 IPC before the appropriate Court against plaintiff Daljit Singh Sahi, defendant No.1 Smt. Sudesh Dogra and defendant No.5 Ms. Urvashi Dogra, for perjury punishable under Section 193 of the IPC on account of :

(i) furnishing fabricated documents ;

(ii) making false statement; and

(iii) submitting after affixing signatures false applications, affidavits, compromise agreement and also concealing the Will alleged to have been executed by late Sh. Suresh Chand Dogra.

2. Mr. Ajay Mohan Goel, learned counsel for respondents No. 2 and 3 has raised two preliminary submissions:

(i) that the application under provisions of Indian Penal Code is not maintainable, that too, by simultaneously invoking the provisions of Section 151 CPC and if at all the application was maintainable, the same could only be maintained under the provisions of procedural law i.e. Code of Criminal Procedure;

(ii) that the application is not maintainable inasmuch as once it is not the case of the applicant that the offences enumerated above had been committed with respect to a document after it had been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in "custodia legis", the application would not be maintainable.

3. Insofar as the first contention regarding maintainability of the application under wrong provision of law is concerned, suffice it to say that it is well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision of law, has no effect as it would not vitiate the exercise of power and jurisdiction of this Court so long as the power and jurisdiction exists and can be traced to a source available in law. It is settled that mere mentioning of wrong provision of law when the power exercised is available even though under a different provision, is by itself of no consequence and would not be sufficient to invalidate the exercise of power.

4. Now, coming to the second submission, it is not in dispute that once the application/complaint pertains to an offence under Section 193 IPC, then the provisions of Section 195 Cr.P.C. would come into play. Section 195 of the Criminal Procedure Code reads thus:

> ***"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence****. - 1) No Court shall take cognizance-*
>
> *(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or*
>
> *(ii) of any abetment of, or attempt to commit, such offence, or*
>
> *(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;*
>
> *(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive),*

199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub- clause (i) or sub- clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate."

5. The issue in the instant case is no longer res-integra in view of the judgment of the Constitution Bench in ***Iqbal Singh Marwah and another*** vs. ***Meenakshi Marwah and another (2005) 4 SCC 370.*** The Constitution Bench after analyzing in detail the contours of provisions contained in Section 340, 195 (1) (b) and after referring to the earlier decisions in ***Patel Laljibhai Somabhai*** vs. ***State of Gujarat (1971) 2 SCC 376*** and the decision in ***Raghunath*** vs***. State of U.P. (1973) 1 SCC 564*** and after taking note of deletion of certain words occurring in Section 195 (1) of the old Code, and the 31st report of the Law Commission, came to hold as follows:

"23. *In view of the language used in Section 340 Cr.P.C. the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(i)(b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remedyless. Any interpretation which leads to a situation where a victim of a crime is rendered remedyless, has to be discarded.*

25. An enlarged interpretation to Section 195(1)(b)(ii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in Court, is capable of great misuse. As pointed out in Sachida Nand Singh, after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the

instance of a private party or the police until the Court, where the document has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of such a person may be delayed indefinitely. Such an interpretation would he highly detrimental to the interest of society at large.

33. In view of the discussion made above, we are of the opinion that Sachida Nand Singh has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) Cr.P.C. would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in custodia legis."

(underlining supplied by this Court).

6. A perusal of the aforesaid observation reveals that the Hon'ble Constitution Bench repelled the argument of strict construction and after distinguishing many decisions, came to hold that Section 195 is not a penal provision but is a part of procedural law, namely, Cr.P.C., which elaborately gives a procedure for trial of criminal cases.

7. Eventually, taking note of the facts in that case, the Court held the Will in question had been produced in the court subsequently and there was no allegation that the offence as enumerated in Section 195 (1) (b) (ii) was committed in respect of the said Will after it had been produced or filed in the Court, the bar created by the said provision would not come into play and hence, there was no embargo on the power of the Court to take cognizance of the offence on the basis of the complaint filed by the complainants therein, but the Court would not then act as a complainant.

8. Reverting to the facts, it would be noticed that in the entire application there is not even a single whisper that the offence with respect to the documents had been committed during the time when the document was in "custodia legis" of this Court.

9. Learned counsel for the applicant would however argue that since the original Special Power of Attorney was withheld from this Court, it would be this Court which alone have the jurisdiction to file the complaint as per the judgment in ***Iqbal Singh Marwah's*** case (supra).

10. This submission is equally without any force as firstly the applicant has not specifically raised this ground in the application and secondly, the ratio of the judgment in ***Iqbal Singh Marwah's*** case (supra) does not support such contention. Rather as observed earlier, the Hon'ble Supreme Court has refused to adopt an enlarged interpretation to Section 195 (1) (b) (ii) and the ratio of the judgment has been culled out in paragraph 33 of its judgment (quoted above).

11. In view of the aforesaid discussion, the preliminary objection raised by the learned counsel for respondents No. 2 and 3 is accepted and the application is held to be not maintainable and dismissed as such.

12. However, the dismissal of this application would not come in the way of the applicant in availing any other remedy which may be available to her under the law. The parties are left to bear their own costs.

OMP No. 106 of 2015

In view of dismissal of OMP No. 1443 of 2013, this application has been rendered infructuous.

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

Ashwani Sood ...Petitioner.
Versus
Mohini Devi Sood and another ...Respondents.

CMPMO No. 163 of 2015
Reserved on: 11.8.2015
Decided on: 12.8.2015

Indian Evidence Act, 1872- Section 45- Defendant moved an application for allowing handwriting expert to take photographs of the disputed agreement to sell for expert opinion and to produce the same in the Court- application was allowed by the Court- defendant No.1 had denied the execution of the agreement and stated that plaintiff used to take her signatures on blank papers- execution of the agreement to sell is under dispute- held that application for comparison of signatures can be filed at any stage and it cannot be rejected simply because there was delay in filing the application- the Court had rightly allowed the application- petition dismissed. (Para-8 to 13)

Cases referred:
Guru Govindu v. Devarapu Venkataramana AIR 2006 Andhra Pradesh 371
Janachaitanya Housing Ltd. v. M/s. Divya Financiers AIR 2008 Andhra Pradesh 163
Karuppa Gounder v. Kuppusamy AIR 2009 Madras 122
Medikonda Rama Swarajyalakshmi vs. Posina Satyanarayana, 1991 (1) And LD 210
Ghulam Ghouse and other vs. Madarse Jeelania Shama-UI-Uloom Educational Society and other, 2007 (4) And LD 434

For the Petitioner : Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishta, Advocate.
For the Respondents : Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the order dated 6.4.2015 rendered by the Civil Judge (Senior Division), Shimla in Civil Suit No. 99-1 of 2007.

2. "Key facts" necessary for the adjudication of this petition are that petitioner has instituted a Civil Suit No. 99-1 of 2007 against the respondents for permanent prohibitory injunction restraining the respondents from interfering with the possession in any manner, ownership, administration and management of land measuring 834.7 square yards comprised in Khasra No. 379/305/251 (old) and 940, 941 and 945 (new). Respondents have filed the written statement to the same.

3. Issues were framed by the trial Court on 26.5.2011. Petitioner has closed his evidence on 15.6.2013. Thereafter, respondent No.1 moved an application under Section 151 of the Code of Civil Procedure read with Section 45 of the Indian Evidence Act to allow the handwriting expert Shri Devendra Prashad, Forensic Document Expert to take the photographs of the disputed agreement to sell dated 9.10.1996 for its expert opinion and producing the same in the case. According to the averments contained in the application,

signatures of respondent No.1 were obtained by the petitioner on the blank paper in business dealings and the same have been misused. The application has been contested by the petitioner. According to the averments contained in the reply, the agreement dated 9.10.1996 stood admitted by respondent in her cross-examination in Civil Suit No. 103-1 of 2011/10 (Annexure P-7). Learned Civil Judge (Senior Division) allowed the application vide order dated 6.4.2015. Hence, this petition.

4. Mr. Ajay Kumar, learned Senior Advocate has vehemently argued that respondent No.1 has admitted the execution of agreement dated 9.10.1996. Thus, there was no requirement of sending the same to the expert.

5. Mr. Ashok Sood, Advocate has supported Order dated 6.4.2015.

6. I have heard the learned counsel for the parties and have gone through the pleadings carefully.

7. Suit for specific performance is based upon execution of the agreement dated 9.10.1996 executed by respondent No. 1. Petitioner has already led his evidence.

8. Mr. Ajay Kumar, learned Senior Counsel has vehemently argued that respondent No.1 in her cross-examination in Civil Suit No. 103-1 of 2011/2010 (Annexure P-7) has admitted that she came to know about the agreement, 20-25 years back. The agreement was read over to her by her husband. Her husband was educated. However, fact of the matter is that respondent No. 1 in her cross-examination has denied the execution of agreement in the month of October, 1996 vide Ext. PW-12/A. It has also come in her statement that petitioner used to obtained her signatures on blank papers. The application has been preferred by the respondents at the stage when their evidence was being recorded. The trial Court has come to a right conclusion that no prejudice would be caused to the petitioner if the photographs of the agreement are exhibited. The execution of the agreement Ext. PW-12/A dated 9.10.1996 is under dispute. There is neither any illegality nor any perversity in Order dated 6.4.2015 rendered by the learned Civil Judge (Senior Division), Shimla.

9. Learned Single Judge of Andhra Pradesh High Court in **Guru Govindu v. Devarapu Venkataramana** reported in AIR 2006 Andhra Pradesh 371, has held that the application under Section 45 of the Evidence Act need not be filed soon after written statement is presented. Party can file application even at the stage of arguments. Learned Single Judge has held as under:

> **[4] The trial Court dismissed the application of the petitioner on two grounds. The first is that it was filed at a belated stage and the second is that in view of existence of power in the trial Court under Section 73 of the Act, it may not be necessary to accede to the request to send the documents to an expert's opinion. The first reason assigned by the trial Court does not appear to be sound. It is not as if the application under Section 45 of the Act must be filed soon after the written statement is presented. There may be instances where the necessity to file such application would arise after the oral evidence of certain witnesses is over. In case, the party concerned is able to elicit necessary information or admissions during the course of evidence, the necessity to file an application under Section 45 of the Act may not arise. Nothing prevents the party to a suit to**

file an application under Section 45 of the Act, even at the stage of arguments.

10. A Division Bench of Andhra Pradesh High Court in **Janachaitanya Housing Ltd. v. M/s. Divya Financiers** reported in AIR 2008 Andhra Pradesh 163 has held that no time limit could be fixed for filing application under Section 45 of the Evidence Act for sending disputed signatures, writings or handwritings to handwriting expert for comparison and opinion. The Division Bench has held as under:

> **14. In view of the same, we are of the opinion that the court cannot lay down any hard-and-fast rules controlling the discretion of the court to send the disputed documents/writings for the opinion of the expert or to examine him in support of such opinion. On sending the document to handwriting expert and on receiving report, parties, on showing sufficient cause, may call upon the court to permit them to examine hand-writing expert or any witness in support or rebut the said opinion.**
>
> **16. For the reasons aforementioned, we answer the reference thus: "No time could be fixed for filing applications under Section 45 of the Indian Evidence Act for sending the disputed signature or writings to the handwriting expert for comparison and opinion and same shall be left open to the discretion of the court; for exercising such discretion when exigencies so demand, depending upon the facts and circumstances of the each case."**

11. Learned Single Judge of Madras High Court in **Karuppa Gounder v. Kuppusamy** reported in AIR 2009 Madras 122, has held that merely because there was delay in seeking opinion of expert, application should not be rejected. Learned Single Judge has held as under:

> **[5] A plain poring over and perusal of the relevant facts would exemplify and evince that the revision petitioner/ defendant even at the time of replying to the pre suit notice as well as in the written statement filed in the suit took up the consistent stand that the purported signature in the agreement to sell is not that of his and in such a case, the plaintiff himself could have taken steps to obtain handwriting expert's opinion in that regard, but he did not do so. Hence the defendant had come forward with such an I.A. for taking the assistance of handwriting expert, but the lower Court dismissed it.**
>
> **[6] I am of the considered opinion that obtaining handwriting expert's opinion in the facts and circumstances of this case would certainly help the Court to arrive at a consistent and firm conclusion. A plain reading of the order of the lower Court would convey the idea that the lower Court dismissed the I.A. on the sole ground that there was delay in applying to the Court by the defendant for getting the assistance of the handwriting expert. In such a case, the mere delay should not be taken as material, for the reason that as per the defendant's version, he awaited the plaintiff to take steps to obtain handwriting expert's opinion, but in this case, he did not do so. Hence, when the matter was posted for defence, he chose to invoke the power of the Court under Order 26 Rule 10(a) of CPC and to get assistance of handwriting expert to find out whether the purported signature of the defendant is that of his admitted signature. Even though Section 73 of**

the Indian Evidence Act might contemplate that the Court itself could compare the disputed signature with that of the admitted signature, nonetheless, the Court should be slow in resorting to such a procedure, to the effect judicial views are found set out in catena of decisions of the Hon'ble Apex Court reported in 1992 (3) SCC 701 (State of Maharashtra thro' CBI v. Sukhdev Singh @ Sukha and Ors.).

12. Learned Single Judge of Andhra Pradesh High Court in ***Medikonda Rama Swarajyalakshmi*** vs. ***Posina Satyanarayana***, 1991 (1) And LD 210 has held that the rights of petitioner would be affected if document is not sent to handwriting expert and the evidence which she seeks to lead would be denied to her. Learned Single Judge has held as under:

"[5] The learned Counsel for the petitioner contended that it is only after the plaintiff s witnesses asserted that the signature on Ex.A1 is that of the first defendant, the defendants now sought for sending the same to handwriting expert since according to the first defendant the signature found on Ex.A1 is not her signature and it cannot be said that there is any belatedness on the part of the petitioner-first defendant. From going through the impugned order, I find that the petition filed by the revision petitioner has been dismissed on the ground that the petitioner/ 1st defendant has filed the present petition at a belated stage and the same is intended only to protract the matter and enjoy the benefits from the land for some more time. But, in my opinion, it cannot be dismissed on the ground of belatedness. Even though the opinion of the handwriting expert cannot be conclusive, it is important piece of evidence to hold whether the suit document is forged document or not. Though, no doubt, the Courts have also got power under Section 73 of the Evidence Act to compare the disputed signature in order to give a finding on the issue involved, but at the same time, the Courts normally take the assistance of the handwriting expert. In these circumstances, I think it appropriate to send the disputed document for the opinion of the handwriting expert. However, the learned Counsel for the petitioner strenuously contended that the impugned order cannot be said to be a case decided for exercising jurisdiction of this Court under Section 115, CPC. He relied upon the judgments of the Supreme Court in S.S. Khanna v. F.J. Dillon, AIR 1964 SC 407, Baldevdas v. Filmistan Distributors, , and Gurdev Singh and others v. Mehnga Ram and another, 1997 (5) ALD (SCSN) 5, in support of his contention. From a reading of judgment in S.S. Khanna 's case (supra), I find that the Supreme Court ruled that the case decided need not be the entire suit decided and it may be at interlocutory stage. But, what is to be seen is whether the rights of the person are affected by the impugned order. The principle laid down by the Supreme Court cannot be disputed. The explanation added to Section 115, CPC specifically incorporated the principle laid down by the Supreme Court in the above judgment. But, what is to be seen is whether the rights of the petitioner would be affected by the impugned order or not. In my opinion, the rights of the petitioner would be affected if the document in question is not sent to the handwriting expert since to that extent the evidence which she seeks to lead would be denied to him. In fact, in Gurdev Singh's case (supra), the Honorable Supreme Court found fault

with the order of the High Court in setting aside the order of the appellate Court directing to send the document for the opinion of the handwriting expert and the Supreme Court further observed that the order of the appellate Court should not have been set aside by the High Court."

13. Learned Single Judge of Andhra Pradesh in ***Ghulam Ghouse and other*** vs. ***Madarse Jeelania Shama-Ul-Uloom Educational Society and other***, 2007 (4) And LD 434 has held that there is no bar to send documents to expert for comparison and opinion which would give quietus to plea taken by defendants. The Court has discretion to exercise its mind judiciously whether to send the disputed documents for opinion of expert or not. Learned Single Judge has held as under:

6. Whenever the signature on the document is disputed, the party who is disputing the signature may make an application under Section 45 of the Evidence Act to send the document to the expert for comparison. Normally, the Courts are inclined to allow the petition to send the documents so that the opinion of the expert would help the Court to come to a right conclusion regarding the genuineness of the document. The earlier application was dismissed by the lower Court on the ground that the documents filed by petitioners, which contain the admitted signatures, do not belong to the year 2006. The agreement of sale, covered by Ex.A-1, was executed by the defendants on 5-2-1993. The receipts, covered by Exs.A-2 to A-5, were also executed on 5-3-1993, 17-12-1993, 6-5-1993, 23-7-1993 and 19-8-1993. The disputed document is said to be a document regarding (sic. relating) to the extension of time by taking Rs. 25,000/- on 8-11 -2001, in addition to the amount already received towards sale consideration. The agreement of sale was executed for the sale of a share constructed in the area of 29.45 square yards at Medak town.

12. In the present case, the petitioners did not ask the opinion of the expert for different purposes. Both the applications were filed only for comparison of the signatures on the ground that those documents are fabricated documents. Therefore, the decisions rendered by this Court in the above judgments are clearly conveying that the Court can exercise its discretion depending upon the facts and circumstances and the defendants cannot ask for opinion for different parts of a disputed document for (sic. at) different times. In this case, the crucial issue regarding the limitation is involved through the crucial documents covered by Exs.A-6, A-8 and A-9.

14. On the basis of the principle laid down by the Supreme Court, there is no bar to send the document to the expert for comparison. The Court exercises its mind judiciously to give a right conclusion whether it is essential to send the documents for opinion of the experts. As already observed, the crucial issue regarding the maintainability of the suit is involved in the preset suit on the basis of Exs.A-6, A-8 and A-9. When such a crucial issue is involved, the lower Court ought to have exercised its discretion judiciously and come to a conclusion that the opinion of the expert would help the Court to give a quietus to the plea taken by the defendants.

15. After going through the entire material, I am of the view that the lower Court ought to have allowed the application, instead of dismissing it by observing that it is belated one. Immediately after examination of P.Ws.1 to 3, the defendants filed the application, therefore, it cannot be treated as belated application and the disposal of the earlier application will not operate as res judicata, as the present application was filed to compare the disputed signatures with Exs.A-1 to A-5. Therefore. I am inclined to set aside the impugned order.

14. Accordingly there is no merit in the petition and the same is dismissed so also the pending applications, if any. No costs.

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

Ashwani Sood ...Petitioner.

Versus

Mohini Devi Sood and another ...Respondents.

CMPMO No. 164 of 2015
Reserved on: 11.8.2015
Decided on: 12.8.2015

Indian Evidence Act, 1872- Section 45- Defendant moved an application for allowing handwriting expert to take photographs of the disputed agreement to sell for expert opinion and to produce the same in the Court- application was allowed by the Court- defendant No.1 had denied the execution of the agreement and stated that plaintiff used to take her signatures on blank papers- execution of the agreement to sell is under dispute- held that application for comparison of signatures can be filed at any stage and it cannot be rejected simply because there was delay in filing the application- the Court had rightly allowed the application- petition dismissed. (Para-8 to 13)

Cases referred:

Guru Govindu v. Devarapu Venkataramana, AIR 2006 Andhra Pradesh 371
Janachaitanya Housing Ltd. v. M/s. Divya Financiers, AIR 2008 Andhra Pradesh 163
Karuppa Gounder v. Kuppusamy, AIR 2009 Madras 122
Medikonda Rama Swarajyalakshmi vs. Posina Satyanarayana, 1991 (1) And LD 210
Ghulam Ghouse and other vs. Madarse Jeelania Shama-UI-Uloom Educational Society and other, 2007 (4) And LD 434

For the Petitioner: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishta, Advocate.
For the Respondents: Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the order dated 6.4.2015 rendered by the Civil Judge (Senior Division) in Civil Suit No. 103-1 of 2011/10.

2. "Key facts" necessary for the adjudication of this petition are that petitioner has instituted a suit against the respondents for specific performance of the agreement dated 9.10.1996. It was registered as Civil Suit No. 103-1 of 2011/10. According to the terms and conditions of the agreement Ext. PW-12/A, respondents had agreed to transfer the property in favour of the petitioner. Written statement was filed by respondent Nos.1 and 2. According the averments contained in the written statement, agreement dated 9.10.1996 was without consideration and was the result of fraud, misrepresentation and the same was not binding upon the respondents. The plaintiff has manipulated the signatures taking advantage of fiduciary relationship. Agreement dated 9.10.1996 did not give any right, title or interest to the petitioner in respect of the land in question or the hotel building or the hotel business.

3. Issues were framed by the trial Court on 26.5.2011. Petitioner has closed his evidence on 15.6.2013. Thereafter, respondent moved an application under Section 151 of the Code of Civil Procedure read with Section 45 of the Indian Evidence Act to allow the handwriting expert Shri Devendra Prashad, Forensic Document Expert to take the photographs of the disputed agreement to sell dated 9.10.1996 for its expert opinion and producing the same in the case. According to the averments contained in the application, signatures of respondent No.1 were obtained by the petitioner on the blank paper in business dealings and the same have been misused. The application has been contested by the petitioner. According to the averments contained in the reply, the agreement dated 9.10.1996 stood admitted by respondent in her cross-examination. Learned Civil Judge (Senior Division) allowed the application vide order dated 6.4.2015. Hence, this petition.

4. Mr. Ajay Kumar, learned Senior Advocate has vehemently argued that respondent No.1 has admitted the execution of agreement Ext. PW-12/A dated 9.10.1996. Thus, there was no requirement of sending the same to the expert.

5. Mr. Ashok Sood, Advocate has supported Order dated 6.4.2015.

6. I have heard the learned counsel for the parties and have gone through the pleadings carefully.

7. Suit for specific performance is based upon execution of the agreement dated 9.10.1996 executed by respondent No. 1. Petitioner has already led his evidence. Statement of respondent No.1 was also recorded as DW-1. The same has been placed on record.

8. Mr. Ajay Kumar, learned Senior Counsel has vehemently argued that respondent No.1 in her cross-examination has admitted that she came to know about the agreement Ext. PW-12/A , 20-25 years back. The agreement was read over to her by her husband. Her husband was educated. However, fact of the matter is that respondent No. 1 in her cross-examination has denied the execution of agreement in the month of October, 1996 vide Ext. PW-12/A. It has also come in her statement that petitioner used to obtained her signatures on blank papers. The application has been preferred by the respondents at the stage when their evidence was being recorded. The trial Court has come to a right conclusion that no prejudice would be caused to the petitioner if the photographs of the agreement are exhibited. The execution of the agreement Ext. PW-12/A dated 9.10.1996 is under dispute. There is neither any illegality nor any perversity in Order dated 6.4.2015 rendered by the learned Civil Judge (Senior Division), Shimla.

9. Learned Single Judge of Andhra Pradesh High Court in **Guru Govindu v. Devarapu Venkataramana** reported in AIR 2006 Andhra Pradesh 371, has held that the application under Section 45 of the Evidence Act need not be filed soon after written

statement is presented. Party can file application even at the stage of arguments. Learned Single Judge has held as under:

> **[4] The trial Court dismissed the application of the petitioner on two grounds. The first is that it was filed at a belated stage and the second is that in view of existence of power in the trial Court under Section 73 of the Act, it may not be necessary to accede to the request to send the documents to an expert's opinion. The first reason assigned by the trial Court does not appear to be sound. It is not as if the application under Section 45 of the Act must be filed soon after the written statement is presented. There may be instances where the necessity to file such application would arise after the oral evidence of certain witnesses is over. In case, the party concerned is able to elicit necessary information or admissions during the course of evidence, the necessity to file an application under Section 45 of the Act may not arise. Nothing prevents the party to a suit to file an application under Section 45 of the Act, even at the stage of arguments.**

10. A Division Bench of Andhra Pradesh High Court in **Janachaitanya Housing Ltd. v. M/s. Divya Financiers** reported in AIR 2008 Andhra Pradesh 163 has held that no time limit could be fixed for filing application under Section 45 of the Evidence Act for sending disputed signatures, writings or handwritings to handwriting expert for comparison and opinion. The Division Bench has held as under:

> **14. In view of the same, we are of the opinion that the court cannot lay down any hard-and-fast rules controlling the discretion of the court to send the disputed documents/writings for the opinion of the expert or to examine him in support of such opinion. On sending the document to handwriting expert and on receiving report, parties, on showing sufficient cause, may call upon the court to permit them to examine hand-writing expert or any witness in support or rebut the said opinion.**
>
> **16. For the reasons aforementioned, we answer the reference thus: "No time could be fixed for filing applications under Section 45 of the Indian Evidence Act for sending the disputed signature or writings to the handwriting expert for comparison and opinion and same shall be left open to the discretion of the court; for exercising such discretion when exigencies so demand, depending upon the facts and circumstances of the each case."**

11. Learned Single Judge of Madras High Court in **Karuppa Gounder v. Kuppusamy** reported in AIR 2009 Madras 122, has held that merely because there was delay in seeking opinion of expert, application should not be rejected. Learned Single Judge has held as under:

> **[5] A plain poring over and perusal of the relevant facts would exemplify and evince that the revision petitioner/ defendant even at the time of replying to the pre suit notice as well as in the written statement filed in the suit took up the consistent stand that the purported signature in the agreement to sell is not that of his and in such a case, the plaintiff himself could have taken steps to obtain handwriting expert's opinion**

in that regard, but he did not do so. Hence the defendant had come forward with such an I.A. for taking the assistance of handwriting expert, but the lower Court dismissed it.

[6] I am of the considered opinion that obtaining handwriting expert's opinion in the facts and circumstances of this case would certainly help the Court to arrive at a consistent and firm conclusion. A plain reading of the order of the lower Court would convey the idea that the lower Court dismissed the I.A. on the sole ground that there was delay in applying to the Court by the defendant for getting the assistance of the handwriting expert. In such a case, the mere delay should not be taken as material, for the reason that as per the defendant's version, he awaited the plaintiff to take steps to obtain handwriting expert's opinion, but in this case, he did not do so. Hence, when the matter was posted for defence, he chose to invoke the power of the Court under Order 26 Rule 10(a) of CPC and to get assistance of handwriting expert to find out whether the purported signature of the defendant is that of his admitted signature. Even though Section 73 of the Indian Evidence Act might contemplate that the Court itself could compare the disputed signature with that of the admitted signature, nonetheless, the Court should be slow in resorting to such a procedure, to the effect judicial views are found set out in catena of decisions of the Hon'ble Apex Court reported in 1992 (3) SCC 701 (State of Maharashtra thro' CBI v. Sukhdev Singh @ Sukha and Ors.).

12. Learned Single Judge of Andhra Pradesh High Court in ***Medikonda Rama Swarajyalakshmi*** vs. ***Posina Satyanarayana***, 1991 (1) And LD 210 has held that the rights of petitioner would be affected if document is not sent to handwriting expert and the evidence which she seeks to lead would be denied to her. Learned Single Judge has held as under:

"[5] The learned Counsel for the petitioner contended that it is only after the plaintiff s witnesses asserted that the signature on Ex.A1 is that of the first defendant, the defendants now sought for sending the same to handwriting expert since according to the first defendant the signature found on Ex.A1 is not her signature and it cannot be said that there is any belatedness on the part of the petitioner-first defendant. From going through the impugned order, I find that the petition filed by the revision petitioner has been dismissed on the ground that the petitioner/ 1st defendant has filed the present petition at a belated stage and the same is intended only to protract the matter and enjoy the benefits from the land for some more time. But, in my opinion, it cannot be dismissed on the ground of belatedness. Even though the opinion of the handwriting expert cannot be conclusive, it is important piece of evidence to hold whether the suit document is forged document or not. Though, no doubt, the Courts have also got power under Section 73 of the Evidence Act to compare the disputed signature in order to give a finding on the issue involved, but at the same time, the Courts normally take the assistance of the handwriting expert. In these circumstances, I think it appropriate to send the disputed document for the opinion of the handwriting expert. However, the learned Counsel for the petitioner strenuously contended that the impugned order cannot be said to be a case decided for exercising

jurisdiction of this Court under Section 115, CPC. He relied upon the judgments of the Supreme Court in S.S. Khanna v. F.J. Dillon, AIR 1964 SC 407, Baldevdas v. Filmistan Distributors, , and Gurdev Singh and others v. Mehnga Ram and another, 1997 (5) ALD (SCSN) 5, in support of his contention. From a reading of judgment in S.S. Khanna 's case (supra), I find that the Supreme Court ruled that the case decided need not be the entire suit decided and it may be at interlocutory stage. But, what is to be seen is whether the rights of the person are affected by the impugned order. The principle laid down by the Supreme Court cannot be disputed. The explanation added to Section 115, CPC specifically incorporated the principle laid down by the Supreme Court in the above judgment. But, what is to be seen is whether the rights of the petitioner would be affected by the impugned order or not. In my opinion, the rights of the petitioner would be affected if the document in question is not sent to the handwriting expert since to that extent the evidence which she seeks to lead would be denied to him. In fact, in Gurdev Singh's case (supra), the Honorable Supreme Court found fault with the order of the High Court in setting aside the order of the appellate Court directing to send the document for the opinion of the handwriting expert and the Supreme Court further observed that the order of the appellate Court should not have been set aside by the High Court."

13. Learned Single Judge of Andhra Pradesh in ***Ghulam Ghouse and other*** vs. ***Madarse Jeelania Shama-Ul-Uloom Educational Society and other***, 2007 (4) And LD 434 has held that there is no bar to send documents to expert for comparison and opinion which would give quietus to plea taken by defendants. The Court has discretion to exercise its mind judiciously whether to send the disputed documents for opinion of expert or not. Learned Single Judge has held as under:

6. Whenever the signature on the document is disputed, the party who is disputing the signature may make an application under Section 45 of the Evidence Act to send the document to the expert for comparison. Normally, the Courts are inclined to allow the petition to send the documents so that the opinion of the expert would help the Court to come to a right conclusion regarding the genuineness of the document. The earlier application was dismissed by the lower Court on the ground that the documents filed by petitioners, which contain the admitted signatures, do not belong to the year 2006. The agreement of sale, covered by Ex.A-1, was executed by the defendants on 5-2-1993. The receipts, covered by Exs.A-2 to A-5, were also executed on 5-3-1993, 17-12-1993, 6-5-1993, 23-7-1993 and 19-8-1993. The disputed document is said to be a document regarding (sic. relating) to the extension of time by taking Rs. 25,000/- on 8-11 -2001, in addition to the amount already received towards sale consideration. The agreement of sale was executed for the sale of a share constructed in the area of 29.45 square yards at Medak town.

12. In the present case, the petitioners did not ask the opinion of the expert for different purposes. Both the applications were filed only for comparison of the signatures on the ground that those documents are fabricated documents. Therefore, the decisions rendered by this Court in the above judgments are clearly conveying that the

Court can exercise its discretion depending upon the facts and circumstances and the defendants cannot ask for opinion for different parts of a disputed document for (sic. at) different times. In this case, the crucial issue regarding the limitation is involved through the crucial documents covered by Exs.A-6, A-8 and A-9.

14. On the basis of the principle laid down by the Supreme Court, there is no bar to send the document to the expert for comparison. The Court exercises its mind judiciously to give a right conclusion whether it is essential to send the documents for opinion of the experts. As already observed, the crucial issue regarding the maintainability of the suit is involved in the preset suit on the basis of Exs.A-6, A-8 and A-9. When such a crucial issue is involved, the lower Court ought to have exercised its discretion judiciously and come to a conclusion that the opinion of the expert would help the Court to give a quietus to the plea taken by the defendants.

15. After going through the entire material, I am of the view that the lower Court ought to have allowed the application, instead of dismissing it by observing that it is belated one. Immediately after examination of P.Ws.1 to 3, the defendants filed the application, therefore, it cannot be treated as belated application and the disposal of the earlier application will not operate as res judicata, as the present application was filed to compare the disputed signatures with Exs.A-1 to A-5. Therefore. I am inclined to set aside the impugned order.

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

Dabey Ram. ...Appellant

Versus

State of Himachal Pradesh and others. ...Respondents

LPA No. 399 of 2012
Judgment Reserved on 3.8.2015
Date of decision: 12.8.2015

Constitution of India, 1950- Article 226- Selection process for filling up the post of water carrier for Government Primary School was initiated in which both the appellant and respondent no. 4 participated- name of appellant was recommended by the Selection Committee- the selection was challenged on the ground that selection was against the policy/ instructions/ guidelines and notification of the government- the appointment of appellant was quashed on the ground that the Revenue record did not reflect that gift was made by appellant but shows that the gift made by "N" - the procedure prescribed under H.P. Panchayati Raj Rules was not followed while entering the name of the appellant in the family register of "N"- held that "N" was alive at the time of the selection – the will would come into operation after his death and therefore, the revenue record would only reflect the gift made by "N" and not by the appellant –no reasons are required to be recorded for

executing a Will - it was not specified in the order as to how the procedure prescribed under the Rules was not followed-appeal allowed and the order passed by Writ Court set aside.

(Para 7-12)

For the Appellant: Mr.Bimal Gupta, Senior Advocate with Mr.Vineet Vashishta, Advocate.

For the Respondents: Mr.Sharwan Dogra, Advocate General with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General for respondents No. 1 and 2.

Ms.Kiran Kanwar, Advocate, vice Mr.Anshul Bansal, Advocate, for respondent No. 3.

Mr. Sanjeev Kuthiala, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The appellant has taken exception to the judgment passed by the learned writ Court on 15.5.2012 in CWP (T) No. 8727 of 2008, whereby his appointment as Water Carrier came to be quashed and set aside.

2. The facts in brief may be noticed.

In the year 2002 selection process for filling up post of Water Carrier for Government Primary School, Barmadi was initiated, in which the appellant, as also respondent No. 4 (who was the writ petitioner) participated. The name of the appellant was recommended by the Selection Committee and he accordingly came to be appointed. His selection was questioned by the writ petitioner on the ground that his selection was against the policy/instructions/ guidelines and notification of the Government and the respondents have adopted a policy of pick and choose, depriving the writ petitioner of being appointed, though he belongs to IRDP/BPL category and is also from Scheduled Caste category. He claimed a preferential right on the ground that he had served the school free of cost and also donated land to the school.

3. The official respondents contested the petition and supported the appointment of the appellant herein and it was averred that the selection of the appellant has been made strictly in accordance with the instructions/guidelines issued by the State Government. The official respondents reproduced the recommendations of the Selection Committee, which are as under:-

"Applicant:-

Distance from home to school	Whether land was donated	SC/ST/OBC	Whether unemployed family	Viva	Total marks
Yes	Yes	Yes	Yes	-	-
10	**5**	**3**	**5**	**3**	**26**

Respondent No. 4:-

Distance from home to school	Whether land was donated	SC/ST/OBC	Whether unemployed family	Viva	Total marks

Yes	Yes	---	Yes	---	---
10	**5**	**---**	**5**	**6.5**	**26.5**

It appears that in the reply filed by the official respondents there was no mention of the appellant or his ancestors having donated land to the State Government so as to entitle him to the award of 5 marks. This led to the passing of the following order by the learned writ Court on 8.12.2010:-

> *"The respondent is directed to file a supplementary affidavit whether respondent No. 4 or his ancestors have donated the land entitling him to five marks by next date. List on* ***7th January, 2011.****"*

4. In compliance to the aforesaid direction, the official respondents filed supplementary affidavit, where it was mentioned that as per information received from the Block Elementary Education, Banjar, District Kullu, Sh. Narpat Ram, S/o Sh. Noop Ram R/o Village Jawal, P.O. Kanoun, Tehsil Sainj, District Kullu has donated 0-10 biswa of land to the Government Primary School, Barmadi and the appellant had also produced at the time of selection land donation certificate verified by Pradhan, in which Sh. Narpat Ram had executed a Will of his land in favour of the appellant. It was also averred that the appellant was the care taker of Sh. Narpat Ram, as he was living with him.

5. The writ Court quashed the appointment of the appellant on the grounds that:-

(i) The revenue record only reflects the gift made by Sh.Narpat Ram and not the appellant.

(ii) Will executed by Sh. Narpat Ram in favour of the appellant was not produced on record.

(iii) No reasons forthcoming why Sh. Narpat Ram made a Will in favour of the appellant.

(iv) The procedure prescribed under Sub Rule (2) of Rule 21 of the H.P. Panchayti Raj Rules, 1997 (for short the "Rules") has not been followed, while entering the name of the appellant in the Family Register of Narpat Ram.

6. The order passed by the learned writ Court has been assailed on various grounds, as taken in the memo of appeal.

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

Ground No. (i)

7. It is not in dispute that Sh. Narpat Ram was alive at the time of the selection and being the owner of the property his name was duly reflected in the revenue record. The Will executed by him would only come into operation after his death when succession on the basis of this Will is claimed and the property is mutated in favour of the legatee i.e. appellant and consequent to such mutation, these entries are then reflected and incorporated in the jamabandis. Therefore, it was what obvious that the revenue record would only reflect the gift made by Sh. Narpat Ram and not the appellant.

Ground No. (ii)

8. The original record of selection was produced for our perusal, which apart from containing other documents contained the Will executed by Sh. Narpat Ram in favour

of the appellant, which was executed and registered on 12.3.1981 and therefore, there was no reason to conclude that the Will executed by Sh. Narpat Ram was in fact not available on record.

Ground No. (iii)

9. Though the law does not envisage or provide for recording of reasons as to why one was bequeathing his property to another, but in the instant case, it has specifically been mentioned in the Will executed by Sh. Narpat Ram that his wife had left his company more than three years back and thereafter he was being looked after by his cousin Lal Chand and his nephew Dabey Ram (appellant herein) and that is why he was executing Will in favour of his cousin Lal Chand and nephew Dabey Ram.

Ground No. (iv)

10. Though the appellant has been non-suited on the ground of non compliance of Sub Rule (2) of Rule 21 of the H.P. Panchayati Raj Rules, but the record reveals that no such ground was even raised by the petitioner. Therefore, before invoking and applying this provision we feel it was incumbent upon the learned writ Court to have afforded an opportunity to the opposite parties to meet out this argument.

11. That apart, the impugned order does not even spell out as to how and in what matter the procedure prescribed under Sub Rule 2 of Rule 21 of the Rules had not been followed.

12. In view of the aforesaid discussion, we find merit in this appeal and the same is accordingly allowed. The writ petition filed by respondent No. 4 herein is ordered to be dismissed. Since the services of the appellant have been discontinued on 18.8.2013, he is directed to be reinstated in service with all back wages along with all consequential benefits, as if the appellant had throughout been in uninterrupted service, notionally, as per the directions passed by this Court earlier on 25.10.2013. Records of selection be returned against proper receipt. Parties are left to bear their costs.

****

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

Mukesh Thareja. ....Petitioner

Versus

Smt. Neelam Rana. ....Non-petitiner.

CMPMO No. 166 of 2015
ORDER Decided on: 12.8.2015.

Code of Civil Procedure, 1908- Section 24- Application for transfer of suit from Shimla to Kasauli on the ground of territorial jurisdiction- allowed as not opposed as matter pertains to the jurisdiction of the Kasauli courts.

For the petitioner : Mr. P.S. Goverdhan Advocate.
For the non-petitioner : Mr. Mr. G.C. Gupta Sr. Advocate with Ms. Meera Devi Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the non-petitioner submitted that he has no objection if Civil Suit No. 61/1 of 2014/12 titled Neelam Rana vs. Mukesh Thareja

is transferred from the Court of learned Civil Judge (Senior Division) Court No. 1 Shimla to the Court of learned Civil Judge (Senior Division) Kasauli because matter in dispute falls within the territorial jurisdiction of learned Civil Judge (Senior Division) Kasauli. In view of the fact that matter in dispute falls within the jurisdiction of learned Civil Judge (Senior Division) Kasauli, Civil Suit No. 61/1 of 2014/12 titled Neelam Rana vs. Mukesh Thareja is withdrawn from the Court of learned Civil Judge (Senior Division) Court No. 1 Shimla and is ordered to be transferred to the Court of learned Civil Judge (Senior Division) Kasauli for disposal strictly in accordance with law. Parties are directed to appear before the learned Civil Judge (Senior Division) Kasauli on date 11.9.2015. Entire record of Civil Suit No. 61/1 of 2014/12 titled Neelam Rana vs. Mukesh Thareja should reach in the Court of learned Civil Judge (Senior Division) Kasauli on or before 11.9.2015. CMPMO No. 166 of 2015 is disposed of.

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

National Insurance Company Ltd. .....Appellant.

Versus

Smt. Tripta Devi & ors. .....Respondents.

FAO No. 196 of 2007.
Reserved on: 10.8.2015.
Decided on: 12.8.2015.

Workmen Compensation Act, 1923- Section____- Award passed by the Commissioner Workmen Compensation challenged by the Insurance Company on the ground that Commissioner has wrongly applied the provisions of amended Act retrospectively- accident took place on 29.4.2000, whereas Commissioner applied Law amended after this date- Commissioner erred in applying the law not in force at the time of accident- there is nothing in insurance policy to exclude Insurance Company from not paying the interest- no pleading by the appellant to show that any clause to the agreement excluded its liability to pay the interest- plea that interest was not payable by the Insurance Company was not tenable- Driver not possessing valid driving licence- Learned Tribunal rightly held that Insurance Company was liable to pay compensation with liberty to recover the amount from the owner- appeal partly allowed. (Para-6 to 13)

Cases referred:

Rani Kour and others vs. Jagtar Singh and another, 2012 ACJ 2072

Manju Sarkar and others vs. Mabish Miah and others, (2014) 14 SCC 21

For the appellant: Mr. Deepak Bhasin, Advocate.

For the respondents: Mr. Ajay Dhiman, Advocate, for respondents No. 1, 5 & 6.
Ms. Salochna Rana, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the award dated 20.11.2006, rendered by the learned Commissioner, Workmen's Compensation, Dharamshala, Distt. Kangra, H.P. in case No. 2/2002, 1/2005.

2. Key facts, necessary for the adjudication of this appeal are that respondents No. 1 to 6, being legal heirs of deceased Prakash Chand, driver, who died in the accident during the course of his employment on 29.4.2000, have filed petition for grant of compensation under Workmen Compensation Act 1923 (hereinafter referred to as the Act). Late Sh. Prakash Chand was engaged as driver. He died in the accident on 29.4.2000 at 2:30 AM. He was 29 years of age at the time of accident. His wages were Rs. 4500/- per month. Respondent No. 7 was proceeded ex-parte on 24.9.2002 by the learned Commissioner.

3. The appellant Insurance Company contested the petition by filing preliminary objections as well. According to it, the vehicle in question was not insured with it. Sh. Prakash Chand has not died in the accident during the course of his employment.

4. The learned Commissioner framed the issues on 29.10.2002. The learned Commissioner awarded a sum of Rs. 6,10,840/- alongwith interest @ 12% in favour of the applicants on 20.11.2006. Hence, this appeal at the instance of the Insurance Company.

5. The appeal was admitted on 19.9.2007 on the following substantial questions of law:

> "1. Whether he Commissioner erred while fastening the liability upon the insurance company in the absence of any subsisting contract of insurance with the Respondent No. 1 to cover his employee's liability?
>
> 2. Whether the Commissioner is empowered to adopt his own procedure alien to the provisions of the W.C. Act and can apply the amended provisions of the Act with retrospective effect?
>
> 3. Whether the Ld. Commissioner was justified in imposing the interest and penalty on award amount upon the insurance company in the absence of any contract or statutory provision empowering him to do so?"

6. Mr. Deepak Bhasin, Advocate for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that the learned Commissioner has applied the amended provisions while awarding the compensation to the claimants. He then contended that the interest was not payable by the Insurance Company. He also argued that the vehicle in question was not insured with the appellant-Insurance Company. On the other hand, M/S. Ajay Dhiman and Salochna Kaundal, Advocates, have supported the award dated 20.11.2006.

7. I have heard learned counsel for the parties at length and gone through the records and order very carefully.

8. AW-1 Tripta Devi testified that her husband was driving the truck. He met with an accident on 29.4.2000. FIR was registered and post mortem was also conducted. The age of her husband was 29 years at the time of the accident. AW-2 Angrej Singh, PS Muktsar Punjab, has proved rapat Roznamcha No. 53 dated 29.4.2000. AW-3 Dr. M.G.Sharma, has proved the post mortem report Ext. PW-2/A.

9. RW-1 Bal Krishan Thakur, Clerk RLA Office Solan, has testified that as per the record, driving licence No. 9236/SLN/MLC/86 was not issued by MLO Solan in the name of Prakash Chand. He also deposed that from 1.1.1986 to 31.12.1986, total 531 licences had been issued from Sr. No. 1 to 531. Ext. RW-1/A was not issued by their office. RW-2 Gian Chand testified that he was the owner of truck No. HP-38- 9535. The truck was insured with the National Insurance Company, Dharamshala. He proved insurance vide Ext. RW-2/A. It was valid up to 14.10.2000. The accident occurred on 29.4.2000. The

driver Prakash Chand had valid and effective driving licence at the time of recruitment. He used to pay Rs. 3000/- per month to deceased Prakash Chand. He also used to pay allowances to him. He has proved driving licence Ext. RW-1/A.

10. The claimants have duly proved that the deceased has died during the course of his employment while driving truck No. HP-38-9535 on 29.4.2000. The claimants have proved insurance of the vehicle vide Ext. RW-2/A. The accident took place on 29.4.2000. The deceased was 29 years of age at the time of accident. It has also come on record that Ext. RW-1/A driving licence was not issued by MLO Office, Solan in the name of deceased. The Insurance Company has proved that the driver was not possessing valid and effective driving licence at the time of the accident. The vehicle in question was insured vide Insurance Policy Ext. RW-2/A. The Insurance Company was rightly made liable to pay compensation but could get it recovered from the owner on the basis of insurance policy Ext. RW-2/A.

11. Mr. Deepak Bhasin, Advocate, for the appellant has failed to show any clause whereby the interest was not payable by the Insurance Company. The learned Single Judge of Madhya Pradesh High Court (Indore Bench) in ***Rani Kour and others*** vs. ***Jagtar Singh and another***, 2012 ACJ 2072 has held that where Insurance Company has not expressly stipulated non-liability for payment of interest in the policy, it is liable to pay the interest on the amount of compensation. Learned Single Judge has held as under:

> "[14] Learned Advocate Mr. Sandip Shah appearing for respondent No. 1-original plaintiff in all the appeals referred to the documentary evidences as well as the pleadings in detail and submitted that the operations were performed on the left eye by defendant No. 3 and thereafter the operation was performed for removal of the left eye-ball by defendant No. 5 and again for cataract in the right eye the operation was performed by defendant No. 5. He submitted that if the chronology of events and the dates are considered, it is evident that there was sepsis in his left eye when the operation was performed. He submitted that with the same condition the operation could not have been performed. The submission with regard to endogenous infection in some other part of the body is misconceived as the pathological reports clearly state that the plaintiff was normal. He submitted that, thus, at the time of treating the patient when there was an injury and the blood had clotted, both defendant Nos. 3 and 4 tried to hush up, played mischief keeping the respondent-plaintiff in the dark which led to deterioration in not only the left eye but also affected his right eye. Learned Advocate Mr. Sandip Shah, therefore, submitted that if the pleadings in the form of written statement as well as the depositions are considered, it clearly suggests negligence in performance of the duty by all concerned including defendant Nos. 3 and 5. The Civil Hospital would be liable vicariously for the act of negligence by defendant No. 3.
>
> [15] He, therefore, submitted that when the person has lost vision of both the eyes because of any such carelessness or negligence, it cannot be a ground for further scrutiny on any technical grounds raised on the medical opinion. He submitted that the evidence on record as discussed at length in the impugned judgment clearly suggests that there was negligence on the part of original defendant No. 3-Dr. Bhikubhai Patel as well as defendant No. 5-Dr.

> Jagdishbhai Shah and both the doctors have failed in discharge of their duty exhibiting reasonable care and standard expected of a person in the medical profession. He, therefore, submitted that the appeals may be dismissed."

12. Their Lordships of the Hon'ble Supreme Court in ***Manju Sarkar and others*** vs. ***Mabish Miah and others***, (2014) 14 SCC 21 have held that in the absence of clause of contract of insurance excluding provision for interest, the insurance of company is liable to pay interest. Their Lordships have held as under:

> "13. A contention was raised by the learned counsel for the Respondent No.3 Insurance Company that they are not liable to pay the interest component and reliance was placed on the decision of New India Assurances Co. Ltd. Vs. Harshad Bhai Amrut Bhai Modhiya and another [(2006) 5 SCC 192] In the facts of the case on which the said decision arose, the contract of insurance entered into between the parties contained a proviso that the insurance granted is not extended to include any interest. In the present case there is nothing on record to show that respondent No.3 Insurance Company either pleaded about existence of such a clause in the contract of insurance or led any evidence to the said effect and hence the said decision will not help respondent No.3 in any way and the contention raised is devoid of merit."

13. The accident has taken place, as noticed hereinabove, on 29.4.2000. However, the learned Workmen's Commissioner has applied the amended provisions of law with retrospective effect, while calculating the wages of the deceased. The wages of the deceased at the relevant time were to be taken as Rs. 2000/- and thereafter, it was to be reduced to Rs. 1000/-. It was to be further multiplied by the relevant factor i.e. 209.92, at the age of 29. Thus, the learned Workmen's Commissioner has erred in applying the law. It is settled law that the law has to be applied which is prevalent at the time of the accident for calculating the compensation. The substantial questions of law are answered accordingly.

14. The petitioners, being the legal heirs of the deceased are entitled to compensation amount as under:

(1) Age 29 years, salary Rs. (2000 – 1000) = Rs. 1000 per month, for the purpose of compensation i.e Rs. 1000 x 209.92 = 2,09,920/-

(2) Simple interest @ 12% per annum from 29.4.2000, till date, comes out to Rs.3,84,909.312, instead of 6% awarded by the learned Commissioner.

(3) Total amount comes out to Rs. **5,94,829.312**.

15. Accordingly, the appeal is partly allowed. The claimants are entitled to compensation of Rs. **5,94,829.312,** as computed hereinabove, initially to be paid by the Insurance Company and the same can be recovered by the Insurance Company from respondent No. 7.

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

Sh. Rajinder & others. ...Petitioners

Versus

Sh. Gokal Chand and others. ...Respondents

Review Petition No. 91 of 2015 IN
LPA No.109 of 2007
Judgment Reserved on 3.8.2015
Date of decision: 12 .8.2015

Code of Civil Procedure, 1908- Order 47 Rule 1- Review petition was filed on the ground that as per clause 11 for grant of Nautor Scheme, 1975 a restriction of 15 years in respect of alienation has been provided whereas the Court had taken the period to be 20 years- Deputy Commissioner had only clarified his own order and the Court had wrongly concluded that he had reviewed it- Reply filed by official respondent admitted the time restriction for transfer to be 20 years and not 15 years - official respondents were the best authorities who could have stated about the time restriction – the question regarding review/clarification of the order by Deputy Commissioner had already been adjudicated- the question sought to be raised in the review petition cannot be gone into because power of review cannot be exercised on the ground that decision is incorrect or erroneous on merit - the parties are not entitled to rehearing under the guise of review and the Court while exercising the power of review cannot sit in appeal over its own order- petition dismissed. (Para 3-11)

Cases referred:

Chhajju Ram Vs. Neki, 1992 AIR (PC) 112

Moran Mar Basselios Catholicos Vs. Most. Rev. Mar Poulose Athanasius & Ors. 1995 1 SCR 520

For the Petitioners: Mr.Sanjeev Kuthiala, Advocate.

For the Respondents: Mr.Sharwan Dogra, Advocate General with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

By medium of this Petition under Order 47 Rule 1 read with Section 114 of the Code of Civil Procedure, the petitioners have sought review of judgment dated 2.5.2015, whereby LPA preferred by the appellants was dismissed.

2. The review has primarily been sought on the ground that as per clause 11 of the Grant of Nautor Scheme, 1975, a restriction of only 15 years in respect of alienation was provided, whereas the Court has taken this period to be 20 years. It is further contended that the Deputy Commissioner had only clarified his own order and this Court has wrongly concluded that he had infact reviewed it. The petitioner has also sought to invoke the provisions of the Government Grants Act to claim complete ownership and lastly has relied upon a judgment of this Court in Purshotam Vs. State of H.P., 1990 (2) SLC

206 to contend that alteration effected by a notification can only apply to a transaction subsequent to the date of said notification and cannot affect a concluded contract.

3. Section 114 of the Code of Civil Procedure (for short the "Code') reads thus:-

> *"114.* ***Review****—*
>
> *Subject as aforesaid, any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed by this Court, or*
>
> *(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."*
>
> Order 47 of the Code reads thus:-
>
> *"Review*
>
> *Application for review of judgment.- (1) Any person considering himself aggrieved,—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed, or*
>
> *(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.*
>
> *(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."*

4. The words "any other sufficient reason" as contained above have been interpreted in the case of ***Chhajju Ram Vs. Neki, 1992 AIR (PC) 112*** and approved by the Hon'ble Supreme Court in ***Moran Mar Basselios Catholicos Vs. Most. Rev. Mar Poulose Athanasius & Ors. 1995 1 SCR 520*** to mean *"a reason sufficient on grounds, at least analogous to those specified in the rule."*

5. Adverting to the facts of the case, it would be noticed that it was on the basis of reply filed by the official respondents to the writ petition, wherein they admitted the time restriction for transfer to be 20 years and not 15 years, that such findings regarding embargo on transfer was recorded. Indisputably, it was the official respondents, who alone were the best authorities that could have stated about the time period of the embargo placed on the transfer.

6. The learned counsel for the petitioners has vehemently argued that the Deputy Commissioner had not reviewed his order and had in fact only clarified the same.

This issue has already been dealt with in detail by this Court, as is evident from paragraphs 23 to 25 of the impugned order.

7. In so far as the applicability of the provisions of the Government Grants Act to claim complete ownership is concerned, suffice it to say that once the grant has been made to the predecessor-in-interest of the petitioners under a special scheme i.e. H.P. Grant of Nautor Land to Landless Persons and Other Eligible Persons Scheme of 1975, then the grant would essentially abide and will be governed by the provisions of the Scheme and not by the provisions of Government Grants Act.

8. Regarding the applicability of the ratio of the judgment in Purshotam's case supra, suffice it to say that not only this is not the pleaded case of the petitioner, but this point was not even argued and therefore, there was any occasion for this Court to have considered the submissions as are now sought to be made by the petitioners and therefore, even this contention of the petitioners is rejected being devoid of any merit.

9. This Court in M/s Harvel Agua India Pvt. Ltd. Vs. State of H.P. and others, Review Petition No. 4084 of 2013, decided on 9.7.2014, after taking note of various judgments of the Hon'ble Supreme Court observed as under:-

> *"10. Thus what appears to be more than settled law is that an error contemplated under the rule must be such, which is apparent on the face of the record and not an error which has to be fished out and searched. It must essentially be an error of inadvertence and definitely something more than a mere error and must be one which must be manifest on the face of the record. If the error is so apparent that without further investigation or inquiry only one conclusion can be drawn in favour of the applicant, in such circumstances, the review will lie. However, under the guise of review, the parties are not entitled to re-hearing of the same issue but the issue can be decided just by a perusal of the record and if it is manifest can be set right by reviewing the order. It must be remembered that in exercise of the powers of review this court cannot sit in appeal over its own order. Re-hearing of the matter is impermissible in law, since the power of review is an exception to the general rule that once the judgment is signed or pronounced, it should not be altered. It has to be remembered that power of review can be exercised for correction of a mistake but not to substitute a view. The review cannot be treated like an appeal in disguise.*
>
> *11. The error contemplated under the rule is that the same should not require any long-drawn process of reasoning. The wrong decision can be subject to appeal to a higher form but a review is not permissible on the ground that court proceeded on wrong proposition of law. It is not permissible for erroneous decision to be "re-heard and corrected." There is clear distinction between an erroneous decision and an error apparent on the face of the record. While the former can be corrected only by a higher form, the latter can be corrected by exercise of review jurisdiction. A review of judgment is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The present stage is not a virgin ground but review of an earlier order, which has the normal feature of finality."*

From the above observation, certain broad principles can be deduced regarding the maintainability/non-maintainability of the review petition:-

(A) When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record'

(iii) Any other sufficient reason.

(B) When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(v) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negative.

(x) Review is not maintainable on the basis of a subsequent decision/judgment of a coordinate or larger Bench of the Court or of a superior Court.

(xi) While considering an application for review, court must confine its adjudication with regard to the material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(xii) Mere discovery of a new or important matter or evidence is not sufficient ground for review. The parties seeking review has also to show that such mater or evidence was not within its knowledge and even after exercise of due diligence, the same could not be produced before the Court earlier.

We may clarify that the aforesaid principles are only broad guidelines and not caste-iron imperatives.

10. It is clear from the aforesaid discussion that the questions now sought to be raised in this petition cannot be gone into because the power of review cannot be exercised on the ground that the decision is incorrect or erroneous on merit, as the same lies within the ambit of higher court having appellate power which alone is in a position to correct the error committed by the subordinate courts by virtue of power of appeal conferred on the said court by some statute, of course subject to the exception that the error is otherwise apparent on the face of record and not an error which has to be fished out and searched. Under the guise of review, the parties are not entitled to re-hearing and this Court while exercising power of review cannot sit in appeal over its own order.

11. Having said so, it can safely be concluded that the petitioners have failed to make out a case within the four corners of Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure. Accordingly, we find no merit in this Review Petition and the same is 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.

State of Himachal Pradesh ...Appellant.

Vs.

Jatinder Kumar son of Shri Purshotam Chand and others ...Respondents.

Cr. Appeal No. 343 of 2010
Judgment reserved on: 23rd June 2015
Date of Judgment: 14th July, 2015

Indian Penal Code, 1860- Section 306- Deceased was treated with cruelty due to which she committed suicide by jumping into a rivulet – held, that there should be a direct nexus between abetment and suicide- prosecution witnesses had not deposed that accused had abetted the deceased to commit suicide- therefore, accused cannot be held liable for the commission of offence punishable under Section 306 of IPC. (Para-18)

Indian Penal Code, 1860- Section 498-A- Marriage of the deceased was solemnized with 'J' in 2003- accused ill-treated the deceased in her matrimonial home at Ludhiana- accused did not allow the deceased to meet or telephone her parents- deceased left her home and was not traceable- her dead body was found in a rivulet- it was duly proved by the testimonies of the prosecution witnesses that accused had treated the deceased with cruelty- this version was corroborated by the compromise effected between the parties- held, that husband is guilty of the commission of offence punishable under Section 498-A of IPC. (Para-14 to 17)

Cases referred:

M.Mohan vs. State, AIR 2011 SC 1238
Sangarabonia Sreenu vs. State of A.P., 1997(4) Supreme 214
Aruna Ramchandra Shanbaug vs. Union of India, AIR 2011 SC 1290
C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588

State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433
Sita Ram and others vs. State of Haryana and another, 1997(3) Crimes 362 (P&H)
Jagdish and others vs. State of Rajasthan and another, 1998 Cr.L.J. 554
Kanchanben Purshottambhai Bhanderi vs. State of Gujarat, (2015)2 SCC 690
Ram Kumar and another vs. State of Haryana, 1998 SCC (Cri) 833
Arun Vyas and another vs. Anita Vyas, AIR 1999 SC 2071
Virbhan Singh and another vs. State of U.P., AIR 1983 SC 1002
State of H.P. vs. Tara Dutta, AIR 2000 SC 297
Sangarabonia Sreenu vs. State of A.P., 1997(4) SCC 214
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Rai Singh vs. State of Haryana, AIR 1971 SC 2505
Jose vs. State of Kerala, AIR 1973 SC 944
State of Punjab vs. Bawa Singh, 2015(3) SCC 441
State of M.P. vs. Surendra Singh, AIR 2015 SC 398

For the Appellant: Mr. Ashok Chaudhary Additional Advocate General with Mr. V.S.Chauhan, Additional Advocate General and Mr.J.S.Guleria, Assistant Advocate General.
For the Respondents: Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment of acquittal passed by learned Additional Sessions Judge Fast Track Court Kangra at Dharamshala in RBT SC No. 36-K/VII/06/05 decided on dated 8.1.2010.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that marriage of deceased Neelam Kumari was solemnized with co-accused Jatinder in 2003. It is alleged by prosecution that after marriage accused persons beaten the deceased in her matrimonial house and also ill-treated the deceased in her matrimonial house. It is alleged by prosecution that on the intervening night of 19/20th February 2005 deceased committed suicide by way of jumping into a rivulet. It is alleged by prosecution that co-accused Jatinder Kumar husband of deceased did not allow the deceased to meet her parents and also did not allow the deceased to telephone her parents. It is alleged by prosecution that co-accused Jatinder Kumar took the deceased to Ludhiana in the year 2003 and had tortured her. It is further alleged by prosecution that on dated 18.2.2005 deceased Neelam Kumari had telephoned her mother from Kangra and told that accused persons had been regularly torturing her. It is alleged by prosecution that on dated 18.2.2005 at about 9.30 PM father of deceased Neelam Kumari was informed by accused persons that Neelam Kumari had left her matrimonial house and was not traceable. It is alleged by prosecution that thereafter dead body of deceased Neelam Kumari was found in Hattian rivulet. It is also alleged by prosecution that at the time of death of deceased Neelam Kumari deceased was carrying

pregnancy of 8/9 months. It is alleged by prosecution that in the year 2004 with the intervention of local Panchayat a compromise was also effected between Neelam Kumari and accused persons. It is alleged by prosecution that after recovery of dead body of deceased Neelam Kumari inquest reports Ext.PW6/A and Ext.PW6/B were prepared and photographs Ext.PW9/A-1 to Ext.PW9/A-12 and negatives of photographs Ext.PW9/A-13 to Ext.PW9/A-24 were taken. It is alleged by prosecution that thereafter Investigating Officer moved application Ext.PW9/B for conducting the post mortem of deceased Neelam Kumari and thereafter post mortem report Ext.PY and medical report Ext.PZ were obtained. It is alleged by prosecution that Investigating Officer also prepared spot map Ext.PW9/D.

3. Charge was framed against the accused persons by learned trial Court on dated 31.12.2007 under Sections 498-A and 306 IPC. Accused persons did not plead guilty and claimed trial.

4. Prosecution examined the following witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Punjab Singh
PW2	Satya Devi
PW3	Saneh Lata
PW4	Des Raj
PW5	Swarup Chand
PW6	Dalip Chand
PW7	Ram Gopal
PW8	Rakesh Kumar
PW9	Daya Nand Sharma
DW1	Dr. Kiran Kaushal
DW2	Sanjay Kumar
DW3	Dr. Sanjay Arora

4.1 Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description:*
Ex.PW7/A.	*Copy of FIR No. 61 of 2005*
Ex.PW8/A.	*Copy of Rapat No.5*
Ex.PW8/B	*Copy of Rapat No. 1 dt.20.2.2005*
Ext.PW1/A	*Statement under Section 154 Cr.P.C. of complainant*
Ex.PW7/B	*Endorsement on ruka*
Ext.PW9/D	*Spot map*
Ext.PW9/B	*Application for post mortem*
Ex.PW6/A	*Inquest paper*
Ext.PY	*Post mortem report*
Ext.PZ	*Letter of queries by the police*
Ext.PW9/A-1 to	*Photographs of dead body of Neelam*

Ext.PW9/A-12	*Kumari*
Ext.DW1/A	*Prescription card of Dr.B.L. Kapoor Hospital*
Ext.DW1/B	*-do-*
Ext.DW1/C	*OPD slip*
Ext.D1 to Ext.D15	*Test report's receipt etc.*
Ext.DW3/A to Ext.DW3/G	*Brain analysis reports of Neelam*

5. Learned trial Court acquitted all accused persons qua criminal offences under Sections 498-A and 306 IPC.

6. Feeling aggrieved against the judgment passed by learned Trial Court State of H.P. filed present appeal under Section 378 of Code of Criminal Procedure.

7. We have heard learned Additional Advocate General appearing on behalf of the State of H.P. and learned Advocate appearing on behalf of the respondents and also perused the entire record carefully.

8. Point 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.

9. ***ORAL EVIDENCE ADDUCED BY PROSECUTION:***

9.1. PW1 Punjab Singh has stated that deceased Neelam Kumari was his daughter. He has stated that in the month of March 2002 the deceased was married to accused Jatinder. He has stated that before marriage his daughter was doing Nursing training at Chandigarh. He has stated that after marriage deceased stayed in her matrimonial house for about two months. He has stated that he had paid the expenses of remaining period of training and sent the deceased daughter to complete the training. He has stated that after completion of training his deceased daughter went to the house of accused persons. He has stated that during training period whenever deceased used to go to the house of accused they used to torture her by demanding dowry. He has stated that co-accused Jatinder was working at Ludhiana and he took the deceased to Ludhiana. He has stated that co-accused Jatinder did not allow his daughter to telephone her parents and he used to torture her. He has stated that whenever his daughter used to telephone him she used to inform that accused persons have beaten and tortured her. He has stated that he went to Ludhiana twice but due to non-availability of address he could not find the residence of deceased daughter. He has stated that thereafter he came back from Ludhiana and talked to the parents of co-accused Jatinder but co-accused Krishna Devi and co-accused Purshotam told that they had no idea about the residence of co-accused Jatinder at Ludhiana. He has stated that on dated 18.2.2005 his deceased daughter telephoned his wife that she came back in her matrimonial house at Kangra. He has stated that his deceased daughter told his wife that all three accused persons used to torture her. He has stated that again on 9.30 PM co-accused Purshottam telephoned his wife that his deceased daughter left her matrimonial house and was not traceable. He has stated that on the next morning he and his wife went to house of accused and searched the deceased but she could not be traced. He has stated that thereafter dead body of deceased was found in Hattian rivulet. He has stated that at the time of death the deceased was carrying pregnancy of 8/9 months. He has stated that arms of deceased were broken and there was injury on head of deceased. He

has stated that he got suspicious that all accused persons have killed the deceased and threw dead body in rivulet. He has stated that police visited the spot and his statement Ext.PW1/A was recorded. He has stated that he did not lodge any complaint regarding torture because he intended to settle his deceased daughter in her matrimonial house. He has denied suggestion that deceased was suffering from mental depression before marriage. He has denied suggestion that he did not disclose the ailment of deceased to accused persons before marriage. He has denied suggestion that due to mental disorder at Ludhiana his deceased daughter used to go to the premises of neighbourer after crossing the walls. He has denied suggestion that accused persons did not torture the deceased. He has denied suggestion that accused persons have not beaten the deceased. He has denied suggestion that accused persons did not demand any dowry. He has denied suggestion that deceased had slipped due to mental ailment and also denied suggestion that deceased had jumped into the rivulet due to mental ailment.

9.2 PW2 Satya Devi has stated that deceased was her daughter who was married to co-accused Jatinder. She has stated that her daughter had qualified B.A. examination at the time of her marriage and she was performing Nursing training at Mohali. She has stated that at the time of marriage deceased had completed half period of training. She has stated that after marriage when her daughter came to her parental house she directly narrated to her that accused persons have demanded one car and Rs.1 lac (Rupees one lac only) in cash. She has stated that her daughter had directly told her that accused persons present in Court used to torture the deceased and used to beat the deceased and also used to taunt her. She has stated that Jitender took the deceased to Ludhiana where she stayed for about nine months. She has stated that co-accused Jitender did not allow the deceased to talk with her mother. She has stated that about one week prior to the death of her daughter, her daughter came to matrimonial house from Ludhiana. She has stated that on telephone the deceased was weeping and deceased told that she was in danger to her life. She has stated that thereafter dead body of deceased was found in Hattian rivulet. She has stated that her daughter was killed by accused persons. She has denied suggestion that deceased was suffering from mental ailment before her marriage. She has denied suggestion that due to mental ailment while crossing walls deceased had fallen and thereafter she developed some problem and thereafter she was brought and admitted in Nursing Home at Ludhiana. She has admitted that due to intervention of local Panchayat compromise was effected with accused persons. She has denied suggestion that deceased was also medically treated for her mental treatment at Amritsar. She has denied suggestion that accused persons have not tortured the deceased. She has denied suggestion that accused have not beaten the deceased. She has denied suggestion that accused persons have not demanded any dowry. She has denied suggestion that due to mental ailment deceased had jumped into the rivulet.

9.3 PW3 Sneh Lata has stated that in the year 2004 her father used to reside at Chandigarh. She has stated that her father was Superintendent in D.C. office. She has stated that Satya Devi is her husband's sister. She has stated that she was performing Nursing training along with deceased Neelam at Mohali (Chandigarh). She has stated that deceased Neelam was married with co-accused Jitender and deceased had continued her training after marriage. She has stated that in August 2004 she went to her father at Chandigarh and thereafter she went to her niece Sushma at Ludhiana. She has stated that she came to know that deceased Neelam and co-accused Jitender were also residing at Ludhiana and thereafter she telephoned them. She has stated that co-accused Jitender dis-connected the telephone but she again telephoned him and inquired about his address but he did not disclose the address. She has stated that in the evening co-accused Jitender and deceased Neelam came to meet her at Sushma's residence. She has stated that she inquired from co-accused Jitender as to why he did not allow deceased Neelam to talk with her

parents. She has stated that thereafter co-accused Jitender replied that he would torture the parents of deceased Neelam in the same manner. She has stated that thereafter she inquired from co-accused Jitender as to why he did not allow the deceased to go to her parents. She has stated that thereafter co-accused Jitender told that he would not allow the deceased Neelam to go to her parents. She has stated that co-accused Jitender also told that after delivery of child he would leave deceased Neelam. She has stated that thereafter she took deceased Neelam to another room and inquired from deceased. She has stated that thereafter deceased told that accused was beating her and torturing her. She has stated that deceased told her that co-accused Jitender used to lock the premises from outside whenever he used to go out. She has stated that deceased also told that accused had also demanded car. She has stated that thereafter she came to know about death of deceased Neelam. She has stated that dead body of deceased was lying in the rivulet. She has denied suggestion that deceased could not complete her training and she has denied suggestion that deceased could not qualify her exam. She has denied suggestion that deceased was not good in her studies. She has denied suggestion that deceased did not disclose about torture and maltreatment to her. She has denied suggestion that deceased did not tell her about demand of one car. She has denied suggestion that deceased was suffering from mental ailment. She has denied suggestion that because deceased was her niece she had given false statement.

9.4 PW4 Des Raj member of Gram Panchayat Mumta has stated that in the year 2004-05 he was member of Gram Panchayat Mumta and in the year 2004 he was called by Punjab Singh to have a discussion with in-laws of deceased Neelam. He has stated that he went to the spot where all three accused persons were present and compromise was effected between the parties and thereafter deceased was sent with co-accused Jitender to his in-laws house. He has stated that deceased told that she would not join the company of accused persons. He has stated that deceased told him that accused persons were troubling her. He has denied suggestion that neither deceased nor her father told him that accused persons were troubling the deceased.

9.5 PW5 Swarup Chand has stated that he remained Vice President of G.P. Mumta from 2000 to 2005. He has stated that he is mason by profession and he had carried out the construction work of house of Punjab Singh for 2/2½ years. He has stated that during those days Neelam was studying in college. He has stated that Punjab Singh told him that his deceased daughter used to remain upset because she was troubled by her in-laws. He has stated that thereafter Punjab told that deceased had expired and he had also visited the spot. He has denied suggestion that Punjab Singh did not inform him that his daughter was troubled by her in-laws.

9.6 PW6 Dalip Chand has stated that on dated 20.2.2005 he and Sanjay remained associated with police during investigation of case. He has stated that dead body of deceased took out from Hattian rivulet with the aid of fire brigade ladder in his presence. He has stated that parents of deceased were also present. He has stated that dead body was identified by parents of deceased. He has stated that inquest reports Ext.PW6/A and Ext.PW6/B were prepared by police which were signed by him and Sanjay. He has stated that behaviour of deceased was normal.

9.7 PW7 HC Ram Gopal has stated that on dated 20.2.2005 he was posted as MHC in P.S. Kangra and on dated 20.2.2005 he received ruka Ext.PW1/A containing endorsement of SI Dayanand. He has stated that he registered FIR Ext.PW7/A. He has stated that on the reverse of ruka Ext.PW1/A there is his endorsement within red encircle Ext.PW7/B.

9.8 PW8 Rakesh Kumar has stated that he has brought the rapat roznacha register of 2005. He has stated that in the year 2005 he was posted as M.C. P.S. Kangra. He has stated that co-accused Purshottam had lodged Rapat No. 5 dated 20.2.2005 in P.S. which is Ext.PW8/A. He has stated that dead body of deceased was found and rapat Ext.PW8/B was recorded. He has stated that rapats are true copies of original.

9.9 PW9 Daya Nand Sharma Inspector has stated that in the year 2005 he was posted as SHO P.S. Kangra. He has stated that after lodging rapat Ext.PW8/A he sent HC Som Raj with complainant Purshottam Chand in search of deceased. He has stated that at about 1.30 PM he received the telephonic call from Som Raj that dead body of deceased was found and thereafter rapat Ext.PW8/B was lodged. He has stated that thereafter he along with SHO and other police officials went to the spot. He has stated that he took photographs of dead body with his official camera and photographs are Ext.PW9/A-1 to Ext.PW9/A-12 and its negatives are Ext.PW9/A-13 to Ext.PW9/A24 and thereafter he prepared inquest reports Ext.PW6/A and Ext.PW6/B. He has stated that he also prepared application for post mortem report. He has stated that he recorded the statement of Punjab Singh. He has stated that after visiting the spot he prepared spot map Ext.PW9/D and also recorded statements of witnesses as per their versions. He has stated that he also obtained post mortem report of deceased and after completion of investigation he submitted the file to Inspector Sanjiv Chauhan who prepared the challan. He has stated that during investigation it was observed that deceased had stayed with co-accused Jitender at Ludhiana for 8-10 months. He has stated that rivulet in which dead body of deceased was found was 70-100 feet deep.

10. Statements of accused recorded under Section 313 Cr.P.C. Accused have stated that deceased Neelam Kumari was under mental depression and her conduct was not normal. Accused persons have stated that they did not maltreat deceased. Accused examined three witnesses in their defence.

11. DW1 Dr. Kiran Kaushal B.L. Kapoor Memorial Hospital Ludhiana has stated that he is working in B.L. Kapoor Memorial Hospital Ludhiana since 2001 and he brought the record pertaining to treatment of deceased Neelam Kumari. He has stated that deceased came in hospital for medical check-up on dated 20.12.2004 and deceased had visited the hospital on 27.12.2004 and 10.1.2005. He has stated that as per record deceased had alleged history of depression. He has stated that ultra sound of deceased was also conducted on dated 20.12.2004 and ultra sound report is Ext.DW1/B. He has stated that on dated 10.1.2005 deceased was admitted as indoor patient and was discharged on dated 14.1.2005. He has stated that test reports of deceased are Ext.D1 to Ext.D5 and receipts are Ext.D6 to Ext.D14. He has stated that discharge card of deceased is Ext.D15. He has stated that he does not remember whether during the period of medical treatment he had observed any symptoms of depression. He has stated that as per record there was no such symptom.

11.1 DW2 Sanjay Kumar has stated that accused persons are known to him. He has stated that house of accused is situated at the distance of 200-300 yards away from his house. He has stated that he is running a dairy farm in his house and he used to go to the house of accused to supply the milk. He has stated that Neelam wife of Jitender was also known to him. He has stated that he did not find the behaviour of deceased normal. He has stated that in his presence deceased was trying to dry the clothes in rain after washing them. He has stated that behaviour of accused towards Neelam was good. He has stated that accused persons belong to his caste. He has stated that he has got *bartandari* relations with accused persons on the occasion of marriages etc. He has denied suggestion that accused persons used to beat the deceased.

11.2 DW3 Dr. Sanjay Arora has stated that he has qualified his M.D in psychiatry from Dayanand Medical College at Ludhiana in 1993. He has stated that he has the experience of 15 years and now he is posted as consultant psychiatric in Arora Neuro Psychiatric and Drug De-addiction Centre Amritsar. He has stated that deceased came for medical treatment on dated 14.7.2004 and report Ext.DW3/A was issued by him and bears his signatures. He has stated that deceased visited again on dated 20.7.2004 and 30.7.2004. He has stated that he conducted brain mapping and neuro imaging tests. He has stated that when deceased approached him she was already on medical treatment. He has stated that deceased was suffering from psychiatric ailment. He has stated that he made the diagnose of schizophrenia and further stated that as pre result of said disorder at times patient becomes violent as sleep gets disturbed. He has stated that under this disorder patient may commit suicide. He has stated that he called the patient on 13.8.2004 for follow up checkup but deceased did not turn up. He has denied suggestion that on dated 14.7.2004 behaviour of deceased was normal. Again stated that he did not remember it exactly. He has admitted that schizophrenia is not by birth. He has admitted that there is no recital in his record that deceased was having tendency to commit suicide.

12. Submission of learned Additional Advocate General appearing on behalf of the State that criminal offence under Section 498-A IPC is proved against co-accused Jatinder is accepted for the reasons hereinafter mentioned. It is proved on record that deceased resided with co-accused Jatinder at Ludhiana for about nine months. PW1 Punjab Singh father of deceased has stated in positive manner that co-accused Jatinder took the deceased to Ludhiana and tortured her. PW1 Punjab Singh has stated in positive manner that deceased had told him directly that co-accused Jitender had beaten and tortured the deceased. Even co-accused Jitender did not give his residential address of Ludhiana to parents of deceased and even PW1 Punjab Singh could not locate the residential house of deceased and co-accused Jitender. As per testimony of PW1 Punjab Singh it is proved beyond reasonable doubt that co-accused Jitender had given mental cruelty to deceased in her matrimonial house when deceased resided with co-accused Jitender at Ludhiana for nine months. Testimony of PW1 is trustworthy reliable and inspires confidence of Court qua factum of mental cruelty upon deceased on the part of co-accused Jitender.

13. PW2 Satya Devi mother of deceased has specifically stated that deceased Satya Devi resided at Ludhiana with co-accused Jitender for nine months and PW2 has specifically stated that co-accused Jitender did not allow the deceased to talk with her parents. PW2 has further stated in positive manner that deceased has directly informed her in weeping condition that there was danger to her life. It is proved on record that due to intervention of Panchayat compromise was effected between the parties. It is held that as per testimony of PW2 Satya Devi it is proved on record beyond reasonable doubt that co-accused Jitender had caused mental cruelty to deceased when deceased resided with co-accused Jitender at Ludhiana for nine months.

14. Even as per testimony of PW3 Sneh Lata it is proved on record that co-accused Jitender had caused mental cruelty to deceased when deceased was residing with co-accused Jitender at Ludhiana for nine months. PW3 Sneh Lata has specifically stated that co-accused Jitender told in her presence that he would not allow deceased Neelam to go to her parents. PW3 has further stated in positive manner that co-accused Jitender told that he would torture the parents of deceased Neelam. Court is of the opinion that same facts amount to mental cruelty upon the married woman. Court is of the opinion that married woman has legal right to visit her parental house after marriage within a reasonable time. Denying the married woman to meet her parents amounts to mental cruelty as defined under Section 498-A IPC. Mental cruelty on the part of co-accused Jitender is proved as per

testimony of PW3. PW3 Saneh Lata has also stated in positive manner that co-accused Jitender in her presence told that after delivery of child he would leave Neelam. Court is of the opinion that above said words amount to mental cruelty to a married woman as defined under Section 498-A IPC. Testimony of PW3 Sneh Lata is trustworthy reliable and inspires confidence of Court. There is no evidence on record in order to prove that PW3 has hostile animus against co-accused Jitender.

15. Even PW4 Des Raj member of Gram Panchayat Mumta has stated in positive manner that deceased had told in his presence that accused was troubling her. Even deceased had told in presence of Ward member of Panchayat qua her mental cruelty. Mental cruelty on the part of co-accused Jitender is also proved as per testimony of PW4 Des Raj. Testimony of PW4 Des Raj is trustworthy reliable and inspires confidence of Court. There is no evidence on record in order to prove that PW4 has hostile animus against co-accused Jitender at any point of time.

16. Even PW5 Swarup Chand has specifically stated in positive manner that father of deceased had told him that deceased used to remain upset because she was troubled by her in-laws. Mental cruelty on the part of co-accused Jitender is proved as per testimony of PW5. Court is of the opinion that husband is under legal obligation to keep his married wife in proper manner in her matrimonial house. Court is of the opinion that it is the duty of husband to keep his wife in cordial atmosphere in matrimonial house so that no mental and physical torture should be caused to married woman in her matrimonial house. It is proved on record that dead body of deceased was found in Hattian rivulet. The dead body of deceased was found in rivulet which was deep. It is proved beyond reasonable doubt that deceased was found dead when deceased was pregnant of 8-9 months. It is proved on record that deceased had committed suicide within three years of her marriage. Even as per post mortem report deceased had died due to ante-mortem head injury.

17. Submission of learned Additional Advocate General appearing on behalf of State that criminal offence under Section 498-A IPC is also proved against co-accused Smt.Krishna Devi and co-accused Shri Purshottam Chand is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that co-accused Krishna Devi was mother-in-law of deceased and co-accused Purshottam Chand was father-in-law of deceased. It is proved on record that after marriage the deceased went to Ludhiana and resided at Ludhiana with co-accused Jitender for about nine months. There is no positive cogent and reliable evidence on record against co-accused Purshottam and co-accused Krishna Devi relating to cruelty as defined under Section 498-A IPC. Hence it is held that both co-accused Krishna Devi and Purshottam Chand have been correctly acquitted by learned trial Court.

18. Submission of learned Additional Advocate General appearing on behalf of State that criminal offence under Section 306 IPC is proved against the accused persons, beyond reasonable time is rejected being devoid of any force.

It is well settled law that there should be direct nexus between abetment and suicide. There is no evidence on record in order to prove that accused persons had abetted the deceased to commit suicide. None of prosecution witnesses have stated that accused persons have abetted the deceased to commit suicide. In absence of direct nexus between the abetment and suicide it is not expedient in the ends of justice to convict the accused persons under Section 306 IPC. It was held in case reported in ***AIR 2011 SC 1238 titled M.Mohan vs. State*** that in order to convict a person under section 306 IPC there has to be clear *mensrea* to commit offence. It was held that it requires an active act or direct act which leads the deceased to commit suicide and act must have been intended to push the deceased into

such position that deceased committed suicide. ***Also see 1997(4) Supreme 214 titled Sangarabonia Sreenu vs. State of A.P.. Also see AIR 2011 SC 1290 titled Aruna Ramchandra Shanbaug vs. Union of India.*** It is held that prosecution did not prove beyond reasonable doubt that accused have committed the criminal offence under Section 306 IPC.

19. Submission of learned Advocate appearing on behalf of the co-accused Jatinder that as per testimony of DW1 co-accused Jatinder be acquitted qua offence punishable under Section 498-A IPC is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the testimony of DW1 Dr. Kiran Kaushal posted in B.L. Kapoor Memorial Hospital Ludhiana (Punjab). DW1 Dr. Kiran Kaushal when appeared in witness box has specifically stated in cross examination that he did not remember whether during the period of medical treatment given by him to deceased Neelam Kumari he had observed any symptoms of depression. DW1 has specifically stated in cross examination that as per his record there was no symptom of depression. DW1 has specifically stated when appeared in witness box that he did not record any symptom of depression upon the deceased in medical record. It is held that testimony of DW1 is not helpful to co-accused Jatinder.

20. Submission of learned Advocate appearing on behalf of co-accused Jatinder that as per testimony of DW2 Sanjay Kumar co-accused Jatinder be acquitted qua criminal offence punishable under Section 498-A IPC is rejected being devoid of any force for the reasons hereinafter mentioned. DW2 Sanjay Kumar has specifically stated that accused persons belong to his caste and he has got *Bartandari* relations with accused persons. DW2 is not expert. It is well settled law that mental stage of individual can be proved in judicial proceedings only by medical officer or only by medical expert.

21. Submission of learned Advocate appearing on behalf of co-accused Jatinder that as per testimony of DW3 Dr.Sanjay Arora co-accused Jatinder be acquitted qua offence punishable under Section 498-A IPC is rejected being devoid of any force for the reasons hereinafter mentioned. DW3 has specifically stated that schizophrenia is not by birth. DW3 has also stated in positive manner that there is no recital in his record that deceased was having tendency to commit suicide. DW3 did not state in his report or in his testimony that attack of schizophrenia remained upon the deceased continuously for 24 hours. As per medical jurisprudence attack of schizophrenia is intervals in nature. There is no positive cogent and reliable evidence on record that on dated 19/20th October 2005 deceased had sustained attack of schizophrenia. No explanation has been given by accused persons that how the deceased reached at rivulet in the stage of schizophrenia attack which was situated at a distance of about 3 K.m. from police station and which was 100 feet in depth. Court is of the opinion that a person cannot reach in rivulet which is 100 feet in depth from her matrimonial house in schizophrenia condition. Age of deceased was 29 years and deceased was also pregnant when she died due to ante-mortem head injury. It is also proved on record as per testimony of PW3 Sneh Lata that deceased was acquiring Nursing training in Mohali Chandigarh. There is no evidence on record in order to prove that deceased was patient of schizophrenia continuously for 24 hours. On the contrary it is proved on record as per testimony of PW1, PW2 and PW3 that deceased had directly narrated the incident of her mental cruelty given to deceased by co-accused Jatinder when she was in sound state of mind. It is held that it is proved on record beyond reasonable doubt that deceased was not patient of schizophrenia continuously for 24 hours. There is no evidence on record in order to prove that when deceased committed suicide at that time the deceased was suffering the attack of schizophrenia.

22. Another submission of learned Advocate appearing on behalf of co-accused Jatinder that there is material improvement in testimonies of prosecution witnesses relating to offence under Section 498-A and on this ground co-accused Jatinder be acquitted is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the entire evidence of prosecution witnesses. Incident took place on the intervening night of 19/20th October 2005 and testimonies of prosecution witnesses were recorded on dated 25.5.2009, 26.5.2009, 27.5.2009 and 28.5.2009. There is no material contradiction in testimonies of prosecution witnesses. It was held in case reported in ***(2010)9 SCC 567 titled C. Muniappan and others vs. State of Tamil Nadu*** that even if there are some omissions contradictions and discrepancies then entire evidence would not be discarded. It was held that undue importance should not be given to omissions, contradictions and discrepancies which do not go to the root of the case. ***(See: AIR 1972 SC 2020 titled Sohrab and another vs. The State of Madhya Pradesh, See: AIR 1985 SC 48 titled State of U.P. 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 alias Prithi Chand and another vs. State of Himachal Pradesh; (2009)9 SCC 626 titled State of Uttar Pradesh vs. Santosh Kumar and others; See:AIR 1988 SC 696 titled Appabhai and another vs. State of Gujarat; See: AIR 1999 SC 3544 titled Rammi alias Rameshwar vs. State of Madhya Pradesh; See: (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another; See: (2004) 10 SCC 94 titled Laxman Singh vs. Poonam Singh and others; See: (2012)10 SCC 433 Kuriya and another vs. State of Rajasthan)***

23. Submission of learned Advocate appearing on behalf of co-accused Jatinder that all prosecution witnesses are interested witnesses and on this ground co-accused Jatinder be acquitted qua criminal offence punishable under Section 498-A IPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that cruelty to a married woman in her matrimonial house is committed within four walls of a room. It was held in case reported in ***1997(3) Crimes 362 (P&H) titled Sita Ram and others vs. State of Haryana and another*** that cruelty is not physical only but mental cruelty is also cruelty as defined under Section 498-A IPC. It is well settled law that offence under Section 498-A IPC is continuing offence. It was held in case reported in ***1998 Cr.L.J. 554 titled Jagdish and others vs. State of Rajasthan and another*** that if harassment is meted out to a married woman in her matrimonial house same would fall within the definition of mental cruelty. It was held in case reported in ***1993(3) Crimes 518 SC titled State of West Bengal vs. Orilal Jaiswal and another*** that where evidence about physical and mental torture of deceased came from relatives same should not be discarded simply on ground of absence of corroboration from independent witness. ***Also see (2015)2 SCC 690 titled Kanchanben Purshottambhai Bhanderi vs. State of Gujarat. See 1998 SCC (Cri) 833 titled Ram Kumar and another vs. State of Haryana.***

24. Another submission of learned Advocate appearing on behalf of co-accused Jatinder that if accused is acquitted qua offence punishable under section 306 IPC then co-accused Jatinder could not be convicted under Section 498-A IPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that criminal offences under Section 498-A IPC and criminal offence under Section 306 IPC are distinct criminal offences. It was held in case reported in ***AIR 1999 SC 2071 titled Arun Vyas and another vs. Anita Vyas*** that cruelty as defined and explained appended to Section 498-A IPC is continuing criminal offence on each occasion on which wife is subjected to cruelty. Section 498-A IPC was inserted in criminal law in Second Amendment Act 1983 and came into force w.e.f. 25.12.1983. Section 498-A IPC is the outcome of pressing need of society to stop all sorts of cruelty towards married women which became burning problem of the

country. ***(AIR 1983 SC 1002 titled Virbhan Singh and another vs. State of U.P.)*** In present case deceased had died in the alarming stage when she was in pregnancy of 8/9 months. Even non-born child in the womb had also died in present case. Even as per section 222(2) Code of Criminal Procedure 1973, accused can be convicted for minor offence. ***See AIR 2000 SC 297 titled State of H.P. vs. Tara Dutta. See 1997(4) SCC 214 Sangarabonia Sreenu vs. State of A.P.*** It was held in case reported in ***AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana*** that *falsus in uno falsus in omnibus* will not be applicable in criminal cases. ***Also See AIR 1971 SC 2505 titled Rai Singh vs. State of Haryana.*** It was held in case reported in ***AIR 1973 SC 944 titled Jose vs. State of Kerala*** that conviction can be given on testimony of solitary witness in criminal case if testimony of witness inspires confidence of Court.

25. In view of above stated facts appeal is partly allowed. Acquittal of co-accused Jatinder Kumar only relating to criminal offence under Section 498-A IPC is set aside and co-accused Jatinder Kumar is convicted under Section 498-A IPC. Judgment of learned trial Court is modified to this extent only. Now convicted Jatinder Kumar be heard on quantum of Court on 10.8.2015.

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Cr. Appeal No. 343 of 2010

QUANTUM OF SENTENCE

12.08.2015

Present:- Mr. Ashok Chaudhary, Additional Advocate General with Mr.V.S. Chauhan, Additional Advocate General, for the appellant.

Mr. Anup Chitkara Advocate, for convicted person.

Convicted person is in custody of HHC Narender Kumar No. 1294 and HHC Shyam Lal No. 822 of P.L.Kaithu.

26. We have heard learned Additional Advocate General appearing on behalf of the State and learned defence counsel appearing on behalf of the convicted person upon quantum of sentence.

27. Learned Additional Advocate General appearing on behalf of the State submitted before us that convicted namely Jatinder Kumar has committed cruelty upon the deceased in her matrimonial home when deceased was pregnant and deterrent punishment be awarded to the convicted person in order to maintain majesty of law in the society. On the contrary learned defence counsel appearing on behalf of convicted person submitted before us that convicted person is first offender and he has family and old parents to support and lenient view be adopted.

28. We have considered the submissions of learned Additional Advocate General appearing for the State and learned defence counsel appearing on behalf of convicted person carefully upon quantum of sentence.

29. In present case cruelty was committed upon the deceased when deceased was in pregnancy stage. It is well settled law that during pregnancy stage woman requires special care and special protection. It was held in case reported in ***2015(3) SCC 441 titled State of Punjab vs. Bawa Singh*** that sentence should commensurate with gravity of offence. ***Also see AIR 2015 SC 398 titled State of M.P. vs. Surendra Singh.*** In order to curb out the tendency of cruelty upon married women in pregnancy stage and in view of the

fact that deceased had died in prime age of 29 years due to cruelty committed upon the deceased in her matrimonial house and in order to maintain majesty of law in society we sentence the convicted person as follow:-

Sr. No.	Nature of Offence	Sentence imposed
1.	Offence under Section 498-A IPC	Convicted person is sentenced to undergo simple imprisonment for nine months and fine to the tune of Rs.20,000/- (Rupees twenty thousand only). In default of payment of fine convicted person shall further undergo simple imprisonment for two months.

30. Period of custody during investigation, inquiry and trial will be set off. Certified copy of this judgment and sentence be supplied to convicted person forthwith free of cost. Case property will be confiscated to State of H.P. after the expiry of period of filing further legal proceedings before the competent Court of law. File of learned trial Court along with certified copy of judgment and sentence will be sent back forthwith. Criminal appeal No. 343 of 2010 stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

State of H.P. .....Applicant.

Versus

Shyam Lal S/o Mansa Ram and another. ...Non-applicants.

Cr.MP(M) NO. 560 of 2015
Order reserved on:5.8.2015.
Date of Order: August 12, 2015.

Code of Criminal Procedure, 1973- Section 378(3)- Accused were acquitted of the commission of offences punishable under Sections 323, 341 and 506 read with Section 34 IPC by the trial court- appeal against acquittal was also dismissed- State filed an appeal against the acquittal- held, that there is no provision of regular second criminal appeal and such appeal is not maintainable before the High Court- appeal can only be preferred against the original acquittal order and not against the acquittal order affirmed by the Appellate Court. (Para-7 and 8)

For the applicant: Mr.M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana Asstt. Advocate General.

For Non-applicants. Mr.K.S.Banyal Sr. Advocate with Mr.Sudhir Thakur, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Order passed upon application filed under Section 378 (3) Cr.P.C.

Present application is filed under Section 378(3) of the Code of Criminal Procedure 1973 for grant of leave to file appeal under Section 378 of the Code of Criminal Procedure 1973 against the judgment of acquittal passed by learned trial Court and affirmed

by learned first appellate Court i.e. Sessions Judge Shimla relating to FIR No.31 dated 18.2.2012 registered in police station Shimla West under Sections 323,341,506 and 34 IPC.

BREIF FACTS OF THE CASE:

2. Smt. Tara Sharma wife of Sh Hukam Chand Sharma resident of Om Niwas House No. T-178 Jutogh Cantt Shimla H.P filed criminal complaint in police station under Section 154 of the Code of Criminal Procedure 1973. There is recital in criminal complaint that on dated 18.2.2012 brother-in-law of complainant namely Shyam Lal Sharma and his son namely Rakesh Sharma at about 4.30 came nearby residential house of complainant and started digging old water pipes which were installed behind the residential house of complainant. There is further recital in criminal complaint that complainant was standing upon the roof of her residential house and complainant requested accused persons to take water pipes of dirty water through other location. There is further recital in criminal complaint that thereafter Shyam Lal and his son Rakesh Sharma started verbal altercations with complainant. There is further recital in criminal complaint that thereafter accused Rakesh Kumar had slapped the complainant and caught complainant from her neck. There is further recital in criminal complaint that thereafter Shyam Lal Sharma also started beatings complainant namely Smt. Tara Sharma. There is further recital in criminal complaint that entire incident was witnessed by Sharda Sharma, Suman Rana and Bandana Sharma. There is further recital in criminal complaint that golden article of complainant was also lost. There is further recital in criminal complaint that when complainant tried to enter into her residential house then accused persons have stopped the complainant upon path. There is further recital in criminal complaint that accused persons have also threatened the complainant that they would kill the complainant.

3. Thereafter FIR No. 31 of 2012 was registered under Sections 323, 341, 506 read with Section 34 IPC in police station Boileauganj District Shimla HP. Thereafter police challan under Sections 323, 341, 506 read with Section 34 IPC was filed before learned Chief Judicial Magistrate Shimla and learned Chief Judicial Magistrate Shimla in Criminal Case No. 31/2 of 2012 titled State of H.P. Vs. Shyam Lal and another on dated 3.9.2013 acquitted both accused persons.

4. Thereafter State of H.P. filed Criminal Appeal No.6/S/10 of 2014 titled State of H.P. Vs. Shyam Lal and another before learned Sessions Judge Shimla and learned Sessions Judge Shimla affirmed the judgment of acquittal passed by learned trial Court on dated 7.2.2015. Thereafter State of H.P. filed regular second criminal appeal against acquittal judgments before High Court of HP and sought leave of the High Court to file regular second criminal appeal against acquittal judgment of learned trial Court and against acquittal judgment of learned Sessions Judge Shimla HP under Section 378(3) Code of Criminal Procedure 1973.

5. Court heard learned Additional Advocate General appearing on behalf of applicant and Court also heard learned Advocate appearing on behalf of non-applicants. Court also perused entire record of learned trial Court and record of learned Sessions Judge Shimla HP.

6. Following points arise for determination in the present application.

(1) Whether regular second criminal appeal against findings of acquittal judgment passed by learned trial Court and affirmed by learned Sessions Judge is maintainable before High Court of HP under Section 378(b) of Code of Criminal Procedure 1973?.

(2) Final Order.

Finding upon Point No.1.

7. Submission of learned Additional Advocate General appearing on behalf of State that regular second criminal appeal is maintainable before Hon'ble High Court of HP under Section 378(b) of the Code of Criminal Procedure 1973 against acquittal judgment passed by learned trial Court and affirmed by learned Sessions Judge under Section 378(b) Code of Criminal Procedure 1973 is rejected being devoid of any force for the reasons hereinafter mentioned. Appeal against acquittal is provided under Section 378 Chapter XXIX of the Code of Criminal Procedure 1973 which is quoted in toto.

> 378 Appeal in case of acquittal (1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5)—
>
> (a) The District Magistrate may in any case direct the Public Prosecutor to present an appeal to the Court of Sessions from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence.
>
> (b) The State Government may in any case direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court (not being an order under clause (a)) or an order of acquittal passed by the Court of Session in revision.
>
> (2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code [the Central Government may subject to the provisions of sub-section (3)] also direct the Public Prosecutor to present an appeal.
>
> > (a) To the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence.
> >
> > (b) To the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision).
>
> (3) (No appeal to the High Court) under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.
>
> (4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court.
>
> (5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months where the complainant is a public servant, and sixty days in every other case computed from the date of that order of acquittal.
>
> (6) If in any case the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

8. In the present case it is proved on record that learned Chief Judicial Magistrate Shimla in Criminal Case No. 31/2 of 2012 decided on 3.9.2013 titled State of HP Vs. Shyam Lal and another had acquitted both accused persons. It is also proved on record that thereafter criminal appeal under Section 378 of the Code of Criminal Procedure 1973 was filed before learned Sessions Judge Shimla by State of HP and same was registered as

Criminal Appeal No. 6/S/10 of 2014 titled State of HP Vs. Shyam Lal and another. It is proved on record that on dated 7th February 2015 learned Sessions Judge Shimla affirmed the judgment passed by learned trial Court and dismissed the appeal filed by State of HP. It is proved on record that thereafter State of HP filed regular second criminal appeal against findings of acquittal passed by learned trial Court and affirmed by learned Sessions Judge. It is held that there is no provision of regular second criminal appeal against the acquittal judgment under the Code of Criminal Procedure 1973. It is held that regular second criminal appeal against findings of acquittal judgment passed by learned trial Court and affirmed by learned Sessions Judge is not maintainable before the High Court in view of Chapter XXIX of Code of Criminal Procedure 1973. It is held that words from an original or appellate order of an acquittal passed by any Court other than a High Court mentioned in Section 378(b) of the Code of Criminal Procedure 1973 means original acquittal judgment passed by learned trial Court or original acquittal judgment passed by learned Sessions Judge and did not cover both acquittal judgment passed by learned trial Court and acquittal judgment passed learned first appellate Court i.e. Sessions Judge subsequently. It is held that when judgment of acquittal of learned trial Court is affirmed by learned Sessions Judge then revision petition under Section 397 or under section 401 Code of Criminal Procedure 1973 is maintainable before High Court. In view of above stated facts point No.1 is answered in negative against the State of HP.

Point No.2 (Final Order)

9. In view of fact that State of H.P. did not file any revision petition under Section 397 or under Section 401 Code of Criminal Procedure 1973 before High Court against acquittal judgment of learned trial Court i.e. Chief Judicial Magistrate Shimla HP and against acquittal judgment of learned Sessions Judge Shimla HP application filed under Section 378(3) Code of Criminal Procedure 1973 for leave to file criminal appeal under Section 378(b) is rejected. Cr.MP(M) No. 560 of 2015 is disposed of accordingly. File of learned trial Court and learned Sessions Judge be transmitted forthwith along with certify copy of order and file of this Court after due completion be consigned to record room forthwith.

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

RFA Nos. 280 of 2008 along with RFA Nos. 281 of 2008, 282 of 2008, 283 of 2008, 284 of 2008, 285 of 2008, 286 of 2008, 287 of 2008 and 288 of 2008
Judgment reserved on 29th July 2015
Date of Judgment 12th August 2015

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1. RFA No. 280 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
.....Appellants

Versus

Ishwar Prashad son of Jakhu and others .....Respondents

2. RFA No. 281 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
....Appellants

Versus

Godawari d/o late Smt. Rajjo Devi .....Respondent

3. RFA No. 282 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
....Appellants
Versus
Godawari d/o Late Smt. Rajjo Devi and another .....Respondents

4. RFA No. 283 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
.....Appellants
Versus
Gurudei widow of Shri Ravi Dutt Sharma .....Respondent

5. RFA No. 284 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
.....Appellants
Versus
Salig Ram son of Shri Dhuru and another .....Respondents

6. RFA No. 285 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
. .....Appellants
Versus
Nand Lal son of Shri Sihnu and others .....Respondents

7. RFA No. 286 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
....Appellants
Versus
Kanshi Ram (died) through LRs Ashok Kumar son of late Shri Kanshi Ram and others .....Respondents

8. RFA No. 287 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
.....Appellants
Versus
Bhagat Ram son of Shri Prabhu and others .....Respondents

9. RFA No. 288 of 2008
The Land Acquisition Collector HP PWD Mandi, District Mandi and another
....Appellants
Versus
Bali Ram son of Noulu .....Respondent

Land Acquisition Act, 1894- Section 11(A)- Land was acquired for the construction of Bamta-Ali Khad-Kothi Kandrour road in village Bhandwar Tehsil Sadar District Bilaspur- notification under Section 4 was issued on 10.6.1998 and notification under Sections 6 and 7 was issued on 7.6.1999- award was passed by Land Acquisition Collector on 25.2.2004- it was held by Learned District Judge, Bilsapur that award passed by Land Acquisition Collector was passed beyond the period of two years- he ordered the issuance of fresh notification to seek recovery of amount paid in accordance with law- appeal was preferred before the High Court- held, that award was passed beyond a period of two years- Section 11(A) provides that award is to be passed within a period of two years and uses the word 'shall' which shows that period of two years is mandatory- mere fact that the party participated in the hearing will not constitute an estoppel as their can be no estoppel against the law- Court was duty bound to look into the question of limitation, even if such question was not raised by any party- appeal dismissed. (Para-5 to 9)

Case referred:
Indra Bahadur Singh vs. Bar Council of U.P. AIR 1986 All. 56 (DB)

For the Appellants:	Mr. M.L. Chauhan, Additional Advocate General with Mr.J.S.Rana Assistant Advocate General.
For the Respondents:	None.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

RFA Nos. 281 of 2008 to RFA Nos. 288 of 2008 are consolidated with RFA No. 280 of 2008 because all regular first appeals filed against the same award passed by learned District Judge Bilaspur. Learned District Judge Bilaspur consolidated land reference petitions and passed the same award. All regular first appeals are consolidated in order to avoid conflicting award.

Brief facts of the case

2. Land Acquisition Collector HPPWD (CZ) Mandi passed award No. 40 on dated 25.2.2004 wherein the land was acquired for construction of Bamta-Ali Khad-Kothi Kandrour road in village Bhandwar Tehsil Sadar District Bilaspur (H.P.) Notification under Section 4 was issued in H.P. Rajpatra on dated 10.6.1998 and notification under Sections 6 and 7 of Land Acquisition Act 1894 was issued in H.P. Rajpatra on dated 7.6.1999. The award was passed by Land Acquisition Collector HPPWD (CZ) Mandi on dated 25.2.2004. Land reference petitions were instituted in the year 2004 before learned District Judge Bilaspur H.P. Learned District Judge Bilaspur H.P. dismissed all reference petitions with observation that award was not passed within two years after notification issued under Section 6 of Land Acquisition Act 1894. Learned District Judge held that award passed by Land Acquisition Collector HPPWD(CZ) Mandi was untenable award in view of Section 11(A) of Land Acquisition Act 1894. Learned District Judge directed either to issue fresh notification under Section 4 of Land Acquisition Act or to seek recovery of amount paid to land owners in accordance with law. Learned District Judge further directed that in case fresh notification issued then amount of compensation received by petitioners with interest would be adjusted.

3. Feeling aggrieved against the award passed by learned District Judge Bilaspur dated 9.7.2008 Land Acquisition Collector HPPWD Mandi filed RFAs Nos. 280 of 2008 to 288 of 2008. None appeared on behlaf of the respondents despite service.

4. Court heard learned Additional Advocate General appearing on behalf of appellants in all appeals.

5. Submission of learned Additional Advocate General appearing on behalf of appellants that learned District Judge had failed to appreciate the documents on record and oral evidence adduced by parties and on this ground appeals be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Learned District Judge has dismissed the reference petitions on the ground that award was not passed by Land Acquisition Collector HPPWD (CZ) Mandi within two years from the date of publication of declaration under Section 6 of Land Acquisition Act 1894. As per Section 11(A) of Land Acquisition Act 1894 it is obligatory upon the Collector to pass award under Section 11 of Land Acquisition Act 1894 within two years from the date of publication of declaration. Section 11(A) of Land Acquisition Act 1894 is quoted in toto:-

> ***"11A.Period within which an award shall be made-*** *(1) The Collector shall make an award under Section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period the entire proceedings for the acquisition of the land shall lapse :*
>
> *Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act 1984 the award shall be made within a period of two years from such commencement.*
>
> *Explanation-In computing the period of two years referred to in this section the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded.)*

It is proved beyond reasonable doubt that Land Acquisition Collector did not pass the award within two years from the date of publication of declaration under Section 6 of Land Acquisition Act 1894. In present case declaration under Section 6 was published in H.P. Rajpatra on dated 7.6.1999 and same was published in newspaper Indian Express on dated 23.6.1999 and same was published in Vir Partap on dated 23.6.1999 and wide publicity was effected in locality on dated 11.11.1999. Award No. 40 was passed by learned Land Acquisition Collector HPPWD (CZ) Mandi on dated 25.2.2004. It is proved on record that award No. 40 dated 25.2.2004 was not passed by learned Land Acquisition Collector HPPWD (CZ) Mandi within two years after publication of declaration issued under Section 6 of Land Acquisition Act 1894. The word "shall" has been mentioned in Section 11 (A) of Land Acquisition Act 1894 and word "shall" is mandatory in nature and not directory in nature. In view of proved facts that Land Acqusition Collector HPPWD(CZ) Mandi did not pass award No. 40 within two years from the date of publication of declaration under Section 6 of Land Acquisition Act 1894 it is held that entire proceedings for the acquisition of land passed under award No. 40 dated 25.02.2004 stood lapsed as per provision of Section 11-A of Land Acquisition Act 1894.

6. Another submission of learned Additional Advocate General appearing on behalf of appellants that owners of land have participated in inquiry proceedings of Land Acquisition Collector Mandi after notification issued under Section 4 of the Act and award was announced in presence of land owners on dated 25.2.2004 and land owners did not raise any objection under Section 11(A) of Land Acquisition Act and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Section 11 (A) is incorporated in Land Acquisition Act 1894. Land Acquisition Act 1894 is a special Act. There is specific provision under Section 11 (A) that award should be annoucned by the Collector within two years from the date of publication of declaration under Section 6 of Land Acquisition Act 1894. It is well settled law that no estoppel against law can be pleaded by any of the parties before Court of law. ***(See AIR 1986 All. 56 (DB) titled Indra Bahadur Singh vs. Bar Council of U.P.)***

7. Another submission of learned Additional Advocate General appearing on behlaf of appellants that land owners have raised the objection relating to enhancement of compensation under Section 18 of Land Acquisition Act and did not raise any objection of limitation as mentioned under Section 11(A) of Land Acquisition Act 1894 and on this ground appeals be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 3 of Limitation Act 1963 the Courts are under legal obligation to dismiss the suits, appeals and applications filed after the prescribed period of limitation although limitation is not pleaded as a defence. It is held that all Courts are under legal obligation to dismiss all appeals, suits and applications which are filed beyond limitation even though limitation is not pleaded as a defence.

8. Another submission of learned Additional Advocate General appearing on behalf of appellants that no issue of limitation was framed by learned District Judge Bilaspur and law of limitation was raised when the case was listed for arguments before learned District Judge Bilaspur and on this ground appeals be accepted is rejected being devoid of anty force for the reasons hereinafter mentioned. It is held that as per Section 3 of Limitation Act 1963 the Courts are under legal obligation to dismiss all suits, appeals and applications which are filed beyond limitation period. As per Section 11 (A) of Land Acquisition Act 1894 there is specific limitation that award should be passed by Land Acquisition Collector within two years after issuance of declaration under Section 6 of Land Acquisition Act 1894. Court is of the opinion that in present case there is no need of framing any issue relating to limitation because there is positive evidence on record as per award No. 40 that declaration under Section 6 of Land Acquisition Act 1894 was issued on dated 7.6.1999 and award No. 40 was passed by learned Land Acquisition Collector on dated 25.2.2004. There is no issue on facts inter se the parties relating to issuance of declaration under Section 6 of Land Acquisition Act 1894 and relating to date of award No. 40 passed by learned Land Acquisition Collector HPPWD (CZ) Mandi. It is admitted case of both the parties that declaration under Section 6 of Land Acquisition Act 1894 was issued in H.P. Rajpatra on dated 7.6.1999 and award was passed by Land Acquisition Collector on dated 25.2.2004. In view of the fact that there was no issue inter se the parties relating to issuance of declaration under Section 6 and relating to passing of final award No. 40 by Land Acquisition Collector Court is of the opinion that learned District Judge was not under legal obligation to frame issues qua facts which were not in dispute inter se parties. It is well settled law that issues are framed if there is conflict between the parties relating to facts. In present case there is no conflict between the parties relating to issuance of declaration under Section 6 of Land Acquisition Act and relating to passing of award No. 40 by learned Land Acquisition Collector HPPWD (CZ) Mandi. Hence it is held that it was not obligatory upon learned District Judge to frame issues upon point of limitation.

9. In view of above stated facts RFA Nos. 280 of 2008 to 288 of 2008 are dismissed. It is held that entire proceedings for the acquisition of land stood lapsed under Section 11-A of Land Acquisition Act 1894 relating to award No. 40 dated 25.2.2004. Award passed by learned District Judge Bilaspur dated 9.7.2008 is affirmed. Certified copy of judgment will be placed in original file of RFA Nos. 281 of 2008 to 288 of 2008. No order as to costs. File(s) of learned District Judge Bilaspur and file(s) of Land Acquisition Collector HPPWD (CZ) Mandi be sent back forthwith along with certified copy of this judgment. File of RFA Nos. 280 of 2008 to 288 of 2008 be consigned to Record Room after due completion forthwith. No order as to costs. RFA Nos. 280 of 2008 to 288 of 2008 are disposed of. All pending miscellaneous application(s) are also disposed of.

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

Umak Investment Company Pvt. Ltd. ...Appellant

Versus

M/s Business Associates (Delhi) Pvt. Ltd. and others ...Respondents

Co. Appeal No. 1 of 2015
Judgment reserved on: 5.8.2015
Date of decision : August 12, 2015.

Companies Act, 1956- Section 483- Respondent No. 1 filed a petition for winding up of respondent No. 2 which is pending adjudication- an application for appointment of official liquidator was filed on which company court appointed an official liquidator as provisional liquidator- appeal was filed against the order- held, that object of appointing a provisional liquidator is to ensure fair distribution of the assets of the company- such application is not to be ordinarily allowed except on a petition of the creditor who has been unable to obtain payment of his money or unless the company asks for or agrees to the appointment- a strong prima facie case is to be made out for appointment of liquidator and the Court is required to satisfy itself that it would be just, equitable and proper to appoint a provisional liquidator in the interest of the company- appeal allowed and the matter remitted back for decision afresh. (Para- 5 to 8)

Cases referred:

Kailash Prasad Mishra and others vs. Medwin Laboratory (P) Ltd. and others (1988) 63 Com. Cases 810 (MP)

Virendra Singh Bhandari and others vs. Nandlal Bhandari and sons P. Ltd.1979 (49) Com. Cases 532 (MP)

For the Appellant	:	Mr. Satyen Vaidya, Advocate.
For the respondents	:	Mr. Mukesh Sukhija, Advocate, and Mr. Pranay Pratap Singh, Advocate, for respondent No.1. Mr. Aman Sood, Advocate, for respondent No.2. Mr. Y.P. Sood, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This appeal under Section 483 of the Companies Act, 1956 (for short 'Act') is directed against the order dated 3.3.2015 passed by learned Company Court whereby the provisional liquidator came to be appointed and was directed to proceed with the matter in accordance with law.

2. Looking into the nature of the order we propose to pass, it may not be necessary to discuss the facts in detail. Suffice it to note that respondent No.1 had filed a petition for winding up of respondent No.2 Company, which is yet pending adjudication before the learned Company Court. Alongwith the petition, the Company also filed an application under Section 450 of the Companies Act read with Rule 9 of the Company Court Rules, 1959 for appointment of official liquidator as provisional liquidator for M/s U.G. Hotels and Resorts Limited, which was registered as Company Application No. 27 of 2012. It appears that this application was lying dormant for nearly three years constraining the respondent to file another application for deciding the earlier application. This application was registered as Company Application No. 52 of 2014.

3. When these applications came up for consideration before the learned Company Court on 3.3.2015, it passed the following orders:

> **"Co. Application No. 27 of 2012 in Co. Petition No. 9 of 2012.**
>
> *Heard.*
>
> *The official liquidator attached to this Court is appointed as provisional liquidator. He is directed to proceed with the matter in accordance with law.*

Learned counsel appearing on behalf of the Administrator has raised objection to the order. He has no locus standi to assail the order for appointment of official liquidator as provisional liquidator, as per law. Rather, his submission is wholly misconceived. There is difference between the duties to be discharged by the official liquidator, provisional liquidator and administrator.

The application stands disposed of."

It is this order which has been assailed by the appellant on various grounds as taken in the memorandum of appeal.

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

4. It is not in dispute that the appellant herein had filed detailed reply to Company Application No. 27 of 2012 and had not only raised preliminary objections regarding the very maintainability of the petition, but had also contested the petition on various other grounds. However, as is evident from the impugned order, no reasons have preceded the conclusion whereby the official liquidator attached to this Court has been appointed as a provisional liquidator and directed to proceed in accordance with law.

5. Section 450 of The Companies Act, 1956, which provides for appointment of provisional liquidator, reads thus:

"***450. Appointment and powers of provisional liquidator.***

(1) At any time after the presentation of a winding up petition and before the making of a winding up order, the Court may appoint the Official Liquidator to be liquidator provisionally.

(2) Before appointing a provisional liquidator, the Court shall give notice to the company and give a reasonable opportunity to it to make its representations, if any, unless, for special reasons to be recorded in writing, the Court thinks fit to dispense with such notice.

(3) Where a provisional liquidator is appointed by the Court, the Court may limit and restrict his powers by the order appointing him or by a subsequent order; but otherwise he shall have the same powers as a liquidator.

(4) The Official Liquidator shall cease to hold office as provisional liquidator, and shall become the liquidator, of the company, on a winding up order being made."

6. The object of appointing a provisional liquidator is to ensure that there will be a fair distribution of the assets of the company and that one creditor does not benefit at the expense of the others. An application for the appointment of a provisional liquidator is not ordinarily allowed except on a petition of the creditor who has been unable to obtain payment of his money or unless the company asks for or agrees to the appointment.

7. It is well settled that the same principle which is adopted and followed by the Civil Court for appointment of receiver is required to be applied before passing an order of appointment of a provisional liquidator. Whereas, the applicant is required to carve out a strong prima-facie case, while the Court on the other hand, is required to satisfy itself that it would be just, equitable and proper to appoint a provisional liquidator in the interest of the company, complaining share-holders, creditors or workmen and lastly public interest etc.

8. Appointment of provisional liquidator is a very drastic measure and can be resorted to only if a clear and strong ground for winding up is present and the Court being of the view that it is necessary to do so. Existence of a good ground for making a winding up order need not necessarily be a ground for appointing a provisional liquidator. Before the Court takes this drastic step, it must be satisfied that such an order is absolutely necessary [Refer: ***Kailash Prasad Mishra and others*** vs. ***Medwin Laboratory (P) Ltd. and others (1988) 63 Com. Cases 810 (MP) and Virendra Singh Bhandari and others*** vs. ***Nandlal Bhandari and sons P. Ltd.1979 (49) Com. Cases 532 (MP)].***

9. In view of the aforesaid discussion, the present appeal is allowed and the impugned order passed by the learned Company Court dated 3.3.2015 is set-aside and the matter is remitted back for decision afresh. All pending applications stand disposed of.

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

Balbir Singh son of Sh. Mehar Singh. .....Revisionist.

Vs.

Devinder Singh son of Dalip Singh and another. ...Non-revisionists.

Cr. Revision Petition No.141 of 2014.
Judgment reserved on: 3.7.2015.
Date of Judgment: August 13, 2015.

Negotiable Instruments Act, 1881- Section 138- Complainant contended that a blank cheque was issued as security – accused admitted that he had signed the cheque- there is a presumption regarding the cheque being issued for consideration- accused did not adduce any evidence to rebut this presumption- testimonies of witnesses were corroborating each other- accused had acknowledged antecedent liability- held, that accused was rightly convicted by the trial Court- appeal dismissed. (Para-12 to 16)

Cases referred:

T.Vasanthakumar Vs. Vijay Kumari, 2015 Criminal Law Journal 2853 Apex Court
Maruti Udyog Limited Vs. Narender and others, 1999 (1) SCC 113
M.M.T. Vs. Medical Chemicals, 2002 (1) SCC 234
Anil Hada Vs. Indian Acrylic Ltd., AIR 2000 SC 145

For the revisionist: Mr.Deepak Kaushal and Mr.Lovnish Thakur, Advocates.
For Non-revisionist-1 Mr.A.K.Dhiman, Advocate.
For Non-revisionist-2 Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present criminal revision is filed under Section 397 of the Code of Criminal Procedure against the judgment and sentence passed by learned Addl. Sessions Judge Sirmour District at Nahan dated 22.2.2014 announced in Cr. Appeal No. 32-N/10 of 2012 titled Balbir Singh Vs. Devinder Singh.

BRIEF FACTS OF THE CASE:

2. Sh Devinder Singh complainant filed complaint under Section 138 of Negotiable Instruments Act 1881 pleaded therein that complainant is the proprietor of Gurunanak Service Station Badripur Paonta Sahib District Sirmour HP who deals in service of vehicle, repair and maintenance of trucks. It is further pleaded that accused was owner truck No HP-17-4105 used to come to service station of complainant for service, repair and maintenance of truck since 2004. It is further pleaded that complainant and accused had friendly relations. It is further pleaded that in the year 2005 accused borrowed a sum of Rs.116000/- (One lac sixteen thousand) from the complainant for the payment of loan against his truck which was refunded within normal period. It is further pleaded that again on dated 16.5.2009 accused had approached the complainant for borrowing a sum of Rs. 120000/- (One lac twenty thousand) for the purchase of new truck and promised to refund the amount within six months. It is further pleaded that complainant had given an amount of Rs. 120000/- (One lac twenty thousand) to accused. It is further pleaded that in lieu of payment of amount accused issued cheque No.220638 dated 30.1.2010. It is further pleaded that complainant presented aforesaid cheque before State Bank of Patiala for crediting the amount in saving bank account of complainant. It is further pleaded that cheque was sent to the bank of accused for collection but bank of the accused returned the cheque with the remarks insufficient funds. It is further pleaded that when accused had issued cheque in dispute at that time there were insufficient funds in the bank account of accused. It is further pleaded that thereafter complainant issued legal notice through his Advocate to the accused demanding the amount due. It is further pleaded that despite demand notice accused did not pay the cheque amount. Prayer for punishment of accused under Section 138 of Negotiable Instrument Act sought.

3. Learned trial Court issued notice of accusation to accused. Complainant examined following witnesses in support of his case.

Sr.No.	Name of Witness
CW1	N.S.Kandari
CW2	Govind Singh
CW3	Daya Ram
CW4	Devinder Singh

4. Complainant produced following piece of documentary evidence in support of his case:-

Sr.No.	*Description.*
Ext.CW1/B	*Statement of account & memo sent by Manager State Bank of Patiala.*
Ext.CW2/A	*Memorandum sent by PNB.*
Ext.CW2/B	*Statement of account*
Ext.CW3/A	*Copy of Slip No. 3484 dated 24.3.2010.*
Ext.CW4/A	*Cheque dated 30.1.2010 amounting to Rs.120000/-*
Ext.CW1/A	*Memo sent by Manager State Bank of Patiala*
CW2/A	*Memorandum of bank PNB.*

CW4/B	*Legal notice dated 19.3.2010.*
CW4/C	*Postal Receipt.*

5. Learned trial Court convicted the accused under Section 138 of the Negotiable Instruments Act to simple imprisonment for six months. Learned trial Court further directed the accused to pay compensation in the sum of Rs.1,20,000/- (One lac twenty thousand) within 30 days.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court accused filed Criminal Appeal No. 32-N/10 of 2012 titled Balbir Singh Vs. Devinder Singh and another before learned Additional Sessions Judge Sirmour District at Nahan. Learned appellant Court dismissed the appeal filed by accused and affirmed the judgment and sentence passed by learned trial Court.

7. Feeling aggrieved against the judgment passed by learned Additional Sessions Judge Sirmour District at Nahan Balbir Singh revisionist filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionist, learned Advocate appearing on behalf of non-revisionist No.1 and learned Assistant Advocate General appearing on behalf of non-revisionist No.2 and also perused entire record carefully.

9. Following points arise for determination in the present criminal revision petition:

1. Whether revision petition filed by revisionist is liable to be accepted as mentioned in memorandum of grounds of revision petition.

2. Final order.

10.Testimony of oral witnesses examined by complainant

10.1 CW1 N.S.Kandari has stated that he has brought the summoned record. He has stated that complainant is account holder in the bank. He has stated that on dated 9th March 2010 complainant had deposited cheque for encashment. He has stated that cheque was sent for clearance. He has stated that cheque was returned back without any encashment with memo Ext. CW1/A. He has stated that statement of account is Ext CW1/B. He has stated that memo Ext CW1/A is not signed by him. He has stated that Ext CW1/B was not prepared by him.

10.2 CW2 Govind Singh has stated that he has brought the summoned record. He has stated that account of accused Balbir Sngh was available in Punjab National Bank Paonta Sahib. He has stated that cheque No. 220638 was received for clearance. He has stated that cheque could not be encashed due to insufficient funds in the account of accused. He has stated that memo Ext CW2/A was issued.

10.3 CW3 Daya Ram has stated that he has brought the summoned record. He has stated that registered letter No. 412 was issued in the name of Balbir Singh and same was received in the office on dated 25th March, 2010. He has stated that registered letter was delivered to Balbir Singh on the same day. He has stated that document Ext CW3/A is correct as per original record.

10.4 CW4 Devinder Singh has stated that he is running a service station at Badripur. He has stated that accused is known to him since 2004. He has stated that accused used to visit in the service station for the service of his vehicle. He has stated that

accused took loan amount of Rs. 116000/- (One lac sixteen thousand) and the same was returned. He has stated that again on dated 16th May 2009 accused took loan to the tune of Rs.120000/-(One lac twenty thousand). He has stated that thereafter in lieu of loan accused issued cheque Ext CW4/A in consideration amount of Rs.120000/-(One lac twenty thousand). He has stated that on dated 9.3.2010 the cheque was presented for encashment but same was returned from the bank of loanee with the remarks insufficient funds. He has stated that thereafter he issued demand notice to accused. He has stated that despite demand notice accused did not pay the loan amount to the complainant. He has denied suggestion that he did not issue any demand notice to accused. He has denied suggestion that cheque was issued by accused as a security. He has denied suggestion that no amount was paid to accused by complainant. He has denied suggestion that accused did not issue any cheque to the complainant. He has denied suggestion that false complaint filed against accused. He has denied suggestion that he has committed breach of trust with accused.

11. Statement of accused recorded under Section 313 Cr.PC. Accused has stated that his signature is appearing in the cheque. Accused has stated that blank cheque was issued by him five years back. Accused has stated that he did not receive any demand notice. Accused has stated that cheque was filled by complainant himself. Accused did not lead any defence evidence.

Finding upon point No.1.

12. Submission of learned Advocate appearing on behalf of revisionist that cheque in question was filled by complainant which was issued as blank security cheque against non-existing liability and thereafter complainant misappropriated the aforesaid cheque and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused cheque Ext CW4/A dated 30.1.2010 placed on record. There is no recital in cheque Ext CW4/A placed on record that cheque was issued as security cheque. Cheque is signed by revisionist Balbir Singh and even revisionist Balbir Singh had admitted that his signature is appearing in the cheque Ext CW4/A placed on record. It is well settled law that Negotiable Instruments Act 1881 is special act and there are presumptions as to negotiable instruments as per section 118 of Negotiable Instruments Act 1881 relating to (a) Of consideration (b) As to date (c) As to time of acceptance (d) As to time of transfer (e) As to order of endorsements (f) As to stamps (g) That holder is a holder in due course. There is positive evidence on record that cheque was presented for encashment. There is positive evidence on record that cheque was dishonoured due to insufficient funds in the account of revisionist. There is positive, cogent and reliable evidence on record that thereafter demand notice was issued to revisionist but despite demand notice revisionist did not pay the amount due to complainant.

13. Another submission of learned Advocate appearing on behalf of revisionist that judgment passed by learned Judicial Magistrate is based on surmises and conjectures and learned trial Court did not properly appreciate oral as well as documentary evidence placed on record is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused oral as well as documentary evidence placed on record. The case of the complainant is duly corroborated by testimony of CW1 N.S.Kandari, CW2 Govind Singh, CW3 Daya Ram. There is no reason to disbelieve the testimony of CW1, CW2 and CW3. There is no positive, cogent and reliable evidence on record in order to prove that CW1, CW2 and CW3 have hostile animus against revisionist at any point of time. Testimony of CW1, CW2 and CW3 are also corroborated with documentary evidence placed on record. Court has also carefully perused the judgment and sentence passed by learned trial Court and learned first appellate Court. Learned trial Court has discussed oral as well as documentary evidence in a positive, cogent and reliable manner and has properly

appreciated the oral as well as documentary evidence placed on record in the present case. There is no infirmity in appreciation of oral as well as documentary evidence by learned trial Court. See 2015 Criminal Law Journal 2853 Apex Court titled T.Vasanthakumar Vs. Vijay Kumari. Also see 1999 (1) SCC 113 titled Maruti Udyog Limited Vs. Narender and others. Also see 2002 (1) SCC 234 titled M.M.T. Vs. Medical Chemicals. It was held in case reported in AIR 2000 SC 145 titled Anil Hada Vs. Indian Acrylic Ltd. that under Section 139 of the Negotiable Instruments Act 1881 there is legal presumption that cheque was issued for discharging an antecedent liability. It was held that presumption is in favour of holder of cheque. Revisionist did not adduce any positive rebuttable evidence in order to rebut the presumption under Section 139 of the Negotiable Instruments Act 1881.

14. Another submission of learned Advocate appearing on behalf of revisionist that no notice was served upon revisionist and on this ground revision petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that registered legal notice was given to revisionist on dated 19th March 2010 by complainant Ext CW4/B and postal receipt Ext CW4/C is also proved on record. CW3 Daya Ram delivery agent has specifically stated that registered letter No. 412 was issued in the name of revisionist Balbir Singh. CW3 Daya Ram has stated in positive manner that registered letter was received in the office on dated 25th March 2010. CW3 has specifically stated in positive manner that registered letter was delivered to revisionist on the same day. Testimony of CW3 Daya Ram to this effect is remained un-rebutted on record. There is no reason to disbelieve the testimony of CW3. Testimony of CW3 Daya Ram is trust worthy, reliable and inspires confidence of Court. Even as per Section146 of Negotiable Instruments Act 1881bank slips are prima facie evidence of facts. In the present case revisionist did not disprove the bank slips facts as required under Section 146 of Negotiable Instruments Act 1881.

15. Another submission of learned Advocate appearing on behalf of revisionist that cheque is not filled by revisionist in his own hand writing and on this ground revision petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Revisionist has admitted his signature upon cheque Ext CW4/A dated 30.1.2010 which was issued in consideration amount of Rs.120000/- (One lac twenty thousand). It is well settled law that facts admitted need not to be proved as per Section 58 of the Indian Evidence Act 1872. By way of signing the cheque Ext CW4/A it is held that revisionist has voluntarily acknowledged the liability of antecedent liability. Revisionist did not file any complaint before the police authority in order to prove that his signatures were obtained by complainant in a fraudulent manner. Even revisionist has not filed any application for sending the cheque for the opinion of hand writing expert.

16. Another submission of learned Advocate appearing on behalf of revisionist that complainant had committed breach of trust and on this ground revision petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. The plea of revisionist that complainant had committed breach of trust is not proved on record by way of oral as well as documentary evidence. The plea of revisionist that complainant had committed breach of trust is failed on the concept of ipse dixit (Assertion made without proof). Hence point No.1 is answered in negative.

Point No.2 (Final Order).

17. In view of above stated facts it is held that learned trial Court and learned first appellate Court have properly appreciated oral as well as documentary evidence placed on record and it is also held that there is no illegality in the judgment and sentence passed by learned trial Court and learned first appellate Court. It is held that no mis-carriage of

justice has been caused to revisionist in the present case. Revision petition is dismissed. Pending application(s) if any are also disposed of. File of learned trial Court and learned first appellate Court be sent back forthwith along with certify copy of judgment. File of criminal revision petition be consigned to record room after due completion. Revision petition is disposed of.

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

Capt. H.C. Chandel S/o Late Anant Ram. ....Petitioner
Versus
State of H.P. & others. ....Non-Petitioners.

CWP No. 532 of 2014
Order reserved on 23.7.2015
Date of Order: 13.08.2015

Constitution of India, 1950- Article 226- Petitioner prayed for quashing of water supply order and also prayed for free water supply to his farm at State expenses- perusal of order reveals that it was passed in public interest- private interest of the petitioner cannot override the public interest- moreover writ is not maintainable when there is a factual dispute- authorities directed to provide water facility to the petitioner as per statute -Writ petition dismissed. (Para 5 to 9)

Case referred:
Swati Ferro Alloye (P) Ltd. vs. Orrissa Industrial, 2015 (4) SCC page 2014

For petitioner : Petitioner in person.
For Non-Petitioners No. 1 & 2: Mr. J.S. Rana, Assistant Advocate General.
For Non-Petitioner No.3. Mr. Satyen Vaidya, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Article 226 of the Constitution of India for quashing the order of non-petitioner No.2 i.e. Executive Engineer, IPH Division No.1 Shimla-9 dated 29.12.2012 relating to providing of water supply to the farm house of petitioner situated at Jamu-ki-Galani from Lift Water Scheme. Additional relief sought directing non-petitioners No.1 and 2 to provide free water services from affected gravity water schemes to the farm houses of petitioner in village Jamu-ki-Galani Daruban and Teer on public expenses. Further additional relief sought for abolishing the Water Management Committee and restraining Water Management Committee from any sort of interference in water supply to the farm houses of the petitioner from Government schemes. Further additional relief sought for grant of compensation of Rs. 10 lacs (Rupees ten lacs) in favour of petitioner towards damages, losses, mental agony harassment etc.

2. It is pleaded that between 1970 to 1977 HP PWD constructed two source tanks in the land of petitioner from where the water was tapped to a nearby storage tank. It is further pleaded that on dated 2.12.1994 and 15.2.1995 petitioner filed application before

non-petitioners while the petitioner was in service for providing drinking water to his farm house in village Jamu-ki-Galani, Chak Jungle Narenti, Pargna Matiana from other water scheme but department replied that there was no scheme for the said village. It is further pleaded that on 8.12.1996 and 8.6.1998 representations were sent to the IPH Department by the petitioner for linking up the farm house with the ongoing water scheme. It is further pleaded that on 11.7.2000 and 25.11.2000 representations were presented to the Government for providing water to the farm house of petitioner at public expense. It is further pleaded that on 14.8.2012 notice under Section 80 CPC was sent to the non-petitioners for providing water services to the farm house of petitioner. It is further pleaded that water supply scheme was tapped from the land of the petitioner.

3. Per contra response filed on behalf of non-petitioners No. 1 and 2 pleading therein that petitioner has no cause of action to file and maintain the present writ petition. It is further pleaded that no such Water Management Committee is registered with the IPH Department. It is further pleaded that 19 numbers of petitioners filed a joint writ petition in Hon'ble High Court for construction of water supply scheme to Village Karyal and it is further pleaded that the water supply scheme was executed after the decision of Hon'ble High Court in CWP No. 1739 of 1993. It is further pleaded that petitioner is residing in other village and no house exists except one temporary shed. It is further pleaded that department is not bound to provide any free water connection. It is further pleaded that petitioner did not apply for water connection and petitioner is claiming free water connection on the basis of oral agreement with PWD. It is further pleaded that free water service is not provided under law. It is further pleaded that matter of oral agreement falls within the jurisdiction of Civil Court and did not fall within the purview of Article 226 of the Constitution of India. It is further pleaded that department had already provided water connection to petitioner at village Rouni where petitioner is residing. It is further pleaded that other villagers are not allowing for connecting the water pipe line. It is further pleaded that department has commissioned a lift water supply scheme Mul Matiyana and there is a provision to connect the area of Jamu-ki-Galani from that water supply scheme and it is further pleaded that water supply scheme is nearly in completion stage and would be inaugurated in future. It is further pleaded that water facility from this scheme would be provided to petitioner under rules provided that petitioner completes the codal formalities. It is further pleaded that free water would not be provided to the petitioner. It is further pleaded that non-petitioners tried to lay water pipe line near the land of petitioner but residents of village Durban did not allow the non-petitioners to do so. It is further pleaded that petitioner is claiming water supply to a shed where he is not residing. It is further pleaded that Assistant Engineer has requested petitioner to apply private connection and deposit appropriate fee so that the action to sanction the water connection could be taken. It is further pleaded that petitioner did not apply for the water connection and petitioner also did not deposit the required fee under the rule. It is further pleaded that there is no agreement with petitioner to provide free water connection. It is further pleaded that water supply scheme is maintained by the department and private committee has no authority to interfere with the functioning of the department. It is further pleaded that entire scheme was executed as per administrative approval and expenditure sanction. Prayer for dismissal of writ petition sought.

4. Petitioner also filed rejoinder and re-asserted the allegations mentioned in the petition.

5. Submission of petitioner to quash office order dated 29.12.2010 issued by the IPH Department is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused office letter issued by the IPH Division No.1

Shimla-9 dated 29.12.2010 No.IPHDS-CB-Rep.-Matiana/10-11-24328-. There is recital in the letter issued by the IPH Department that administrative approval and expenditure sanction was granted by the Superintending Engineer IPH Circle Shimla-9 vide letter No. 9794-97 dated 21.11.1995 amounting to Rs. 5,20,000/- (Five lacs twenty thousand) relating to gravity water supply scheme named as GWSS Dharali Sheela Naun Karyal in Gram Panchayat Rouni during the year 1995-96 by taping the water from Reltu source. There is further recital in the office letter cited supra that main storage tank of the said scheme was constructed at Drauman and scheme is also known as Reltu to Drauman scheme. There is further recital in the office letter cited supra that while constructing the scheme house of petitioner Sh. Harish Chandel could not be covered due to the fact that main storage tank was situated at lower level than the house of the petitioner. There is further recital in the office letter cited supra that to end the controversy an estimate was prepared and work was awarded to the contractor and contractor had also executed part work but some people did not allow the work to the house of the petitioner. There is further recital in the office letter dated 29.12.2010 that Sh. Durga Singh Chandel, Mohinder, Mast Ram, Parkash Lal, Gian Chand, Gian Hetta, Liaq Ram, Amer Chand, Sita Ram, Bimla, Lagnu, Lachi Ram Chet Ram, Tara Chand, Narany, Narian Singh Keshav Ram, and Pritam, did not allow to provide water connection and did not allow to lay the water pipes in their own land. There is further recital in the letter cited supra that water supply to the house of petitioner would be provided after commissioning the lift water supply scheme Mool Matiana and adjoining villages. It is held that in view of the above stated facts in the office order dated 29.12.2010 it is not expedient in the ends of justice to quash letter dated 29.12.2010 issued by the Executive Engineer IPH Division No.1 Shimla-9 in the public interest. It is well settled law that when there is conflict between private interest and public interest then public interest always prevail over the private interest. It is also well settled law that disputed question of facts cannot be decided in a writ petition. See 2015 (4) ***SCC page 2014 titled Swati Ferro Alloye (P) Ltd. vs. Orrissa Industrial***.

6. Another submission of petitioner that non-petitioners No. 1 and 2 namely State of H.P. and Executive Engineer IPH Division No.1 Shimla-9 be directed to provide free water service to the farm house of petitioner situated in Jamu-ki-Galani, Daruban and Teer on public expense is also rejected being without any force for the reasons hereinafter mentioned. It is proved on record that private connection had already been issued to the house of the father of petitioner at village Rouni and said connection is in operation and petitioner is not paying any water bill. It is well settled law that first priority should be given to the drinking water facility and thereafter if water in natural source is in excess then water could be supplied to the farm houses for agriculture work. It is held that it is not expedient in the ends of justice to provide free water connection to the farm house of petitioner. However petitioner will be at liberty to apply for the connection after completing all codal formalities and after payment of requisite water charges. It is well settled law that natural source of water is not the property of an individual but natural source of water is property of the State and State is under legal obligation to utilize the natural source of water for the benefit of general public in accordance with law. H.P. Water Supply Act 1968 extends to whole of H.P. as per Section 1(2) of H.P. Water Supply Act 1968. As per Section 7 (4) of H.P. Water Supply Act 1968 development management and control of scheme shall from date of notification shall vest in State Government. As per Water Supply Rule 3 framed under H.P. Water Supply Act 1968 water shall be tapped from source situated within territory of H.P. for benefit of general public. As per rule 15 of Water Supply Rules a person who intends to get private connection shall submit application in form 'A' and would deposit security. Water charges shall be at flat rates where facilities of installation of water meters is not available and where facilities of water meters is available water charges shall be as per consumption of water.

7. Another submission of petitioner that Water Management Committee be abolished and same be restrained from causing any sort of interference in water supply to petitioner is also rejected for the reasons hereinafter mentioned. Non-petitioners have specifically stated in their response that there is no Water Management Committee and it is well settled law that utilization of water from natural sources should be controlled by public authorities in accordance with law. No private authority is legally entitled to interfere in the distribution of water from natural sources. It is held that public authorities are under legal obligation to distribute drinking water facility equally to all residents of the area in view of the gravity of water in the natural source in accordance with H.P. Water Supply Act 1968.

8. Another submission of petitioner that compensation of Rs. 10 lacs (Rupees ten lacs) in favour of petitioner be awarded towards damages, losses, mental agony, harassment etc. is also rejected without any force for the reasons mentioned hereinafter. It is held that natural water source is the property of State under H.P. Water Supply Act 1968 and it is held that State is under legal obligation to utilize the water for the benefit of general public. Plea of petitioner that oral agreement was executed with PWD department for providing free water connection cannot be decided in civil writ petition. Oral agreement is disputed by the PWD Department. It is well settled law that disputed oral agreement should be proved before a Civil Court in accordance with law. It is held that matters of oral agreements relating to supply of free water cannot be decided in a civil writ petition being complicated question of facts. Hence it is held that no relief can be granted to petitioner on the basis of oral agreement for providing free water connection and petitioner will be at liberty to file civil suit before competent Civil Court for enforcement of oral agreement in accordance with law if executed inter-se the parties at any point of time.

9. It is also proved on record that CWP No. 1739 of 1993 titled Devi Ram & others vs. State of H.P. & another was filed and same was disposed on on 11.4.1994 by Division Bench of the Hon'ble High Court with a direction to the State of H.P. and Chief Engineer South IPH US Club Shimla to take necessary steps as expeditiously as possible so that petitioners and other villagers are provided with drinking water from a source near Reltu rivulet. The order passed by the Division Bench in CWP No. 1739 of 1993 has attained the stage of finality. There is no documentary evidence on record in order to prove that order passed in CWP No. 1739 of 1993 was modified or set aside by any competent authority of law.

10. In view of the above stated facts it is held that non-petitioners No.1 and 2 will provide water facility to the petitioner from new lift water scheme LWSS Mul Matiyana strictly as per H.P. Water Supply Act 1968. Other reliefs sought by petitioner are declined in the ends of justice. No order as to costs. Petition is disposed of. Pending applications if any also disposed of.

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BEFORE THE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE DHARAM CHAND CHAUDHARY, J.

Champa Devi .....Petitioner.

Versus

State of H.P. and another .....Respondents.

CWP No.3020 of 2015
Reserved on: 6th August, 2015.
Pronounce on: August 13, 2015.

Constitution of India, 1950- Article 226- Allegations of misappropriation were made against the petitioner as she was working as a Pradhan- a show cause notice was served upon her-she submitted her reply- another inquiry was got conducted by B.D.O. for non signing of a cheque for an amount of Rs. 50,000/- the petitioner pleaded that this notice was never served upon her and therefore, no reply was filed by her- the petitioner was placed under suspension – respondents specifically stated in their reply that show cause notice was duly served upon the petitioner- the petitioner has not filed rejoinder to the reply which means that the allegations made in the reply have gone unrebutted- the petitioner has an alternative efficacious remedy available to her under Section 148 of H.P. Panchayati Raj Act- held, that when alternative efficacious remedy is available to the petitioner, the writ petition is not maintainable at her instance- Petition dismissed. (Para 8-16)

Case referred:
Micromax Informatics Ltd. vs. State of HP and others, ILR 2015 Vol. XLV (III) 1334 D.B

For the Petitioner:	Mr.B.C. Negi, Senior Advocate, with Mr.Narender Thakur, Advocate.
For the respondents:	Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

The petitioner, by the medium of present writ petition, has sought quashment of suspension order (Annexure P-4), made on 12th June, 2015, by respondent No.2, (for short the impugned order), and has also sought writ of mandamus commanding the respondents not to implement the impugned order, on the grounds taken in the memo of the writ petition.

2. Facts of the case, as alleged, are that certain allegations of misappropriation were leveled against the petitioner while she was working as Pradhan of Gram Panchayat, Ser Baneda, Development Block, Solan, District Solan, H.P. Accordingly, a show cause notice, dated 16th July, 2014, (Annexure P-1), was served upon her. The petitioner, upon receiving the said show cause notice, submitted her reply to the same, (Annexure P-2). Thereafter, yet another inquiry of the petitioner was got conducted by the Block Development Officer for the non-signing of a cheque for an amount of Rs.50,000/- in the capacity of Pradhan, whereafter another show cause notice, dated 29th April, 2015, was issued to the petitioner. It is contended by the petitioner that the said show cause notice was never served upon her and, therefore, no reply was filed by the petitioner to the said show cause notice.

3. The concerned Authority passed the impugned order, whereby the petitioner came to be placed under suspension. The petitioner challenged the said impugned order on two counts, namely – i) the notice, dated 29th April, 2015 was never served upon the petitioner and therefore, the petitioner has been condemned unheard; and ii) the impugned order is not in accordance with the mandate of Section 145 of the Himachal Pradesh Panchayati Raj Act, 1994, (for short, the Act) and Rule 142 of the Himachal Pradesh Panchayati Raj (General) Rules, 1997, (for short, the Rules).

4. Respondents resisted the writ petition on the ground that the show cause notice, dated 29th April, 2015, was duly served upon the petitioner, which fact they have sought to substantiate from the copy of receipt Annexure R-3, appended with the reply. It was also pleaded that the petitioner was informed about the charges leveled against her through show cause notices, dated 16th July, 2014 and 29th April, 2015. It is further pleaded that since the petitioner failed to give a satisfactory reply to the show cause notice dated, 16th July, 2014 and did not submit reply to the show cause notice, dated 29th April, 2015, the impugned order placing the petitioner under suspension was issued by invoking the provisions of Section 145 of the Act and Rule 142 of the Rules. Thus, the writ petition was sought to be dismissed.

5. Heard learned counsel for the parties. During the course of hearing, the learned Advocate General appearing for the respondents argued that the writ petition is not maintainable since the petitioner has efficacious remedy available in terms of the mandate of Section 148 of the Act, read with Rule 143 of the Rules, which the petitioner had not availed. It was further argued that the order of suspension cannot be questioned by the medium of writ petition, since the suspension order is not punishment in the eyes of law.

6. On the other hand, the learned counsel for the petitioner argued that the show cause notice, dated 29th April, 2015, was never served upon the petitioner. Thus, the petitioner stands condemned unheard and the order of suspension has been passed in breach of principles of natural justice. It was further sought to be argued that the documents, which were made the basis for issuance of show cause notices, were never supplied to the petitioner.

7. In the above backdrop, the learned counsel for the petitioner has sought quashment of the impugned suspension order by placing reliance on the judgment passed by this Court in **CWP No.100 of 2013, titled Baldev Singh vs. State of Himachal Pradesh and others**.

8. The argument of the learned counsel for the petitioner, though attractive, is devoid of any force for the following reasons. In the reply, the respondents have specifically stated that the show cause notice dated 29th April, 2015 was duly delivered upon and received by the petitioner. The respondents, alongwith the reply, have also placed on record Annexure R-3, copy of the receipt.

9. The petitioner has chosen not to file any rejoinder and the right to file the same stood closed vide order, dated 30th July, 2015. The averments contained in the reply have not been denied by the petitioner by filing rejoinder, thus in the eyes of law, stand admitted.

10. The notice dated 29th April, 2015 was in continuation to the notice already issued vide letter, dated 16th July, 2014, whereby the petitioner was asked to explain about the charges, was duly replied by the petitioner. The reply was not found satisfactory by the respondents and resultantly, second notice, dated 29th April, 2015, was issued, has remained un-rebutted. Thus, the impugned order was made in terms of Section 145 of the Act and Rule 142 of the Rules.

11. The question is – Whether the petitioner is having alternative efficacious remedy available to her? To determine this question, it is profitable to make a reference to Section 148 of the Act, hereunder:

> *"**148. Appeal and revision**.- An appeal or revision against the orders or proceedings of a Panchayat and other authorities under this Act, shall lie to such authority and in a manner as may be prescribed."*

12. Section 148 of the Act mandates that the petitioner has alternate efficacious remedy available which she could have availed by filing appeal under the Act before the prescribed Authority. However, the petitioner has opted not to avail the said remedy and rather chosen to file the instant writ petition. It is beaten law of the land that when an efficacious remedy is available, no writ petition will lie.

13. This Court, while deciding a batch of writ petitions, the lead case of which was **CWP No.4779 of 2014, titled M/s Indian Technomac Company Ltd. vs. State of H.P. and others**, has taken the similar view and held that when the petitioners were having alternative efficacious remedy, the petitions were not maintainable. It is apt to reproduce paragraphs 11 to 14, 16 and 18 of the said judgment hereunder:

> *"11. Now, the question which arises for determination is – when an Act provides mechanism to have remedy(ies), can a writ lie in the given circumstances? The answer is in the negative for the following reasons. It is well settled principle of law that High Courts have imposed rule of self limitation in entertaining the writ petition in terms of writ jurisdiction when alternative remedy is available. High Court must not interfere if there is adequate efficacious alternative remedy available and the practice of approaching the High Court, without availing the remedy(ies) provided, must be deprecated, unless express case is made out.*
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> *12. The Apex Court in **Union of India and another vs. Guwahati Carbon Limited, (2012) 11 SCC 651,** while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:*
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> > *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, AIR 1979 SC 1250. In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)*
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> > > "23. ..... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."
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> > *9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433, held: (SCC p.440, para 11)*
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> > > "11.....The Act provides for a complete-machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed...."
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> > *10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566).*
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> > *11. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, this Court held:*

> *"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....."*
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> *14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by excluding the freight/ transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.*
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> *15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/ assessee."*

13. The Apex Court in **Nivedita Sharma vs. Cellular Operators Association of India and others, (2011) 14 SCC 337,** after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

> *"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.*
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> *25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the respondents."*

14. The Apex Court in a recent decision in **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, (2014) 1 SCC 603,** has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:

> *"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).*
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> *13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp.343-45 paras 12-14)*
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> > *"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).*
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> > *'7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'*
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> > *13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)*
> >
> > *'11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule*

was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)

> *"... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

> *'77. ... So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)*

14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).*
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> > *'23. ... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'"*

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15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case AIR 1964 SC 1419, Titagarh Paper Mills case 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

15..... ....

16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available.

17. ....

18. Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is

made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

14. The said judgment of this Court was questioned before the Apex Court and the Apex Court has dismissed the SLP vide order dated 22nd August, 2014 in SLP(c) Nos.22626-22641 of 2014.

15. The Apex Court in case titled **Union of India and others vs. Major General Shri Kant Sharma and another,** reported in **2015 AIR SCW 2497,** has also held that where efficacious remedy is available to the petitioner, the writ petition is not maintainable. It is apt to reproduce paras 34, 37 and 38 of the said judgment herein:

"34. The aforesaid decisions rendered by this Court can be summarised as follows:

The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).

(ii)The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii)When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).

(iv)The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma).

35-36. ....

[37] Likelihood of anomalous situation

If the High Court entertains a petition under Article 226 of the Constitution of India against order passed by Armed Forces Tribunal under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.

Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or Tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves before the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed

Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 Armed Forces Act.

[38] The High Court (Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of Act. However, we find that Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India."

16. Similar legal point was thrashed and discussed by this Court in a batch of writ petitions, the lead case of which was **CWP No.3012 of 2015, titled Micromax Informatics Ltd. vs. State of HP and others, decided on 24th June, 2015**, and held that the writ petitions were not maintainable.

17. Applying the test to the instant case, the writ petition is not maintainable and merits to be dismissed.

18. The learned counsel for the petitioner argued that in view of the judgment, dated 9th April, 2013, passed by this Court in Baldev Singh's case (supra), the writ petition is maintainable.

19. The said judgment is not applicable to the facts of the instant case for the following reasons. In the said writ petition, it was pleaded and argued that the documents, on the basis of which the show cause notice and the suspension order were made, were not supplied to the petitioner. However, in the instant case, the show cause notice, dated 16th July, 2014, which is the basic foundation of the order of suspension, was served upon the petitioner, was duly replied to by the petitioner, and in the reply, no objection regarding non-furnishing of such documents was ever raised by the petitioner. As far as the second notice, dated 29th April, 2015, is concerned, the same was duly served upon the petitioner, as discussed hereinabove, and the petitioner, on her own volition, chose not to file reply to the same. It is not the case of the petitioner that the documents were not supplied to the petitioner, for which reason she could not reply the second show cause notice. Thus, it cannot be said and held that it is a case of violation of principles of natural justice.

20. Having said so, the judgment relied upon by the learned counsel for the petitioner in Baldev Singh's case (supra) is not applicable to the facts of the instant case.

21. In view of the above discussion, we hold that there is no merit in the writ petition and the same is dismissed, with pending CMPs, if any.

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

Sh. Dharam Pal, S/o late Sh. Chand. ....Revisionist

Versus

Mandir Bhagwati Devi. ...Non-revisionist.

Civil Revision Petition No. 4072/2013
Reserved on: 29th July, 2015
Date of order: 13.8.2015

Indian Stamp Act, 1899- Section 30- At the time of argument, defendant filed application under section 151 C.P.C for placing on record a copy of receipt for payment of money - application was dismissed on the ground that document is not properly stamped-held that document is inadmissible for want of stamp- document impounded as per Stamp Act and permitted to be taken on record subject to payment of cost- Revision allowed. (Para 6 to 8)

For the revisionist : Mr. N. K. Gupta Advocate.
For the non-revisionist : Mr. Pranay Pratap Singh Advocate.

The following order of the Court was delivered:

P. S. Rana, J.

Present civil revision petition is filed against the order dated 3.8.2013 passed by learned Civil Judge (Junior Division) Nurpur District Kangra H.P. whereby application filed under Section 151 CPC by revisionist for adducing additional evidence was dismissed by learned trial Court.

Brief facts of the case

2. Temple Bhagwati Devi non-revisionist filed Civil Suit No. 39 of 2003 titled Temple Bhagwati Devi vs. Dharam Pal for possession by way of ejectment of revisionist from the premises comprised in khata No. 297 khatoni No. 453 khasra No. 590 comprising 0-00-21 H.M. situated in mohal and mauza Jassur Tehsil Nurpur District Kangra H.P. as per site plan attached along with the civil suit. Additional relief of decree for recovery of Rs. 15,200/- also sought as arrears of rent at the rate of Rs. 200/- per month w.e.f. January 2001 and further relief of damages to the tune of Rs. 15,000/- also sought and relief of mesne profit at the rate of Rs. 600/- per month also sought from the date of filing of suit till the date of decree and till actual ejectment of revisionist from the shop in dispute. It is pleaded that revisionist took the shop in dispute on rent. It is pleaded that tenancy commenced from the first date of english calendar month and ends with last date of same month. It is further pleaded that revisionist did not pay the rent despite several requests.

3. Per contra written statement filed on behalf of non-revisionist/defendant pleading therein that vacant land was taken on rent at the rate of Rs. 180/- per year and the lease of the land was perpetual. It is further pleaded that shop was constructed with lintel in the year 1971-72. It is pleaded that land was taken on rent through Col. Kirpal Singh who was the then manager of the Temple Bhagwati Devi.

4. On dated 10.6.2009 learned trial Court closed the evidence of the parties and listed the case for final arguments on 27.6.2009. Thereafter many dates were given for final arguments. On dated 28.9.2011 learned Advocate appearing on behalf of the revisionist

filed application under Section 151 CPC before learned trial Court for placing on record and adducing additional documentary evidence in favour of revisionist/ defendant i.e. receipt of lease money of Rs. 180 (One hundred eighty) w.e.f. 01.01.1988 to 31.12.1988 dated 24.5.1988. Revisionist pleaded in the application filed under Section 151 CPC that lease money receipt of Rs. 180/- was given by Sh. Kirpal Singh who was the then manager of the Temple Committee for a period from 1.1.1988 to 31.12.1988. Revisionist also attached the lease receipt of Rs. 180/-. It is pleaded that receipt is very necessary for proper adjudication of the case and prayer for acceptance of application filed under Section 151 CPC sought.

5. Per contra response filed on behalf of non-revisionist pleading therein that present application has been filed just to delay the proceedings of the present case. It is pleaded that present receipt is not material for the just decision of the case. It is further pleaded that receipt did not belong to suit property. It is pleaded that present application has been filed by the revisionist just to grab the property of Temple Bhagwati Devi and prayer for dismissal of application filed under Section 151 CPC sought.

6. Learned trial Court on dated 3.8.2013 dismissed the application on the ground that present document is not properly stamped and learned trial Court held that present application filed just to linger on civil suit on one pretext or the other and thereafter learned trial Court dismissed the application being devoid of any merit. Thereafter learned trial Court fixed the case for final arguments of Civil Suit No. 39 of 2003 for 19.8.2013. Feeling aggrieved against the order passed by learned trial Court, revisionist filed the present revision petition.

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

8. Court has carefully perused the receipt filed along with application. As per contents of the document placed on record lease money receipt is relating to lease money of Rs. 180/- for the period from 1.1.1988 to 31.12.1988. Lease money receipt was issued on 24.5.1988 by Kirpal. After perusal of lease money receipt carefully, it is observed by the Court that lease money receipt is not properly stamped as required under Indian Stamp Act 1899. As per Section 35 of Indian Stamp Act 1899, instrument not duly stamped will be inadmissible in evidence. As per Section 30 of Indian Stamp Act 1899 if any person received any money exceeding twenty rupees in amount then he is under legal obligation to give duly stamped receipt. In the present case lease money receipt is not properly stamped. Lease money receipt proposed to be proved is annuity lease money receipt as define in Section 25 of Indian Stamp Act 1899. Hence lease money receipt filed along with application filed under Section 151 CPC is impounded by the order of the Court under Section 33 of the Indian Stamp Act 1899 and same will be released upon payment of stamp duty and penalty as provided by Section 35 (a) of Indian Stamp Act 1899. If impounded lease money receipt will release in accordance with Section 35 of Indian Stamp Act 1899 thereafter same will be placed on record and will be proved as per Indian Evidence Act 1872.

9. In view of the fact that present Civil Suit is pending since 2003 and in view of the fact that present civil suit was listed for final arguments on 27.6.2009 and in view of the fact that application was filed at a belated stage on dated 28.9.2011 after two years when civil suit was listed for final arguments. Costs to the tune of Rs. 2000/- (Two thousand) is also imposed upon revisionist. Order of learned trial Court dated 3.8.2013 passed upon application filed under Section 151 CPC is modified accordingly as per observations made supra. As Civil Suit is pending since 2003 learned trial Court will dispose of the civil suit expeditiously within two months after receipt of file. Parties are directed to appear before

learned trial Court on date 10.9.2015. File of the learned trial Court along with certified copy of this order be sent back forthwith. File of civil revision petition be consigned to record room after due completion. Civil Revision Petition No. 4072 of 2013 is disposed of accordingly. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Inder Singh ...Appellant
Versus
HP State Electricity Board ...Respondent.

LPA No. 112 of 2011
Judgment reserved on 6th August, 2015.
Date of decision: 13th August, 2015.

Constitution of India, 1950- Article 226- Appellant was an employee of the respondent board - he filed an application for seeking direction to consider his case for promotion, to fix his seniority and to release the selection grade in his favour- the application was dismissed- the petition was filed after 19 years- held, that the petition of a person who does not seek relief within time has to be dismissed on the ground of delay and latches - the petitioner had not given any reason for the delay and his application was rightly dismissed.(Para 7-13)

Case referred:
Inderjit Kumar Dhir versus State of H.P. and others, ILR 2014 Vol.V Page-142

For the appellant: Mr. N.S. Chandel, Advocate.
For the respondents: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate, for respondent No.1.
Respondent No. 2 already deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This Letters Patent Appeal is directed against the judgment dated 22.11.2010, made by the learned Single Judge of this Court in CWP(T) No. 5668 2008 (OA NO. 87/1999) titled *Sh. Inder Singh Guleria vs. H.P.S.E. B. & Anr.,* whereby the writ petition came to be dismissed for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. It appears that the appellant was an employee of the respondent-Board, reached the age of superannuation on 31.10.1996. He invoked the jurisdiction of the H.P. State Administrative Tribunal in the year 1999, by the medium of Original Application No. 87 of 1999 with the following prayers:

> *"(A) That directions may kindly be issued to the respondent No. 1 to consider the case of the applicant for promotions as S.A.S. Superintendent w.e.f. 12.11.1993, As Accounts Officer w.e.f.*

4th of January, 1989 and Senior Accounts Officer w.e.f. 7th of January, 1994 and then as Deputy Chief Accounts Officer from August, 1996;

(B) Further directions may also kindly be issued that after the promotion of the applicant the respondent-Board be directed to fix the seniority of the applicant in the cadre of Superintendent, Accounts Officer, Senior Accounts officer and then in the cadre of Deputy Chief Accounts officer and to pay him all the arrears of pay with interest throughout.

(C) Similarly respondent No. 1 may also kindly be directed to release the selection grade in favour of the applicant after he has rendered 7 years of service i.e. from January, 1980 with interest throughout."

3. The respondents resisted the Original Application on the grounds taken in the reply.

4. The said Original Application, on the abolition of the H.P. State Administrative Tribunal, was transferred to this Court and came to be registered as CWP(T) No. 5668 of 2008.

5. The learned Single Judge, after considering the entire matter, dismissed the writ petition on various grounds, including on account of delay, laches, waiver and acquiescence.

6. Precisely, the case of the petitioner is that he was entitled to selection grade in the year 1980 when similarly situated persons were granted selection grade by granting some relaxation but the petitioner has been discriminated.

7. The following questions are to be determined:-

(i) Whether a person who has chosen not to come out of deep slumber for 19 years is entitled to invoke the writ jurisdiction for equitable relief?

(ii) Whether writ petitioner can seek relief which was not granted to him in the year 1980 and remained contented with the said decision till the age of retirement in the year 1996 and even thereafter for three years?

8. The answer is in negative for the following reasons.

9. The delay takes away the settings of law. A person who does not seek relief within time, his petition has to be dismissed only on the grounds of delay and laches otherwise it would amount to gross misuse of jurisdiction and disturb the settled position.

10. The Writ Court has dismissed the writ petition on the ground of delay which has crept-in right from 1980 to 1999. The petitioner has not made any whisper about the cause of delay, not to speak of explaining the delay which has crept in for the last 19 years.

11. The apex Court in series of judgments and this Court in ***LPA No. 150 of 2014*** titled ***Mr. Inderjit Kumar Dhir versus State of H.P. and others***, decided on 17th September, 2014, made the detailed discussions on this aspect. It is apt to reproduce paras 5 to 10 of the said judgment herein:

"5.The Apex Court in a case titled as **R & M Trust versus Koramangala Residents Vigilance Group and others,** reported in **(2005) 3 Supreme Court Cases 91,** held that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution; delay defeats equity and delay cannot be brushed aside without any plausible explanation. It is apt to reproduce para 34 of the judgment herein:

"34. There is no doubt that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution. We cannot disturb the third-party interest created on account of delay. Even otherwise also why should the Court come to the rescue of a person who is not vigilant of his rights?"

6.The Apex Court in cases titled as **S.D.O. Grid Corporation of Orissa Ltd. and others versus Timudu Oram, reported in 2005 AIR SCW 3715,** and **Srinivasa Bhat (Dead) by L.Rs. & Ors. versus A. Sarvothama Kini (Dead) by L.Rs. & Ors.,** reported in **AIR 2010 Supreme Court 2106,** has also discussed the same principle. It would be profitable to reproduce para 9 of the judgment in **Timudu Oram's case (supra)** herein:

"9. In the present case, the appellants had disputed the negligence attributed to it and no finding has been recorded by the High Court that the GRIDCO was in any way negligent in the performance of its duty. The present case is squarely covered by the decision of this Court in Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others (supra), 1999 AIR SCW 3383 : AIR 1999 SC 3412. The High Court has also erred in awarding compensation in Civil Appeal No. ..... of 2005 (arising out of SLP (C) No. 9788 of 1998). The subsequent suit or writ petition would not be maintainable in view of the dismissal of the suit. The writ petition was filed after a lapse of 10 years. No reasons have been given for such an inordinate delay. The High Court erred in entertaining the writ petition after a lapse of 10 years. In such a case, awarding of compensation in exercise of its jurisdiction under Article 226 cannot be justified."

7.It would also be apt to reproduce para 39 of the judgment rendered by the Apex Court in **Bhakra Beas Management Board versus Kirshan Kumar Vij & Anr.,** reported in **AIR 2010 Supreme Court 3342,** herein:

"39. Yet, another question that draws our attention is with regard to delay and laches. In fact, respondent No. 1's petition deserved to be dismissed only on that ground but surprisingly the High Court overlooked that aspect of the mater and dealt with it in a rather casual and cursory manner. The appellant had categorically raised the ground of delay of over eight years in approaching the High Court for grant of the said relief. But the High Court has simply brushed it aside and condoned such an inordinate, long and unexplained delay in a casual manner. Since, we have decided the matter on merits, thus it is

not proper to make avoidable observations, except to say that the approach of the High Court was neither proper nor legal."

8.The Apex Court has considered the same issue and point in a case titled as **Delhi Administration and Ors. versus Kaushilya Thakur and Anr.,** reported in **AIR 2012 Supreme Court 2515.** It is apt to reproduce para 10 of the judgment herein:

"10. We have heard Shri H.P. Raval, learned Additional Solicitor General and Shri Rishikesh, learned counsel for respondent No.1 and perused the record. In our view, the impugned order as also the one passed by the learned Single Judge are liable to be set aside because,

(i) While granting relief to the husband of respondent No. 1, the learned Single Judge overlooked the fact that the writ petition had been filed after almost 4 years of the rejection of an application for allotment of 1000 sq. yards plot made by Ranjodh Kumar Thakur. The fact that the writ petitioner made further representations could not be made a ground for ignoring the delay of more than 3 years, more so because in the subsequent communication the concerned authorities had merely indicated that the decision contained in the first letter would stand. It is trite to say that in exercise of the power under Article 226 of the Constitution, the High Court cannot entertain belated claims unless the petitioner offers tangible explanation State of M.P. v. Bhailal Bhai (1964) 6 SCR 261.

(ii) The claim of Ranjodh Kumar Thakur for allotment of land was clearly misconceived and was rightly rejected by the Joint Secretary (L&B), Delhi Administration on the ground that he was not the owner of land comprised in khasra No. 70/2. A bare reading of Sale Deed dated 12.7.1959 executed by Shri Hari Chand in favour of Ranjodh Kumar Thakur shows that the former had sold land forming part of khasra Nos. 166, 167 and 168 of village Kotla and not khasra No.70/2. This being the position, Ranjodh Kumar Thakur did not have the locus to seek allotment of land in terms of the policy framed by the Government of India. The payment of compensation to Ranjodh Kumar Thakur in terms of the award passed by the Land Acquisition Collector and the enhanced compensation determined by the Reference Court cannot lead to an inference that he was the owner of land forming part of Khasra No.70/2. In any case, before issuing a mandamus for allotment of 1000 square yards plot to the writ petitioner, the High Court should have called upon him to produce some tangible evidence to prove his ownership of land forming part of Khasra No.70/2. Unfortunately, the learned Single Judge and the Division Bench of the High Court did not pay serious attention to the stark reality that Ranjodh Kumar Thakur was not the owner of land mentioned in the application filed by him for allotment of 1000 square yards land."

9.The Apex Court in a latest case titled as **Chennai Metropolitan Water Supply and Sewerage Board and others versus T.T. Murali**

Babu, reported in **(2014) 4 Supreme Court Cases 108,** has taken into consideration all the judgments and the development of law and held that delay cannot be brushed aside without any reason. It is apt to reproduce paras 13 to 17 of the judgment herein:

"13. First, we shall deal with the facet of delay. In Maharashtra SRTC v. Balwant Regular Motor Service,, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Hurd, (1874) LR 5 PC 221, which is as follows: (Balwant Regular Motor Service case, AIR 1969 SC 329, AIR pp. 335-36, para 11)

> *"11. .....Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' (Lindsay Petroleum Co. case, PC pp/ 239-40)"*

14. In State of Maharashtra v. Digambar, (1995) 4 SCC 683, while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that: (SCC p. 692, para 19)

> *"19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in*

exercise of such power, when he approaches it with unclean hands or blameworthy conduct."

15. In State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566 : AIR 1987 SC 251, the Court observed that : (SCC p. 594, para 24)

" 24. .....it is well settled that power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic."

It has been further stated therein that: (Nandlal Jaiswal case, (1986) 4 SCC 566 : AIR 1987 SC 251, SCC p. 594, para 24)

"24. ..... If there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction."

Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis.

17. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had

remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold.

10.The same principles have been laid down by this Court in **LPA No. 48 of 2011** titled ***Shri Satija Rajesh N. vs. State of Himachal Pradesh and others*** decided on 26.8.2014."

12. This Court also in a batch of LPAs lead case of which is ***LPA No. 107 of 2014*** titled ***Amit Attri and others versus Anil Verma and others*** decided on 3rd December, 2014, laid down the similar principles of law. It is apt to reproduce paras 34 to 36 of the said judgment herein:

"34.The writ petitioners in CWPs No. 3789 and 6610 of 2014 have sought similar reliefs, which have been granted to the petitioners, in terms of the impugned judgment. They are fencer. They were watching from a distance that what will happen to the writ petitioners in the batch of writ petitions. After noticing the judgment, they have come to the Court, are caught by delay and laches as held by the apex Court in **Nadia Distt. Primary School Council vs. Sristidhar Biswas AIR 2007 SC 2640**. It is apt to reproduce the relevant portion of para 4 herein:

"4. We have heard learned counsel for the parties. Learned counsel for the appellants submitted that the persons who had not approached the Court in time and waited for the result of the decision of other cases cannot stand to benefit. The Court only gives the benefit to the persons who were vigilant about their rights and not who sit in fence. Mallick's case was decided in 1982, in 1989 Dibakar Pal filed the petition and thereafter in 1989 respondents herein filed the writ petition. Thereafter petition filed by Dibakar Pal challenging the panel of 1980 was hopelessly belated. Likewise the present writ petition filed by the respondents herein. The explanation that the respondents waited for the judgment in Mallick's case of Dibakar's case, is hardly relevant……"

35.The apex court in **Ghulam Rasool Lone** vs. **State of J & K, 2009 AIR SCW 5260,** laid down the same principles of law. It is apt to reproduce the relevant portion of paras 14 and 18 herein:

"14. The discretionary jurisdiction under Article 226 of the Constitution may, however, be denied on the ground of delay and latches. It is now well settled that who claims equity must enforce his claim within a reasonable time…….

18. While considering the question of delay and latches on the part of the petitioner, the court must also consider the effect thereof. Promotion of Hamidullah Dar was effected in the year 1987. Abdul Rashid Rather filed his writ petition immediately after the promotion was granted. He, therefore, was not guilty of any delay in ventilating his grievances. It will bear repetition to state that the petitioner waited till Abdul Rashid Rather was in fact promoted. He did not consider it necessary either to join him or to file a separate writ petition immediately thereafter, although even according to him, Abdul Rashid Rather was junior to him. The Division Bench, therefore, in our opinion rightly opined that the petitioner was sitting on the fence."

36. The same principles of law have been laid down by the apex Court in a latest judgment in **State of Uttar Pradesh & Ors. v. Arvind Kumar Srivastava & Ors JT 2014 (12) SC 94**, and it has been held as under:

"23.....

1.....

(2) However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim."

24.Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of

today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."

13. Applying the test in this case, the Writ Court has rightly dismissed the writ petition, needs no interference. Accordingly the LPA is dismissed along with pending applications, if any.

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

Sh. Jai Singh s/o late Sh. Narayan Singh & Ors. ....Revisionists

Versus

Smt. Santo Devi d/o Sh. Mansha Ram & Others ...Non-revisionists

Civil Revision Petition No. 69/2014
Reserved on: 15th July, 2015
Date of order: 13th August, 2015

Code of Civil Procedure, 1908- Order 9 Rule 9 & order 17 Rule 2- Suit dismissed in default - application for restoration dismissed on merits-appeal there against dismissed by appellate court; hence revision-Advocate engaged by the plaintiff did not appear before the court - since there were no directions by the trial court to the parties to appear personally, therefore, absence of the plaintiffs was bona fide—plaintiff's rights cannot be foreclosed for negligence of his counsel - Revision allowed and suit restored to its original number.

(Para 10 to 13)

Cases referred:

State of Patiala vs. Hakam Singh, 1983 Punjab Law reporter page 170
Shaikh Abdul vs. Aspy Beharam (High Court of Judicature at Bombay), 1994 ACJ page 749
Vidhyadhar vs. Mankikrao, AIR 1999 Apex Court 1441
Iswar Bhai C. Patel @ Bachu Bhai Patel vs. Harihar Behera, SLJ 1999 Apex Court 724

For the revisionists :Mr. G. D. Verma, Sr. Advocate with Mr. B. C. Verma, Advocate
For the non-revisionists : None

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure against the order dated 22.03.2014 passed by the learned Additional District Judge-I Shimla in Civil Misc. Appeal RBT No.06-S/14 of 2013/11 whereby the learned Additional District Judge-I Shimla upheld the order of learned trial Court dated 24.05.2011 announced in CMA No. 30/6 of 2008 tilted Narayan Singh vs. Smt. Santo Devi & Ors.

BRIEF FACTS OF THE CASE

2. Sh. Narian Singh S/o Sh. Mansha Ram filed C.S. No. 114/1 of 2005 for decree of permanent prohibitory injunction against co-defendant Smt. Santu Devi restraining co-defendant No.1 from raising any construction over suit land comprised in khata No. 16 min khatoni No. 44 khasra number 231 measuring 0-01-96 as per missal Hakiyat settlement 2000-2001 up mohal Tudd Mahal Tudd (Teh.) Shimla (Distt.) Shimla

H.P. Learned trial Court i.e. Civil Judge (Junior Division) Court No.4 Shimla H.P. dismissed civil suit in default for want of prosecution on dated 28.7.2008. Shri Narayan Singh filed application under Order 9 Rule 9 read with Section 151 CPC on dated 26.8.2008 for restoration of C.S. No.114/1 of 2005 tilted Narayan Singh vs. Smt. Santo Devi & Ors. which was dismissed in default for want of prosecution on dated 28.07.2008 by the learned trial Court. During pendency of the application Sh. Naraayan Singh died and his LRs were brought on record by the learned trial Court. It is pleaded that the civil suit was fixed for service of LRs of co-defendant No.3 on dated 28.07.2008. It is further pleaded that the learned trial Court on the previous date i.e. 05.06.2008 directed the plaintiff to file process fee and correct address for service of LRs of co-defendant No.3. It is further pleaded that thereafter the plaintiff contacted his Advocate on dated 05.06.2008 itself and was informed about the steps to be taken in the civil suit. It is further pleaded that thereafter the plaintiff could not contact his Advocate and consequently neither the plaintiff nor his Advocate could appear before the learned trial Court on dated 28.07.2008 when the case was called for hearing. It is further pleaded that the default was not intentional. It is further pleaded that the plaintiff was diligently prosecuting the case after the institution of the civil suit. It is further pleaded that co-defendant No.3 was proforma defendant in the civil suit. Prayer for restoration of C.S. No.114/1 of 2005 sought.

3. Per contra response filed on behalf of the contesting defendants pleaded therein that the applicant has no cause of action to file the application under Order 9 Rule 9 CPC. It is further pleaded that the applicant was negligent. It is further pleaded that the applicant cannot be permitted to take advantage of his own omission. It is further pleaded that the applicant is estopped from filing the application. It is further pleaded that the application is time barred. It is further pleaded that no sufficient cause is mentioned in the application for restoration of C.S. No.114/1 of 2005 and prayer for dismissal of application sought.

4. As per pleadings of the parties learned trial Court framed following issues on dated 15.07.2010:

1) Whether there are sufficient grounds to set-aside the order dated 28.07.2008 vide which suit was dismissed in default? OPA

2) Whether the applicant has no cause of action to file the application as alleged? OPR

3) Whether the applicant is estopped from filing the present application as alleged? OPR

4) Whether the application is time barred as alleged? OPR

5) Relief.

5. Learned trial Court decided issues No. 1, 2 and 4 in negative and learned trial Court decided issue No. 3 in affirmative. Learned trial Court dismissed application filed under Order 9 Rule 9 CPC read with Section 151 CPC. Learned first appellate Court affirmed order of learned trial Court.

6. The applicant examined AW-1 Sh. Jai Singh as oral witness. AW-1 Sh. Jai Singh has stated that civil suit was dismissed in default on dated 28.07.2008. He has further stated that the learned trial Court had directed to bring on record LRs of co-defendant No.3. He has further stated that when he brought the correct address of LRs of co-defendant No.3 to his Advocate then he was informed that his case was dismissed in default on dated 28.07.2008. He has further stated that C.S. No.114/1 of 2005 be restored to its original status. In cros s-examination he denied the suggestion that he intentionally

did not appear before the Court on the date of hearing. He has also denied the suggestion that there are no sufficient grounds to restore the C.S. No.114/1 of 2005.

7. No rebuttal oral evidence adduced by non-applicants. It is also proved on record that the civil suit was dismissed in default for non-prosecution by the learned trial Court under Order 17 Rule 2 of the Code of Civil Procedure 1908. Learned trial Court did not mention in order sheet whether C.S. No.114/1 of 2005 was dismissed under Order 17 Rule 2 or under Order 17 Rule 3 CPC. Learned trial Court did not proceed to decide the civil suit forthwith on merits.

8. Court heard learned Advocate appearing on behalf of the revisionists at length. None appeared on behalf of the non-revisionists despite service. Court also perused the entire records carefully.

9. Submission of learned Advocate appearing on behalf of the revisionists that there are sufficient grounds for non-appearance of the non-revisionists when the case was listed for hearing before the learned trial Court is accepted for the reasons hereinafter mentioned. It is well settled law that whenever a suit is dismissed under Order 17 Rule 2 CPC the same could be restored to its original number under Order 9 of the Code of Civil Procedure 1908. It is also well settled law that when the suit is disposed of by the learned trial Court under Order 17 Rule 3 CPC on merits then the aggrieved party is at liberty to file application for setting-aside the ex-parte decree. In the present case no ex-parte decree was passed by the learned trial Court. Hence it is held that the learned trial Court disposed of the present suit under Order 17 Rule 2 CPC. The present suit was dismissed in default on dated 28.07.2008 and restoration application was filed on 26.08.2008 within one month from the date of cause of action.

10. It is proved on record in the present case that the applicant had engaged Advocate to appear in the Court and Power of Attorney was filed on behalf of the applicant. It is well settled law that in civil suit parties are not expected to appear in person in all the civil proceedings. There was no direction from the learned trial Court to the revisionists to appear in the civil suit on dated 28.07.2008 in person. It is also well settled law that parties should not be penalized for the fault of learned Advocate. ***See 1983 Punjab Law reporter page 170 titled State of Patiala vs. Hakam Singh.*** Also see ***1994 ACJ page 749 titled Shaikh Abdul vs. Aspy Beharam (High Court of Judicature at Bombay)***.

11. Non-revisionists did not adduce any rebuttal evidence. Non-revisionists did not appear in the witness box to rebut the testimony of revisionists. Hence adverse inference under Section 114(g) of the Indian Evidence Act 1872 is drawn against the non-revisionists in the present case. It was held in case reported in AIR 1999 Apex Court 1441 titled ***Vidhyadhar*** vs. ***Mankikrao*** that if a party did not enter into the witness box then adverse inference should be drawn against the party who did not enter in the witness box. Also see SLJ 1999 Apex Court 724 titled ***Iswar Bhai C. Patel @ Bachu Bhai Patel*** vs. ***Harihar Behera.***

12. In view of the fact that the civil suit was dismissed by the learned trial Court under Order 17 Rule 2 CPC and in view of the fact that restoration application was filed within one month from the date of cause of action and in view of the fact that co-defendant No.3 was simply a proforma defendant and in view of the fact that no relief was claimed by the plaintiff against proforma defendant No.3 Court is of the opinion that it is expedient in the ends of justice to restore C.S. No.114/1 of 2005 to its original number in the ends of justice.

13. In view of the above stated facts Civil Revision Petition No.69/2014 titled Jai Singh & Ors. vs. Santo Devi & Ors. is accepted and orders of learned trial Court and learned first Appellate Court announced upon application filed under Order 9 Rule 9 CPC are set-aside and application filed under Order 9 Rule 9 CPC is allowed in the ends of justice and C.S. No.114/1 of 2005 is restored to its original status subject to payment of costs of Rs.1000/- (One thousand). Learned trial Court will restore C.S. No.114/1 of 2005 to its original status and thereafter the learned trial Court will dispose of C.S. No.114/1 of 2005 strictly in accordance with law expeditiously within two months because C.S. No.114/1 of 2005 is pending since 2005 and requires expeditious disposal. Parties are directed to appear before the learned trial Court on date **11.09.2015**. Files of the learned trial Court and learned first Appellate Court along with certified copy of this order be transmitted forthwith. File of civil revision petition be consigned to record room after due completion. Civil Revision Petition No. 69/2014 is disposed of. Pending application(s) if any also disposed of. No order as to costs.

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

Jeet Lal .....Petitioner.
Versus
Kamaljeet Singh and others .....Respondents.

CMPMO No.194 of 2015.
Date of decision: 13.08.2015.

Code of Civil Procedure, 1908- Order 7 Rule 14- Petitioner filed an application for placing certain documents on record on the ground that the witnesses had wrongly mentioned that there was no tree, however, Khasra Girdawari showed that there were number of trees standing on the suit land- a prayer was made to place on record copy of Khasra Girdawari, Akas Musabi, certificate of Gram Panchayat, Will and the photographs-the application was rejected on the ground that it was filed late and the documents were not per se as permissible in law- held, that only those documents which have some semblance or are connected with lis can be place on record under Order 7 Rule 14 CPC- no issue was framed regarding the existence of trees on the suit land and thus the documents have no bearing on the dispute- the documents cannot be produced on record to contradict the testimonies of witnesses- the application was rightly dismissed by Court. (Para 5- to 7)

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

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned Civil Judge (Junior Division), Court No.IV, Hamirpur, whereby he dismissed the application filed by the petitioner under Order 7 Rule 14 CPC, for permission to produce on record certain documents.

2. The petitioner had filed the application on the ground that the defendants' witnesses had wrongly mentioned that there was no tree over the suit land. But, in the khasra girdawari, it had been reflected that there were number of trees standing thereupon and, therefore, he be permitted to produce on record the copy of khasra girdawari, copy of aks musavi, copy of certificate of Gram Panchayat, Bahanwin, District Hamirpur and copy of the Will dated 29.08.2012 and certain photographs.

3. This application was rejected by the learned Court below on the ground that the application was not maintainable on account of inordinate delay in filing the same and moreover the documents attached were not perse admissible in the eyes of law.

4. The petitioner has assailed the order on number of grounds as taken in the memo of petition.

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

5. At the outset, it may be observed that under Order 7 Rule 14 CPC only those documents can be ordered to be placed on record which have some semblance or are connected with the lis. The lis is determined by issue-wise findings recorded therein and, therefore, the documents as sought to be produced must have some connection with the lis i.e. issues framed in the case and thereafter it has to be further concluded that the same would not be necessary for the just and proper decision of the case. Merely making an averment that the documents are necessary for the complete and proper adjudication or claiming that no prejudice would be caused to the other party or the petitioner would suffer an irreparable loss and injury in case the application is not allowed or to claim that the application is bonafide, is of no consequence.

6. Judged in light of the aforesaid observations, it would be noticed that the following issues in the case came to be settled on 04.01.2013:-

1. Whether suit land is joint between the parties to the suit? OPP.
2. Whether defendants are raising construction and changing nature of the suit land without getting the same partitioned? OPP.
3. Whether plaintiff is entitled to decree of permanent prohibitory injunction, as prayed for? OPP.
4. Whether plaintiff is entitled to in-alternative relief of joint possession by way of demolition? OPP.
5. Whether parties to the suit are in separate possession over the suit land by way of family arrangement, as alleged? OPD.
6. Whether suit of the plaintiff is not maintainable in its present form? OPD.
7. Whether there lies no cause of action in favour of plaintiff to file the present suit? OPD.
8. Whether plaintiff is estopped from filing the present suit by his own act and conduct? OPD.
9. Whether suit of the plaintiff is bad for non-joinder of necessary parties? OPD.
10. Whether defendants are entitled to special costs under Section 35-A CPC? OPD.
11. Relief.

7. It is evident from a perusal of the aforesaid issues that the documents as are sought to be produced by the petitioner have no direct or indirect bearing with the issues so framed. The petitioner was required to explain as to how the documents now sought to be

produced have bearing on the merits of the case. The mere fact that the defendants' witnesses have stated that there was no tree over the suit land would require rebuttal only in case it was "a fact in dispute" and issue to this effect had been framed. After-all, issue can either be issue of fact or a mixed question of fact and law or an issue of law upon which adjudication can be made. Documents sought to be placed on record should be germane to the issues involved in the suit. Once, the documents are not relatable directly or indirectly to the issues framed in the case, I see no illegality, impropriety or irregularity in the order passed by the learned Court below and accordingly this petition is dismissed leaving the parties to bear their own costs. Pending application, if any, also stands disposed of and the interim order passed by this Court on 28.05.2015 is vacated.

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

Anand Prakash Massand son of late Shri Ochi Ram Massand ....Petitioner

Versus

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

Cr.MP(M) No. 1098 of 2015
Order Reserved on 5th August 2015
Date of Order 14th August 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offence punishable under section 406 I.P.C- record reveals the existence of family dispute between the parties- Rule is in favour of bail and not jail- nothing on the record to show that the interest of state and General Public shall be prejudiced in case applicant is released on bail- application allowed. (Para 8 to 10)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702
Nirmal Walia vs. State, 1982 SLJ (HP) 415

For the Petitioner: Mr. Javed Khan, Advocate.
For the Non-petitioner: Mr.M.L.Chauhan, Additional Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 36 of 2015 dated 25.6.2015 registered under Section 406 IPC at P.S. Kasauli District Solan (H.P.)

2. It is pleaded that petitioner is working as Chief Manager in Union Bank of India New Delhi and Smt. Usha is real sister of complainant Raj Kishore Gupta son of late Shri D.R. Gupta. It is pleaded that complainant who is an influenced person wanted to grab the entire ancestral property. It is pleaded that Smt. Usha Devi demanded her share in the

ancestral property. It is pleaded that complainant Raj Kishore Gupta is brother-in-law of petitioner. It is further pleaded that Raj Kishore Gupta complainant did not care his mother during her life time and harassed his mother during her life time. It is pleaded that Raj Kishore Gupta complainant filed false criminal complaint against petitioner and his wife Usha Devi that accused persons took 1½ Kg. gold and ` 16 lacs (Rupees sixteen lacs only) cash and other articles from the house. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence. It is pleaded that petitioner will abide by all terms and conditions imposed by the Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report on dated 25.6.2015 complainant Raj Kishore Gupta son of late Shri D.R. Gupta resident of village Shaktighat P.O. Jubbar Tehsil Kasauli District Solan came in police station and presented criminal complaint against accused persons. There is further recital in police report that father of complainant died many years ago and complainant has one sister namely Usha co-accused No.2. There is recital in police report that father of complainant was posted in education department and retired as Principal. There is recital in police report that Usha co-accused No. 2 is residing at Delhi. There is recital in police report that complainant Raj Kishore Gupta has business at Chandigarh and he is residing in Chandigarh along with his family members. There is further recital in police report that after investigation it was observed that father of complainant had died many years ago and complainant has one sister namely co-accused No. 2 Usha. There is further recital in police report that mother of complainant died on dated 5.4.2015. There is further recital in police report that on dated 18.7.2015 complainant and accused persons were talking about division of ancestral property and when complainant went to his another residential room for some time in the meanwhile both accused persons namely Anand and Usha took golden jewellary and FDRs in vehicle No. PB-10CU-9379. There is recital in police report that complainant tried to call back the accused persons but accused persons did not response. There is recital in police report that golden articles and FDRs are still to be recovered from accused persons. Prayer for dismissal of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?

2. Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of

offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It is prima facie proved on record that complainant Raj Kishore and accused Usha are real brother and sister. It is also prima facie proved on record that co-accused No. 1 Anand Massand is brother-in-law of complainant Raj Kishore. It is prima facie proved on record that dispute inter se the parties is relating to division of ancestral property. In view of the fact that dispute inter se the complainant and accused is a family dispute relating to ancestral property Court is of the opinion that it is expedient in the ends of justice to release the petitioner on anticipatory bail at this stage. Court is of the opinion that if petitioner is released on anticipatory bail at this stage then interest of State and general public will not be adversely affected. Court is of the opinion that if petitioner is released on bail at this stage then investigation of case will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of State that still jewellary and FDR are to be recovered from accused persons and on this ground anticipatory bail application be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that bail cannot be denied to accused persons solely on the ground that some recovery is to be effected from accused ***(See 1982 SLJ (HP) 415 titled Nirmal Walia vs. State)***

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if anticipatory bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional anticipatory bail will be granted to petitioner and if petitioner will flout the terms and conditions of anticipatory bail order then prosecution will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

10. In view of my findings on point No.1 anticipatory bail application filed by petitioner under Section 438 Cr.P.C. is allowed and interim order dated 23.7.2015 is made absolute. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No.18 of 2009 a/w FAO No. 48 of 2009 and C.O. No. 313 of 2009.
Judgment reserved on 7.8.2015
Date of decision: 14. 08.2015.

1. FAO No.18 of 2009.

Managing Director, HPMC Nigam Vihar ...Appellant

Versus

Naresh Kumar and others ...Respondents.

2. FAO No 48/2009.

Naresh Kumar ....Appellant

Versus

Managing Director, HPMC Nigam Vihar and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Insurance Company pleaded that the driver was under the influence of liquor at the time of the accident, however, the policy absolves the Insurance Company of liability, when the vehicle was being driven under the influence of liquor with the knowledge and consent of the insured -no such evidence was led by the insurer- held, that the Tribunal had fallen an error in holding that the insured had committed willful breach of terms and conditions of the policy. (Para 14-17)

Cases referred:

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

Khem Chand versus Smt. Uma Devi and others, Latest HLJ 2010 (HP) 1

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(s): Mr.P.D. Nanda, Advocate, for the appellant in FAO No. 18 of 2009 and Mr. S.C. Sharma, Advocate, for the appellant in FAO No. 48 of 2009.

For the respondent(s): Mr.S.C. Sharma, Advocate, for respondent No. 1 in FAO No. 18 of 2009 and Mr. P.D. Nanda, Advocate, for respondent No. 1in FAO No. 48 of 2009.

Mr. V.S. Chauhan, Advocate, for respondent No. 2 in both the appeals.

Mr.B.M. Chauhan, Advocate, for respondent No. 3 in both the appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

These two appeals are outcome of a common judgment and award dated 1.11.2008, passed by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. in

MAC Petition No.23-S/2 of 2006, titled *Sh. Naresh Kumar versus Managing Director HPMC Nigam Vihar and others*, hereinafter referred to as "the Tribunal", for short, whereby compensation to the tune of Rs.60,000/- alongwith interest @ 9% per annum came to be awarded in favour of the claimant and against respondent No. 1- Managing Director HPMC Nigam Vihar and respondent No.2 driver Ishwar Dass, jointly and severally and respondent No. 1 was directed to satisfy the award, for short "the impugned award", on the grounds taken in the memo of appeal.

2. In view of the above, this judgment will govern both these appeals.

3. It appears that in a vehicular accident which took place on 1st April, 2006 at about 7 p.m. at Green Park near Talland, caused by driver Ishwar Dass respondent No.2 herein, while driving Car No. HP-03A-0065 of the Managing Director H.P.M.C Nigam Vihar, Shimla, the claimant Naresh Kumar sustained injuries, was bedridden for two months and under treatment, constraining him to file claim petition before the Tribunal for the grant of compensation to the tune of Rs.11,65,320.60, as per the break-ups given in the claim petition.

4. The claim petition was contested and resisted by all the respondents in the claim petition.

5. The Tribunal framed following issues:

(i) *Whether the petitioner sustained the injuries due to the rash and negligent driving of Car No. HP-03A-0065 by its driver (respondent No.2) as alleged? OPP*

(ii) Whether the accident took place due to the contributory negligence of the petitioner? OPR

(iii) If issue No. 1 is proved ion affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties.

(iv) Whether the petition is not maintainable in the present form? OPR

(v) Whether the petitioner is estopped from filing the petition by his act and conduct? OPR

(vi) Whether the petition is bad for non-joinder of the necessary parties? OPR

(vii) Whether the respondent No. 2 was not holding and possessing a valid and effective driving licence to drive the Car at the material time. If so, its effect? OPR-3.

(viii) Whether the vehicle was being plied in violation of the terms and conditions of the insurance policy. If so, its effect? OPR-3.

(ix) Relief.

6. The parties have led evidence.

7. The Tribunal, after scanning the evidence, awarded a sum of Rs.60,000/- as compensation, in favour of the claimant and directed the driver and owner of the vehicle to satisfy the award. However, insurer came to be exonerated.

8. The owner/insured, by the medium of FAO No.18 of 2009, has questioned the impugned award on the ground that the Tribunal has fallen in an error in discharging

the insurer from the liability and saddling the owner and driver with the liability. The claimant, by the medium of FAO No. 48 of 2009 has questioned the impugned award on the ground of adequacy of the compensation.

Issue No.1.

9. The claimant has led evidence, oral as well as documentary, and proved that the driver of the offending Car has driven the vehicle rashly and negligently on the date of the accident and caused the accident. The Tribunal has rightly made discussion in paras 10 to 17 of the impugned judgment. The FIR came to be lodged against the driver of the offending vehicle. Thus, it is proved that the accident was outcome of rash and negligent driving of the driver of the offending car. Accordingly, the findings returned on issue No. 1 are upheld.

Issue No.2.

10. It was for the respondents to prove that the accident was outcome of contributory negligence of the claimant and the driver of the offending car, has not led any evidence to prove that the claimant was in any way negligent. It is held that it was not a case of contributory negligence. The accident was caused by the driver of the offending vehicle while driving the vehicle rashly and negligently. In view of the findings returned on issue No. 1, the findings returned on issue No. 2 also merit to be upheld. Thus, the findings returned on issue No. 2 are upheld.

11. Before I will deal with issues No. 3 and 8, I deem it proper to deal with issues No. 4 to 7.

12. Respondents. i.e., driver, owner/insured had to discharge the onus on these issues. Virtually, all these issues have not been pressed before the Tribunal. Thus, they are precluded from questioning the findings returned on these issues. Even otherwise, these issues are not in dispute in these appeals. Accordingly, the findings returned on these issues are upheld.

13. Before I deal with issue No. 3, I deem it proper to deal with issue No. 8.

14. It was for the insurer to plead and prove that the owner of the vehicle has committed willful breach in terms of the mandate of Sections 147 and 149 of the Motor Vehicles Act, "the Act" for short read with **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. 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."

15 The learned counsel for the insurance company has relied upon the terms and conditions of the insurance policy but the Tribunal has fallen in an error in holding that the owner has committed willful breach. The condition No. 2 (c) of the terms and conditions of the insurance policy read as under:

"The Company shall not be liable to make any payment in respect of:

(a) ....

(b) ....

(c) <u>any accidental loss or damage suffered whilst the insured or any person driving the vehicle with the knowledge and consent of the insured is under the influence of intoxicating liquor or drugs."</u>

[Emphasis added]

16. It was for the insurer to plead and prove that the driver was under the state of intoxication with the knowledge and consent of the insured. No such evidence has been led by the insurer that the owner was accompanying the driver and driver had taken the alcohol with the knowledge and consent of the insured. In the given circumstances, how the Tribunal has exonerated the insurer, is not forthcoming.

17. This Court in **<u>Khem Chand versus Smt. Uma Devi and others,</u>** reported in **<u>Latest HLJ 2010 (HP) 1,</u>** has laid down the same principle. It is apt to reproduce para-4 of the judgment *herein:-*

"4. The law is very well settled that a claim which falls within the purview of an Act policy i.e. a liability falling within the ambit of Section 147 of the Motor Vehicles Act, 1988 (the Act) can only be contested by the Insurance Company on the grounds available to it under Section 149 of the Act. It is not permitted to contest the proceedings on any other grounds. Intoxication of the driver is not a ground available to the Insurance Company under Section 149 of the Act. Therefore, the liability, which is statutory under Section 147 of the Act,

> *has to be satisfied by the insurer. It may be clarified that in case the insurer in addition to the liability which it is bound to cover under the Act covers other liability then in case of such extended liability, it may raise the defences available to it as per terms of the policy, but as far as statutory liability is concerned, the insurer has no authority to incorporate any term in the policy which is not contemplated in terms of Section 149 of the Act. Therefore, the Insurance Company could not have been permitted to raise this defence and it could not be permitted to recover the awarded amount from the insured."*

18. This ground is not available to the insurer in terms of the mandate of Sections 147 and 149 of the Act.

19. Having said so, the owner/insured has not committed any willful breach and insurer has to be saddled with the liability and is saddled with the liability. The issue is decided accordingly.

Issue No.3.

20. The Tribunal has awarded a meager amount of compensation which is against the concept of granting of compensation and in breach of the aim and object of the social legislation, needs to be enhanced for the following reasons.

21. In the injury cases, the compensation has to be awarded in two heads "pecuniary damages" and "non-pecuniary damages."

22. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be made and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*

10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being

interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award.

The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

23. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085**, while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."

24. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

"*8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*

9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

25. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. *In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

v) (Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

26. Applying the test in this case, the compensation is to be awarded as under.

27. The claimant was working as Draftsman in the office of Director, Urban Development, Talland, Shimla and his salary, at that relevant point of time was Rs.13,898/- per month and in addition he was stated to be earning Rs.7,000/- per month from the agricultural work. He was admitted in the hospital for four months and 18 days, i.e., w.e.f. 2.4.2006 to 20th August, 2006. He has lost his earned leave to which he would have been entitled at any later point of time during the job or at the time of his retirement. Thus, the claimant is held entitled to Rs.13,898x4= Rs.55,592/-, under the head "loss of income/earned leave".

28. The claimant has also lost future income because he has suffered permanent disability to the extent of 30% and after retirement he would not be in a position to get reemployment and not in a position to do work at his home. The said injury has affected his earning capacity. Thus, it can be safely held that the claimant has lost source of income to the tune of Rs.5000/- per month. The age of the clamant, at the time of accident, was 43 years but he would have retired at the age of 58 years. The multiplier of "6" was applicable

in view of the Second Schedule of the Act. Thus, the claimant is entitled to Rs.5000x12x6= Total Rs.3,60,000/-.

29. The claimant has been granted a very meager amount of compensation for pain and suffering because this pain and suffering, he has to carry with him in future also. Thus, it is held that he is entitled to Rs.50,000/- under the head "pain and suffering" for future and Rs.25,000/- for the pain and suffering he has already undergone, total to the tune of Rs.75,000/-.

30. The claimant was deprived of his amenities of life. The 30% permanent disability has shattered his physical frame and has badly affected his life. Thus, he is entitled to Rs.50,000/- under the head "loss of amenities of life".

31. The amount of compensation, on account of boarding and lodging, has been assessed at Rs.5000/- only which is a very meager amount. He had to remain hospitalized and taken earned leave for this period. At least Rs.25,000/- by a guess work, should have been awarded under the head "boarding and lodging". Accordingly, the claimant is held entitled to Rs.25,000/- under this head.

32. Admittedly, the claimant has proved that he was attended upon by Miss Sari in the hospital during the treatment and also has been attended upon at his home. At least, the claimant should have been awarded attendant charges for the period he has remained hospitalized, bed ridden and on leave. He has availed four months' leave, as discussed hereinabove. At least Rs.10,000/- per month should have been awarded. Thus, the claimant is held entitled to Rs.10,000/-x4 = Rs.40,000/- under the head "attendant charges".

33. The claimant was also entitled under the head "medical expenses". The claimant has proved that he has spent Rs.32000/- on account of medical expenses but was not granted for the reasons that the employer has reimbursed the same to him. The Tribunal has fallen in an error in not awarding Rs.32000/- to the claimant to which he was entitled to because he has to suffer for ever and has to be under treatment in view of the disability certificate. At least Rs.50,000/- in *lump sum* was to be granted under this head. Accordingly Rs.50,000/- is awarded under this head.

34. Having said so, the claimant is held entitled to as follows:

(i)	Loss of income	Rs.55,592/-
(ii)	Loss of future income	Rs.3,60,000/-
(iii)	Pain and sufferings	Rs.75,000/-
(iv)	Loss of amenities of life	Rs.50,000/-
(v)	Boarding and lodging	Rs.25,000/-
(vi)	Attendant charges	Rs.40,000/-
(vii)	Medical expenses	Rs.50,000/-
	Total	Rs.6,55,592/-

35. The claimant in all is entitled to Rs.6,55,592/-instead of the amount of Rs.60,000/- as awarded by the Tribunal. Accordingly, compensation to the tune of Rs.6,55,592/- is awarded in favour of the claimant with interest @ 7.5% per annum from the date of the impugned award till its realization and the insurer is saddled with the liability.

36. The insurer is directed to deposit the amount within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the

claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, after proper verification.

37. Viewed thus, both the appeals and cross objections No. 313 of 2009 are allowed, along with pending applications, as indicated hereinabove.

38. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. .....Appellant

Versu

Khimi Devi & others ..... Respondents

FAO No.619 of 2008
Date of decision: 14.08.2015

Motor Vehicles Act, 1988- Section 166- Appeal by Insurance Company challenging the award on the ground that deceased was a gratuitous passenger- specific pleadings and ample evidence on record to prove that the deceased was travelling with his goods in the offending vehicle-Insurance Company not pleading commission of the willful breach by the owner -Insurance company had miserably failed to prove that the deceased had not hired the vehicle to transport the vegetable- held that the company was rightly saddled with the liability- appeal dismissed. (Para 6 to 8)

For the appellant: Mr.Suneet Goel, Advocate.
For the respondents: Mr.G.R. Palsara, Advocate, for respondents No.1 to 6.
Mr.Vijay Bhatia, Advocate, for respondent No.7.
Mr.Vijay Chaudhary, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 31st July, 2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Mandi, H.P. (for short, "the Tribunal") in Claim Petition No.13/2001, 18/2005, tilted Smt. Khimi Devi & others vs. Megh Raj & others, whereby compensation to the tune of Rs.8,66,800/-, alongwith interest at the rate of 7.5% per annum, came to be awarded in favour of the claimants and the insurer (appellant herein) was saddled with the liability, (for short the "impugned award").

2. The claimants, the owner/insured and the driver have not questioned the impugned award on any count, thus the same has attained finality so far as it relates to them.

3. Only the insurer-appellant has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling it with the liability inasmuch as the deceased was traveling in the offending vehicle as gratuitous passenger, thus the owner/insured has committed willful breach.

4. Thus, the only question needs to be determined in the instant appeal is – Whether the Tribunal has rightly held that the deceased was not traveling in the offending vehicle as gratuitous passenger, but was traveling as owner of the goods?

5. I have gone through the record and the impugned award. The Claimants, in paragraph 24 of the Claim Petition, have specifically pleaded that the deceased was traveling in the offending vehicle as owner of the goods and had hired the same, which fact has also been admitted by the owner of the offending vehicle in the reply filed to the Claim Petition. It is also apt to record herein that Megh Raj, owner of the offending vehicle, has appeared in the witness box as RW-2 and admitted the said factum.

6. The Tribunal has rightly discussed the evidence in paragraph 16 of the impugned award and I deem it proper to reproduce the same hereunder:

> *"16. Sh.Megh Raj owner of the truck while appearing as RW-2 in the witness box and Dharminder driver of the truck respondent No.2 while appearing as RW-3 have admitted that the truck bearing Registration No.HP-33-0372 was hired by the deceased Rattan Chand for taking vegetables to Nerchowk and it was settled that the deceased Rattan Chand will pay Rs.100/- as fare charges of the vegetables and the deceased Rattan Chand has also boarded the truck in question for looking and care of the vegetables."*

7. It was for the insurer to plead and prove that the owner has committed the willful breach, in which it has failed. The insurer has miserably failed to prove that the deceased had not hired the offending vehicle for transporting the vegetables, and thus, was a gratuitous passenger.

8. Having said so, no interference is required in the impugned award and the same is upheld. Consequently, the appeal, being without merit, is dismissed. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Neem Chand .....Appellant

Versus

Jagar Nath & another ...Respondent

FAO No. 240 of 2008
Decided on : 14.08.2015

Motor Vehicles Act, 1988- Section 149- Claimant had asserted in the petition that he was hit by a tractor –the driver had not denied this fact in the reply- it was duly proved by the witnesses and the documents that the claimant was hit by the offending vehicle – held, that tribunal had wrongly held that claimant was travelling in the vehicle as a gratuitous passenger. (Para 6-11)

For the appellant : Mr. K.B. Khajuria, Advocate.

For the respondents: Nemo for respondent No. 1.
Mr. Praneet Gupta, 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 17th January, 2008, made by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur (HP), (hereinafter referred to as 'the Tribunal') in M.A.C. Case No. 55 of 2004, titled as Jagar Nath versus Neem Chand & another, whereby compensation to the tune of Rs.3,70,300/- with interest @ 6% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1, herein and against the driver-cum-owner-appellant herein, for short, 'the impugned award'.

2. Jagar Nath, claimant and the insurer-New India Insurance Company Limited have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

3. Neem Chand, owner-cum-driver of the offending vehicle-Tractor bearing registration No. HP-24-A-1137, has questioned the impugned award on the ground that the Tribunal has fallen in an error in granting right of recovery to the insurer.

4. Heard.

5. The only question to be determined in this appeal is-*whether the Tribunal has rightly held that the claimant-injured was traveling in the offending vehicle as a gratuitous passenger or otherwise*? It appears that the Tribunal has fallen in an error for the following reasons.

6. The claimant has specifically averred in para-24 of the claim petition that he was hit by the offending tractor, which was being driven by Neem Chand, rashly and negligently, on 18.10.2003, at about 6.30 p.m., at village Jukhala, Tehsil Sadar, District Bilaspur, H.P. It is apt to reproduce the relevant portion of the aforesaid para of the claim petition herein:-

> *"24. That on ill fated day of 18.10.2003 at about 6.30 p.m., at village Jukhala, Tehsil Sadar, Distt. Bilaspur, H.P. while the petitioner was coming to his house, the tractor of respondent No. 1 which was being driven by him rashly and negligently fell down and the petitioner who was standing on the side of the road was hit by the tractor and suffered injuries including fracture of his left leg....."*

7. The driver-cum-owner has not denied the averments contained in the aforesaid para in his reply. The pleadings which are not specifically denied, are deemed to have been admitted.

8. It is also beaten law of the land that in order to determine the rashness and negligence in the claim petitions, strict pleadings and proof are not required, claim petitions are to be determined, summarily and the hyper-technicalities, mystic maybes, procedural wrangles and tangles have no role to play.

9. Having said so, the averments contained in para-24 of the claim petition stand admitted, how can it lie in the mouth of the insurer that the claimant was traveling in the offending vehicle as a gratuitous passenger.

10. The claimant has examined Prakash Singh as PW-2, Babu Ram as PW-3 and Dr. Mukand Lal as PW-4 and also placed on record copies of FIR, disability certificate,

discharge slip and other documents, which do disclose that the claimant was hit by the offending vehicle on 18.10.2003 at about 6.30 p.m., at village Jukhala, Tehsil Sadar, Distt. Bilaspur, H.P., FIR No. 34/2 of 2004, under Sections 279, 337 and 338 of the Indian Penal Code was lodged against driver, Neem Chand and a criminal case is pending before the Chief Judicial Magistrate, Bilaspur.

11. In the given circumstances, it is held that the Tribunal has fallen in an error in holding that the claimant was traveling in the offending vehicle as a gratuitous passenger and in granting right of recovery to the insurer. The insurer has to satisfy the award and is fastened with liability without right of recovery.

12. The insurer-Insurance Company is directed to deposit the awarded amount within eight weeks from today. On deposit, the same be released in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, through payees' account cheque.

13. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

14. Send down the records after placing a copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. ...Appellant

Versus

Shri Shamu Ram & others ...Respondents

FAO No. 294 of 2008
Decided on : 14.08.2015

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that Tribunal had wrongly saddled it with liability with the right to recovery – held that the insurer has to satisfy the claim of the 3rd party and the rights of the 3rd party cannot be defeated even if the insured had committed a willful breach. (Para- 4 & 5)

For the appellant : Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Dibender Ghosh, Advocate, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Delinked from FAO No. 244 of 2008.

2. This appeal is directed against the award dated 24th April, 2008, made by the Motor Accident Claims Tribunal, Kinnaur, at Rampur Bushahr, H.P., (hereinafter referred to as 'the Tribunal') in M.A.C. Case No. 66 of 2005, titled as Shamu Ram & others versus Subhadra Kumari & another, whereby compensation to the tune of ` 2,74,000/- with interest 7 ½% per annum from the date of filing of the claim petition till its realization,

came to be awarded in favour of claimants No. 1 & 2-respondent No. 1 & 2 herein and the insurer-appellant herein, was saddled with liability, for short, 'the impugned award'.

3. The claimants and the legal representative of the owner of the offending vehicle have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

4. Only the insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with the liability with right of recovery.

5. The mandate of law is that the insurer has to satisfy the claim of the third party provided that the insurance policy was subsisting. The rights of the third party cannot be defeated even if the owner-insured has committed a willful breach.

6. Having said so, the Tribunal has rightly saddled the insurer with the liability with right of recovery.

7. Having said so, the impugned award is upheld and the appeal is dismissed.

8. Send down the records after placing copy of the judgment on record.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.549 & 550 of 2008 &
FAO No.38 of 2007.
Decided on: 14.08.2015.

FAO No.549 of 2008

Oriental Insurance Company Ltd. ...Appellant

VERSUS

Ujalu Devi and others ...Respondents.

FAO No.550 of 2008

Oriental Insurance Company Ltd. ...Appellant

VERSUS

Smt.Ila and another ...Respondents.

FAO No.38 of 2007

Oriental Insurance Company Ltd. ...Appellant

VERSUS

Khampu Devi and another ...Respondents.

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that the driver did not have a valid driving license and the driver was minor at the time of the accident- the date of birth of the driver is recorded in matriculation certificate is 7-7-1984 and the license was issued in his favour on 31-12-2001- the license was renewed on 30-01-2003- the accident had taken place on 4-9-2004- held, that the license was renewed on the date when the driver had attained the age of majority- the insurer had failed to prove that owner had committed willful breach of the terms and conditions of the policy or that owner had not exercised due care and caution while employing the driver - hence, the plea of the insurance company that it is not liable to pay compensation cannot be accepted. (Para 6-11)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

FAO No.549 & 550 of 2008:

For the Appellant(s): Mr.Deepak Bhasin, Advocate.
For the Respondents: Mr.Arvind Sharma, Advocate, for respondents No.1 and 2.
Mr.B.S. Kanwar, Advocate, for respondent No.3.

FAO No.38 of 2007:

Mr.G.C. Gupta, Senior Advocate, with Mr.Deepak Bhasin, Advocate.
Mr.Ashok Sood, Advocate, for respondents No.1 and 2.
Mr.B.S. Kanwar, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

FAO Nos.549 and 550 of 2008 are directed against the two separate awards, dated 17th July, 2008, passed by the Motor Accident Claims Tribunal(II), Shimla Camp at Rohru, for short, the Tribunal), in Claim Petition Nos.15-R/2 of 2005 and 11-R/2 of 07/05, respectively. Vide award, impugned in FAO No.549 of 2008, the Tribunal awarded compensation to the tune of Rs.4,61,200/-, with interest at the rate of 7.5% in favour of the claimants, while through the award impugned in FAO No.550 of 2008, the claimants were held entitled to compensation to the tune of Rs.3,96,400/- with interest at the rate of 7.5%, and the insurer was saddled with the liability.

2. Subject matter of FAO No.38 of 2007, filed by the insurer, is the award passed by the Commissioner, Workmen's Compensation Act, Anni, District Kullu, whereby compensation to the tune of Rs.4,48,000/-, with simple interest at the rate of 12% from the date of the accident till deposit, was awarded in favour of the claimants and the insurer was saddled with the liability.

3. Since all the three appeals are the outcome of one accident, therefore, they are taken up together for final disposal.

4. Facts of the case, in brief, are that on 4th September, 2004, the deceased in both the claim petitions, were traveling in a vehicle bearing No.HP-01A-3236, which was being driven by the driver, namely, Ashok Verma rashly and negligently. The offending vehicle met with an accident as a result of which the occupants of the vehicle and the driver of the vehicle sustained injuries and succumbed to the same, constraining the claimants of the occupants of the vehicle to file two separate Claim Petitions under the Motor Vehicles Act, 1988, (for short, the Act), while the dependants of the driver of the offending vehicle invoked the jurisdiction under the Workmen's Compensation Act, 1923, (for short, the WC Act).

5. The Tribunal as well as the Commissioner under the WC Act allowed the Claim Petitions and awarded compensation as detailed above. Feeling aggrieved, the insurer has challenged the said awards by the medium of present appeals.

6. During the course of hearing, the learned counsel for the appellant-insurer in FAO Nos.549 and 550 of 2008 argued that the driver of the offending vehicle was not having valid driving licence. It was further submitted that at the time of issuance of driving licence, the driver was minor. The date of birth of the driver, as recorded in Matriculation certificate, is 7.7.1984 and the driving licence was issued in favour of the driver on 31st December, 2001. Thereafter, the driving licence was renewed/issued for driving the Light Motor Vehicles, including other kind of vehicles, on 30th January, 2003. The offending vehicle involved in the accident was Tempo Trax, which, admittedly, was a Light Motor Vehicle as defined in Section 2(21) of the Motor Vehicles Act. The accident had taken place on 4th September, 2004. Thus, on 30th January, 2003, when driving licence was renewed/issued to the driver and on 4th September, 2004, when the accident took place, the driver of the offending vehicle had already attained the age of majority and cannot be said to be minor.

7. This ground is also not available to the insurer since it was for the insurer to plead and prove that the owner has committed willful breach in which it has failed.

8. The Apex Court in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has held that for avoiding liability, the insurer has to prove the breach committed by the insured**.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

9. It is also profitable to reproduce paragraph 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is* 8 *:fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

10. The insurer has failed to prove that the insured has not exercised due care and caution while employing the driver.

11. Having regard to the above discussion, it is held that the driver was major at the time of accident, was competent to drive the vehicle and was having a valid and effective driving licence at the time of accident. Thus, by no stretch of imagination, it can be said that the owner had committed willful breach, as sought to have been argued by the learned counsel for the appellant-insurer. Accordingly, the argument canvassed by the learned counsel for the insurer-appellant is repelled being without any force.

12. Another ground urged by the learned counsel for the appellant-insurer is that the amount awarded by the Tribunal is excessive. However, in the facts of the case, it would be travesty of justice in case the compensation is reduced at this stage. Accordingly, the impugned awards are upheld and the appeals, being FAO Nos.549 and 550 of 2008, are dismissed.

13. In view of the findings returned hereinabove, no question, what to speak of substantial question, is involved in FAO No.38 of 2007 and the same is also dismissed.

14. Pending CMPs, if any, in all the appeals, also stands disposed of accordingly. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned awards.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Co. Ltd. .....Appellant.

Versus

Waryam Singh and others ...Respondents

FAO (MVA) No. 218 of 2008.
Date of decision: 14th August, 2015

Motor Vehicles Act, 1988- Section 166- Injured was travelling in the vehicle which met with an accident-plea that the claimant along with his father was travelling in the vehicle with their goods not denied by the owner-plea of Insurance Company that claimant was a gratuitous passenger wrongly accepted by the Tribunal-Insurance Company, however rightly saddled with the liability by the Tribunal - appeal dismissed. (Para 6 to 9)

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr.Ajay Dhiman, Advocate, for respondent No.1.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 22.12.2007, made by the Motor Accident Claims Tribunal, (III), Kangra at Dharamshala in MACP RBT No. 108-K/II/2005/02, titled *Waryam Singh versus Karnail Singh and others,* for short "the Tribunal", whereby compensation to the tune of Rs.3,18,000/- with 9.5% interest per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

2. Claimant, owner and driver have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the ground of saddling it with the liability.

4. Thus, the only question to be determined in this appeal is whether the insurer came to be rightly saddled with the liability?

5. The answer is in affirmative for the following reasons.

6. The claimant has specifically averred in para 24 of the claim petition that he alongwith his father was traveling in the offending vehicle with their articles/goods. The owner has not denied para 24 of the claim petition. However, the insurer has pleaded that he was a gratuitous passenger.

7. Admittedly, the injured was traveling in the offending vehicle with his articles/goods, cannot be said to be a gratuitous passenger in any way. This issue has already been determined by this Court in ***FAO No. 435 of 2007*** titled ***Oriental Insurance Company versus Smt. Prabha Devi and others***, ***FAO No. 53 of 2007*** titled ***Oriental Insurance Company versus Rattani Devi*** and ***FAO No. 52 of 2007*** titled ***Oriental Insurance Company versus Krishna Devi and others***.

8. In view of the above, the Tribunal has fallen in an error in holding that the claimant/injured was a gratuitous passenger. This finding needs to be set aside and is set aside.

9. Having said so, no interference is called for and the appeal merits to be dismissed. Accordingly, it is held that the insurer is liable to pay the amount of compensation.

10. 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.

11. 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.

Smt. Pawna Devi .....Appellant.

Versus

Shri Raj Kumar and others ...Respondents

FAO (MVA) No. 220 of 2008.
Date of decision: 14th August, 2015

Motor Vehicles Act, 1988- Section 166- Deceased a bachelor was aged 23 years at the time of death-parents were dependent upon him- applying guess work, minimum income of deceased can be held to be Rs. 5,000/- 50% was to be deducted towards the personal expenses and 50% of income was to be deducted towards loss of dependency, and thus, the loss of dependency is held to be Rs.2500/- per month- applying multiplier of 15 deceased held entitled to, total Rs. 4,50,000/- (Rs. 2500x12x15) along with interest @ 7.5 per annum from the date of the claim petition. (Para 6 & 7)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120,

For the appellant: Mr. Dinesh Thakur, Advocate.
For the respondents: Mr.Jagdish Thakur, Advocate, for respondent No.2.
Mr. B.M. Chauhan, Advocate, for respondent No.3.
Nemo for respondent No.1.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 15.2.2008, made by the Motor Accident Claims Tribunal, Hamirpur in MAC Petition No. 91 of 2006, titled *Smt. Pawna Devi and another versus Shri Raj Kumar and others,* for short "the Tribunal", whereby compensation to the tune of Rs.2,74,500/- with 9% interest per annum

was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Insurer, owner and driver have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is whether the amount awarded is adequate or otherwise?

5. The answer is in affirmative for the following reasons.

6. The income of the deceased as pleaded in the claim petition was Rs.10,000/- per month, which fact has remained un-rebutted. The Tribunal in para 14 of the impugned award held that the income of the deceased was not less then 4500/- per month. By a guess work, it can safely be held that the minimum income of the deceased at that point of time was not less than Rs.5000/- per month. The claimants are the parents of the deceased and the deceased was a bachelor. In terms of the ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***, 50% was to be deducted towards the personal expenses and 50% towards the loss of dependency. Thus, the loss of dependency is held to be Rs.2500/- per month.

7. The age of the deceased was 23 years at the time of the accident and in view of the Sarla verma read with Reshma Kumari's case, supra, the multiplier of "15" was applicable.

8. Having said so, the claimants are entitled to Rs. 2500x12x15, total Rs.4,50,000/- alongwith interest @ 7.5 per annum from the date of the claim petition. The insurer is directed to deposit the amount in the Registry within six weeks from today.

9. The Registry, on deposit of the amount 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.

10. 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.

Raj Kiran and others .....Appellants.

Versus

Sh. Rattan Lal and others .....Respondents

FAO (MVA) No. 76 of 2009.
Date of decision: 14th August, 2015

Motor Vehicles Act, 1988- Section 166- Deceased was aged 41 years at the time of accident- tribunal applied multiplier of 12 –held, that the multiplier of 14 is applicable-since the claimants are more than four; personal and living expanses wrongly deducted to be 1/3rd whereas, it should have been 1/5th - appeal allowed and compensation of Rs.13,04,400/- awarded to the claimants. (Para-11 & 12)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant:	Mr. Tara Singh Chauhan, Advocate.
For the respondents:	Mr. Dinesh Thakur, Advocate, for respondents No. 1 and 2. Mr. B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 17.11.2008, made by the Motor Accident Claims Tribunal, Bilaspur in MAC No. 57 of 2006, titled *Sh. Raj Kiran and others versus Sh. Rattan Lal and others,* for short "the Tribunal", whereby compensation to the tune of Rs.9,43,880/- with 9% interest per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Insurer, owner and driver have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is whether the amount awarded is adequate or otherwise?

5. The answer is in the negative for the following reasons.

6. In order to determine this issue, brief facts of the case are required to be given:

7. Deceased Baljeet Singh became victim of a vehicular accident, which was caused by Surjeet Singh driver of Truck No. HP-31-A-2067 while driving the said vehicle rashly and negligently on 26.5.2006 at N.H. 21 near Chharol, Police Station Sadar, District Bilaspur, H.P.

8. The claimants had sought compensation to the tune of Rs.50 lacs, as per the break-ups given in the claim petition.

9. The claim petition was resisted and contested by the respondents.

10. The Tribunal, after discussing the evidence held in para 10 of the impugned judgment that the income of the deceased was Rs.1,11,735.93 per annum, as per the income tax return Ext. RA. It has deducted 1/3rd towards personal expenses of the deceased and held that the claimants have lost source of dependency to the tune of Rs.74490/- per annum. The multiplier of "12" was applied. The Tribunal has fallen in an error in assessing the loss of dependency and multiplier, for the following reasons.

11. The date of birth of the deceased as disclosed in matriculation certificate Ext. PW1/A is 4.8.1964, meaning thereby the age of deceased was 41 years at the time of the accident and multiplier of "14" was to be applied in terms of ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. But the Tribunal has applied the multiplier of "12".

12. The Tribunal has wrongly deducted 1/3rd only but in terms of para 30 of the ***Sarla Verma's*** judgment, supra, 1/5th was to be deducted because the claimants are more than four. It is apt to reproduce para 30 of the said judgment herein:

> *"30.Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six."*

13. Thus, by taking the round income of deceased as Rs.1,12,000/- per annum, the claimants have lost source of dependency to the tune of Rs.89,600x14= Total Rs.12,54,400/-.

14. The Tribunal has also awarded the compensation to the tune of Rs.50,000/-, on account of consortium and love and affection. The said amount is reasonable in view of the latest judgments delivered by the Apex Court.

15. Having said so, the total compensation to the tune of Rs.12,54,400+Rs.50,000/-, total Rs.13,04,400/-, is awarded in favour of the claimants with 9% interest per annum from the date of claim petition till its realization.

16. The insurer is directed to deposit the entire amount in the Registry within six weeks from today.

17. The Registry, on deposit of the amount 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.

18. Send down the record, forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.687 of 2008, 688 of 2008, 684 of 2008, 118 of 2009, 657 of 2008, 24 of 2009, 25 of 2009 & 44 of 2009.
Decided on: 14.08.2015.

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1. FAO No.687 of 2008

Raj Kumar ...Appellant

VERSUS

The New India Assurance Co. and others ...Respondents.

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2. FAO No.688 of 2008

Raj Kumar ...Appellant

VERSUS

The New India Assurance Co. and others ...Respondents.

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3. FAO No.684 of 2008	
Raj Kumar	...Appellant
VERSUS	
The New India Assurance Co. and others	...Respondents.
4. FAO No.118 of 2009	
Raj Kumar	...Appellant
VERSUS	
The New India Assurance Co. and others	...Respondents.
5. FAO No.657 of 2008	
Surjan Singh and others	...Appellants
VERSUS	
The New India Assurance Co. and another	...Respondents.
6. FAO No.24 of 2009	
Seema Devi and others	...Appellants
VERSUS	
The New India Assurance Co. and another	...Respondents.
7. FAO No.25 of 2009	
Naina Devi and others	...Appellants
VERSUS	
The New India Assurance Co. and another	...Respondents.
8. FAO No.44 of 2009	
Kamli Devi and others	...Appellants
VERSUS	
The New India Assurance Co. and another	...Respondents.

Motor Vehicles Act, 1988- Section 149- Owner had paid the premium towards the renewal of the policy through a cheque which was dishonoured- held that It was for the insurer to inform the insured about the dishonor of the cheque and the cancellation of the policy- since it was not done therefore the Insurance Company cannot absolve itself of the liability. (Para 7-12)

Cases referred:

New India Assurance Co. Ltd. versus Rula and others, AIR 2000 Supreme Court 1082

Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., 2007 AIR SCW 7948

United India Insurance Co. Ltd. versus Laxmamma & Ors., 2012 AIR SCW 2657

FAO Nos.687, 688, 684 of 2008 and 118 of 2009.

For the Appellant(s):	Mr.Sanjeev Bhushan, Senior Advocate, with Ms.Abhilasha Kaundal, Advocate.
For the Respondents:	M/s B.M. Chauhan, Varun Rana and Ratish Sharma, Advocates, for respective respondents.

FAO Nos.657 of 2008, 24, 25, and 44 of 2009:

For the Appellant(s):	Mr.Varun Rana and Mr.Surender Verma, Advocates, in respective appeals.

For the Respondents: Mr.B.M. Chauhan, Mr. Ratish Sharma, Advocates, and Mr.Sanjeev Bhushan, Senior Advocate, with Ms.Abhilasha Kaundal, Advocate, for respective respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

The awards, impugned in these appeals, passed by Motor Accident Claims Tribunal, Mandi, H.P., (for short, the Tribunal), are the outcome of one accident caused by respondent/driver Raj Kumar, while driving Tata Sumo No.HP-01-3469 rashly and negligently, on 28th November, 2004. Therefore, all the appeals are being disposed of by this common judgment.

2. The Tribunal, after examining the entire evidence, held that the claimants have proved their case and accordingly, passed separate awards in each Claim petition granting compensation in favour of the claimants and the owner of the offending vehicle came to be saddled with the liability for the reasons given in each award.

3. Feeling aggrieved, the owner has preferred appeals, being FAO Nos.687, 688, 684 of 2008 and 118 of 2009, while the claimants have challenged the impugned awards on the ground of adequacy of compensation by the medium of FAO Nos.657 of 2008, 24, 25 and 44 of 2009.

4. The insurer has not questioned the impugned awards, thus the same have attained finality so far as these relate to it.

5. The learned counsel for the owner has argued that the Tribunal has wrongly discharged the insurer from the liability. The learned counsel for the claimants has argued that the Tribunal has not awarded adequate compensation in favour of the claimants.

6. I have gone through the record and the impugned awards and am of the opinion that the Tribunal has fallen in an error in discharging the insurer from its liability for the following reasons.

7. Admittedly, the owner of the offending vehicle paid the premium towards renewal of the policy through cheque, which, according to the insurer, was bounced. It was for the insurer to inform the insured, by the medium of notice, about the bouncing of the cheque and also about the cancellation of the insurance policy.

8. The learned counsel for the insurer has vehemently argued that the insurer has proved on record that the owner was served with the notice in terms of the Mandate of Section 64-VB of the Insurance Act, 1938 (hereinafter referred to as "the Insurance Act") read with the provisions of Sections 147 to 149 of the Motor Vehicles Act, (for short, the MV Act). However, there is no document proved on the record by the insurer before the Tribunal to prove the said factum. The learned counsel for the insurer, during the course of hearing, was specifically asked to show from the records whether any notice was issued to the owner informing him about the bouncing of cheque and the insurance policy has been cancelled, which he could not do.

9. In terms of Section 64-VB of the Insurance Act, read with the provisions of Sections 147 to 149 of the MV Act, the insurer has to intimate the insured about the bouncing of the cheque.

10. The Apex Court in the case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082,** has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy on the ground that the cheque through which premium was paid was dishonoured and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

11. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

> *"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.*
>
> *27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :*
>
> > *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*
>
> *We, therefore, agree with the opinion of the High Court.*

> *28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly.*

12. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made and conveyed and if the accident occurs till the cancellation is made, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

> *"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."*

13. Following the dictum of the Apex Court, this Court has also taken similar view in series of cases.

14. Having said so, the appeals being FAO Nos.687, 688, 684 of 2008 and 118 of 2009, filed by the owner, are allowed and it is held that the insurer has to indemnify. The insurer is saddled with the liability and the impugned awards are accordingly modified.

15. The learned counsel for the claimant-appellants in FAO Nos.657 of 2008, 24, 25 and 44 of 2009 have argued that the amount awarded by the Tribunal is not adequate and is required to be enhanced. It was further argued that the compensation awarded under the heads 'loss of estate', 'loss of consortium', 'loss of love and affection' and 'funeral expenses' is also on the lower side and the same needs to be enhanced to Rs.1.00 lac under each head.

16. After perusal of the impugned awards, I am of the opinion that the Tribunal has rightly awarded compensation under the head 'loss of source of dependency'. However, the claimants, in each claim petition, are held entitled to Rs.10,000/- each under the heads 'loss of estate', 'loss of consortium', 'loss of love and affection' and 'funeral expenses'.

17. Accordingly, the appeals filed by the claimants (FAO Nos.657 of 2008, 24, 25 and 44 of 2009) are allowed to the above extent.

18. It is pointed out that the insured has deposited Rs.25,000/- in each appeal in the Registry of this Court. The said amount is awarded as costs in favour of the claimants in each appeal and shall be released in their favour by the Registry.

19. The insurer is directed to deposit the amount, with interest as awarded by the Tribunal, within a period of ten weeks from today.

20. All the appeals stand disposed of, as indicated above. A copy of this judgment be placed on the record of each file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Satnam Singh .....Appellant
Versus
Chattur Singh & others ..... Respondents

FAO No.187 of 2008
Date of decision: 14.08.2015

Motor Vehicles Act, 1988- Section 166- Four appeals filed against an award- three appeals decided earlier and Insurance Company saddled with the liability with right of recovery from the owner - fourth appeal pertained to the same transaction - similar direction issued in the same.

For the appellant: Mr. Jagdish Thakur and Mr. Rahul Verma, Advocates.
For the respondents: Nemo for respondents No.1 and 2.
Mr. Deepak Bhasin, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 10th January, 2008, made by the Presiding Officer/M.A.C.T.-II, Fast Track Court, Hamirpur, H.P. (for short "the Tribunal") in M.A.C. Petition No.17 of 2006/RBT No.18 of 2006, titled Satnam Singh vs. Chattur Singh and others, whereby compensation to the tune of Rs.1,50,000/- came to be awarded in favour of the claimant (for short the "impugned award").

2. Learned counsel for the appellant argued that four appeals were filed for the same accident. Out of the four appeals, three appeals, being FAO Nos. 183, 184 and 185 of 2008, have been decided on 24.7.2015, by this Court whereby the insurer came to be saddled with the liability with right of recovery from the owner.

3. Having said so, the matter is already covered by the judgment delivered by this Court in FAO Nos. 183, 184 and 185 of 2008. Accordingly, the impugned award is modified and the insurer is directed to satisfy the impugned award at the first instance with

right of recovery from the owner. Copy of the aforesaid judgment shall form part of this judgment also.

4. The insurer is directed to deposit the compensation amount within eight weeks from today in the Registry of this Court with interest as awarded by the Tribunal and the same, on deposit, be released in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account.

5. Accordingly, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of.

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

Usha Massand wife of Shri Anand Prakash Massand ....Petitioner
Versus
State of H.P. ....Non-petitioner

Cr.MP(M) No. 1099 of 2015
Order Reserved on 5th August 2015
Date of Order 14th August 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offence punishable under section 406 I.P.C- record reveals family dispute between the parties- Rule is in favour of bail and not jail- nothing on the record that the interest of state and General Public shall be prejudiced in case applicant is released on bail -application allowed. (Para- 8 to 10)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702
Nirmal Walia vs. State, 1982 SLJ (HP) 415

For the Petitioner: Mr. Javed Khan, Advocate.
For the Non-petitioner: Mr.M.L.Chauhan, Additional Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 36 of 2015 dated 25.6.2015 registered under Section 406 IPC at P.S. Kasauli District Solan (H.P.)

2. It is pleaded that petitioner is real sister of complainant Raj Kishore Gupta son of late Shri Dhani Ram Gupta presently residing at 224 Sector 15 Chandigarh. It is pleaded that complainant did not have good relations with his mother and she was looked after by petitioner and her husband Anand Mussand. It is pleaded that after death of mother

of petitioner complainant who is an influenced person wanted to grab the entire ancestral property. It is pleaded that Raj Kishore Gupta complainant filed a false complaint against the petitioner and her husband Anand Mussand that accused persons took 1½ Kg. gold and Rs.16 lacs (Rupees sixteen lacs only) cash and other articles from the house. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence. It is pleaded that petitioner will abide by all terms and conditions imposed by the Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report on dated 25.6.2015 complainant Raj Kishore Gupta son of late Shri D.R. Gupta resident of village Shaktighat P.O. Jubbar Tehsil Kasauli District Solan came in police station and presented criminal complaint against accused persons. There is further recital in police report that father of complainant died in the year 2006 and complainant has one sister. There is recital in police report that father of complainant was posted in education department and retired as Principal. There is recital in police report that Usha co-accused No. 2 is residing at Delhi. There is recital in police report that complainant Raj Kishore Gupta has business at Chandigarh and he is residing in Chandigarh along with his family members. There is further recital in police report that mother of complainant died in hospital on dated 5.4.2015. There is recital in police report that after death of mother of complainant conversation took place between complainant and accused persons relating to division of ancestral property. There is further recital in police report that both accused persons namely Anand Massand and Usha quarrelled with complainant and thereafter accused persons went to Delhi. There is further recital in police report that on dated 18.7.2015 complainant and accused persons were talking about division of ancestral property and when complainant went to his another residential room for some time in the meanwhile both accused persons namely Anand and Usha took golden jewellary and FDRs in vehicle No. PB-10CU-9379. There is recital in police report that complainant tried to call back the accused persons but accused persons did not response. There is recital in police report that golden articles and FDRs are still to be recovered from accused persons. Prayer for dismissal of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?

2. Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At

the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It is prima facie proved on record that complainant Raj Kishore and accused Usha are real brother and sister. It is also prima facie proved on record that co-accused No. 1 Anand Massand is brother-in-law of complainant Raj Kishore. It is prima facie proved on record that dispute inter se the parties is relating to division of ancestral property. In view of the fact that dispute inter se the complainant and accused is a family dispute relating to ancestral property Court is of the opinion that it is expedient in the ends of justice to release the petitioner on anticipatory bail at this stage. Court is of the opinion that if petitioner is released on anticipatory bail at this stage then interest of State and general public will not be adversely affected. Court is of the opinion that if petitioner is released on bail at this stage then investigation of case will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of State that still jewellary and FDR are to be recovered from accused persons and on this ground anticipatory bail application be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that bail cannot be denied to accused persons solely on the ground that some recovery is to be effected from accused ***(See 1982 SLJ (HP) 415 titled Nirmal Walia vs. State)***

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if anticipatory bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional anticipatory bail will be granted to petitioner and if petitioner will flout the terms and conditions of anticipatory bail order then prosecution will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

10. In view of my findings on point No.1 anticipatory bail application filed by petitioner under Section 438 Cr.P.C. is allowed and interim order dated 23.7.2015 is made absolute. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

State of H.P. and another. ...Appellants

Versus

Chander Kanta and others. ....Respondents.

LPA No. 212 of 2014
Date of Decision : 17.08.2015.

Constitution of India, 1950- Article 226- Petitioner was senior to respondents No. 3 to 8- however, she was not confirmed and was placed below respondents No. 3 to 8 in the seniority list- she filed a writ Petition which was ordered to be treated as representation- representation was rejected on the ground that instructions to delink the seniority from confirmation came into force after finalization of her seniority- held, that practice of linking seniority with confirmation was deprecated by Supreme Court and the seniority could not have been linked with the confirmation- instructions cannot postpone the law laid down by Supreme Court to some later date. (Para-2 to 4)

Cases referred:

Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and others (1990) 2 SCC 715

Union of India vs. Dharam Pal and others (2009) 4 SCC 170

For the Appellants : Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Addl. Advocate General.

For the Respondents : Mr. Neel Kamal Sood, Advocate, with Mr. Vasu Sood, Advocate, for respondent No.1.
Respondents No. 2 to 7 *ex parte.*

The following judgment of the Court was delivered:

***Dharam Chand Chaudhary, Judge (*Oral)**

Challenge herein is to the judgment passed by learned Single Judge on 28.5.2014 in CWP No.4182 of 2013 directing thereby the appellants herein, to restore the seniority to the writ petitioner over and above the private respondents 3 to 8 in the writ petition. As regards, the consequential benefits if any to be accrued to the petitioner on restoration of her seniority, she was held entitled for the same only on notional basis. However, in the matter of her promotion if due she was ordered to be promoted with all consequential benefits.

2. The writ petitioner admittedly is senior to respondents No. 3 to 8 in the writ petition. Since she was not confirmed, therefore, in the seniority finalized on 20.2.1997, she was placed below private respondents No. 3 to 8 in the seniority list. She assailed such action on the part of the appellants-State in previously instituted writ petition i.e. CWP No. 4375 of 2009. The same was ordered to be treated as representation. Consequently, she submitted the representation to respondent No.2 and the representation so made came to be decided against her on the sole ground that at the relevant time when her seniority finalized confirmation was ultimately sent and the instructions to delink the seniority from confirmation came into force on 26.3.1997 i.e. after finalization of her seniority on

20.2.1997. This has led in filing CWP No. 4182 of 2013 which has been decided vide judgment under challenge in the present appeal.

3. Having gone through the record and also taking into consideration the submissions made on both sides, in our considered opinion, the learned Single Judge has not committed any illegality and irregularity while allowing the writ petition for the reason that the practice of linking seniority with confirmation was deprecated by the Apex Court long back in its judgment in ***Direct Recruit Class II Engineering Officers' Association*** vs**.** ***State of Maharashtra and others (1990) 2 SCC 715.*** The ratio of the law so laid down in the judgment (supra) has even been reiterated in a recent judgment of the Apex Court in ***Union of India*** vs**.** ***Dharam Pal and others (2009) 4 SCC 170.***

4. This being the legal position, the appellant could have not linked the seniority of the respondent with confirmation nor the instructions issued to delink the seniority from confirmation issued by the appellant-State on 26.3.1997, could postpone the law laid down by the Apex Court to some later date. We, therefore, find no illegality or infirmity in the judgment under challenge. The appeal, therefore, fails and the same is accordingly dismissed. Pending application, if any, shall also stands disposed of.

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

State of Himachal Pradesh ...Appellant

Versus

Lekh Ram ...Respondent

Criminal Appeal No. 220 of 2010
Judgment Reserved on : 24.6.2015
Date of Decision : August 17, 2015

Indian Penal Code, 1860- Sections 376, 342 and 506- Accused subjected the prosecutrix to forcible sexual intercourse- the prosecutrix resisted the act of the accused and the accused sustained injuries on his nose and ear- the matter was narrated by her to her husband, who confronted the accused- the matter was subsequently reported to the police on which FIR was registered- Police had not got the DNA profiling done despite the medical advise- the genesis of the incident was doubtful because it was admitted that entry of ladies was not permitted in the guest house- there was no reason for the husband of the prosecutrix to send her to the guest house- there was no evidence that the prosecutrix used to visit the guest house earlier - she did not shout for help at the time of incident- there were no injuries on her person- her clothes were not torn- there were contradictions and improvements in her testimony – held that in these circumstances the accused was rightly acquitted by the Trial Court. (Para 13-26)

Cases referred:

Prandas v. The State, AIR 1954 SC 36

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 SCC 94

For the appellant : Mr. Ashok Chaudhary, Addl. Advocate General with Mr. V. S. Chauhan, Addl. A.G. and Mr. J. S. Guleria, Asstt. A.G. for the appellant-State.

For the respondent : Mr. R. L. Chaudhary, Advocate for the respondent-accused.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 5.10.2009, passed by the learned Sessions Judge, Solan, Himachal Pradesh, in Sessions Trial No. 1-NL/7 of 2009, titled as State of Himachal Pradesh vs. Lekh Ram, whereby respondent-accused stands acquitted, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that M/s Unichem Laboratories had two guest houses at Baddi. Accused Lekh Ram was posted as a Security Guard at Guest House No. 80. Jai Parkash (PW-6) while being posted as an Administrative Officer was occupying the top floor of the guest house, whereas remaining two stories were used for the visiting guests. Sudarshan Paridha (PW-4), husband of the prosecutrix (PW-3) also employed as a cook by the said Company was posted at the adjacent guest house owned by the Company. On 30.8.2008 when Jai Parkash left for Shimla, accused went to the house of Sudarshan Paridha and asked him to send his wife i.e. the prosecutrix to the house of Jai Parkash for cleaning the utensils and washing clothes. Consequently prosecutrix went to Guest House No. 80. While she was washing the clothes, accused after entering the room forcibly subjected her to sexual intercourse. Prosecutrix resisted his overt acts as a result of which he sustained injuries on his nose and ear. After the incident, by freeing herself, prosecutrix reported the incident to Sudarshan Paridha, who in turn confronted the accused with the same. Two officers of the employer company visited the spot and the matter was reported to the police. F.I.R. 143/2008, dated 30.8.2008 (Ext. PW-4/A) was registered at Police Station Baddi, Distt. Solan, H.P., against the accused under the provisions of Sections 376, 342 and 506 of the Indian Penal Code. Investigation was got conducted by ASI Tapinder Kumar (PW-10). Prosecutrix was got medically examined from Dr. Neeraj Rajan (PW-5) who issued MLC (Ext. PW-5/B) and opined that possibility of recent sexual activity could not be ruled out. Accused was also got medically examined from Dr. Naveen Kataria (PW-7) who issued MLC (Ext. PW-7/B). Report of the State Forensic Science Laboratory, Junga (Ext. PX) was obtained. 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 376, 342 and 506 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 ten witnesses and statement of the accused under Section 313 Cr. P.C. was also recorded, in which he took the following defence:

> "PW-4 has taken loan of Rs.6,000/- from me and when I asked for returning loan, he threatened me that he will involve me in a false police case. I took it lightly, but thereafter I was called in Police Station and false case has been registered against me and so the prosecution witnesses have deposed against me."

The injuries found on his body are attributed as a result of beatings given by the police.

5. Court below acquitted the accused for the reason that prosecution could not prove its case, beyond reasonable doubt. Hence the present appeal.

6. We have heard Mr. Ashok Chaudhary, learned Addl. Advocate General ably assisted by Mr. V. S. Chauhan, learned Asstt. A.G. and Mr. J. S. Guleria, Asstt. A.G., on behalf of the State as also Mr. R. L. Chaudhary, learned counsel for the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offences.

8. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.C., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. Dr. Naveen Kataria (PW-7) who examined the accused observed two scratch marks on the left side of face of the accused. The injuries were recent. As per the Doctor,

such injuries could have been sustained as a result of beatings. No injuries were found either on the private parts or any other portion of body of the accused.

10. Dr. Neeraj Rajan (PW-5), upon examination, found no injuries on the body of the prosecutrix. Also no signs of struggle were found on the body of the prosecutrix. The Doctor opined possibility of recent sexual intercourse not to be ruled out for the reason that "*semen was found on pubic hair (exhibit -2b) and petticoat (exhibit-1d) of the prosecutrix*".

11. It be also observed that despite medical advise, DNA profiling was not got done by the police. Why so? no explanation is forthcoming. The scientific evidence only proves that semen was found on the petti-coat of the prosecutrix. But then, whether it was that of the accused or not, has not been conclusively proved on record and the possibility of the same being that of the husband of the prosecutrix has not been ruled out. This was necessary in view of medical opinion that if on a previous night, prosecutrix had had sex with her husband, chances of such stains found on her clothes and pubic hair are likely to be there. This factor acquires significance in view of admission made by the prosecutrix of having sex with her husband the previous night.

12. Though these factors render the prosecution case to be doubtful, however all this may not render version of the prosecution to be false for it is a settled principle of law that even in the absence of any corroborative evidence, scientific/medical or otherwise, if testimony of the prosecutrix is otherwise inspiring in confidence, it would be sufficient to hold the accused guilty.

13. We shall first deal with the testimony of Sudarshan Paridha (PW-4) who states that on 30.8.2008 J.P. Thakur had sent a message through the accused that prosecutrix be sent to the guest house for cleaning and doing other jobs. At about 8.30 a.m. he left the prosecutrix at guest house No. 80 and went for his work at the adjacent guest house No. 91. After about an hour and half, prosecutrix came weeping and informed that while she was washing clothes, accused ravished her. He confronted the accused, who not only denied but dared him to take action. Immediately thereafter, he telephonically informed the officers of his employer and two officers namely Ranbir and Sikka came to the guest house to whom clothes stained with semen were shown. The matter was reported to the police and F.I.R (Ext. PW-4/A) registered.

14. We do not find his version to be inspiring in confidence. This we say so for the reason that accused was not an employee of M/s Unichem Laboratories. He was employed by a third agency and discharging duties as a security guard at the guest house. Now why would the witness send his wife to the guest house on the asking of a third person particularly when he admits of not being asked by J.P. Thakur for sending the prosecutrix to the guest house? Most significantly he admits that entry of ladies is not permitted in any of the guest houses. There is no evidence of the accused being on duty at the time of the alleged offence. Also it is not his case that accused used to stay in the guest house or stealthily entered for committing the crime. It is also not his case that even on an earlier occasion, either on the asking of J.P. Thakur or otherwise, prosecutrix had visited the guest house and cleaned the utensils or washed clothes.

15. Jai Parkash (PW-6) does not state that he had desired the prosecutrix to come and clean the guest house or wash utensils/clothes. In fact he admits that at the time of the incident other guests of the Company were also residing in very same guest house, which fact also stands admitted by Sudarshan Paridha. It is not that either the Company or J. P. Thakur had been utilizing services of the prosecutrix for doing such menial jobs. Now

if women were not allowed in the guest house, then where is the question of Sudarshan Paridha leaving the prosecutrix alone, in the guest house for doing such menial jobs.

16. Prosecutrix can only understand and speak in Oriya language, as such, her statement, in court, was got recorded through the translator Manoj Biswal (PW-2).

17. Prosecutrix (PW-3) states that on 30.8.2008, at about 8 – 9 P.M. her husband left her in the guest house as she was required to wash clothes. What work accused used to do in the guest house and on whose asking she came there, she does not disclose. All that she states is that accused who was present in the guest house asked her to wash clothes. When she went to the bath room, he lifted her, laid her on the bed and after closing the door and opening her blouse sexually assaulted her. While doing so, he lifted her sari and petti-coat. In anger, she scratched his ears and nose. With the completion of act, by opening the door, she went to her husband and narrated the incident. She states that when confronted by her husband, accused denied having committed any illegal or indecent act. Her husband brought the matter to the notice of two officers of the Company. The matter was reported to the police who seized bed sheet (Ext. P-1), her clothes i.e. sari (Ext. P-2), blouse (Ext. P-3), Petti-coat (Ext. P-4) and bra (Ext. P-5) which were sealed with seal impression 'Y'.

18. We do not find the version of the prosecutrix to be inspiring in confidence at all. Prosecutrix is not an employee of the Company. It is not that in the past she had been visiting the guest house and/or cleaning the area under occupation of Jai Parkash. The alleged incident took place at 9.00 a.m. Prosecutrix admits that the guest house where her husband is working is just near the place of crime. Also there are residences closeby. Significantly she never shouted or cried for help. Why so? remains unexplained. Her cries would have invited attention of the other residents.

19. Her version that she resisted the alleged acts of the accused by giving scratch marks does not inspire confidence at all, for we find defence taken by the accused, of having been beaten by the police, to have been probablized in the instant case. Surprisingly there are no marks of injury on her body. Further witness states that accused bodily lifted her, laid her on the bed and thereafter he opened her blouse. Significantly none of her clothes were torn, nor any scratch marks found either on private parts or any other part on her body. Signs of struggle are also absent. If the accused had applied force, in natural course, it would not have been possible for him to have opened the blouse without any resistance. There was no threat or intimidation to her life.

20. Also there is material contradiction in her statement with regard to handing over of her clothes to the police. She is categorical that the bed sheet and her clothes, so stained with semen were collected by the police from the guest house, which version stands belied by Dr. Neeraj Rajan (PW-5), who in fact handed over the clothes of the prosecutrix to the police in the hospital, which fact stands admitted by the police officials.

21. Further her testimony is full of improvements and embellishments. She was confronted with her previous statements (Ext. D-1 and Ext. PW-2/A) wherein it is not recorded that accused lifted her from the back and laid her on the bed; that accused had asked her to wash clothes; accused bolted the door from inside and after the incident she unbolted the same and ran away from the spot. Significantly, in Court, for the first time, she states that her son was with her. It has come on record that she has two children. Now why would she keep only one child with her is not clear from the record.

22. In the backdrop of the aforesaid discussion we find that examination of Ranbir and Sikka, who were called to the spot was relevant as they would have only revealed

the exact events which took place on the spot. Presence of the prosecutrix, in the guest house would have been testified only by them. She is not even aware of the number of rooms in the guest house. Then how is it that she was able to go to that portion of the guest house which was under occupation of Jai Parkash. In fact, we have doubt about her presence in the guest house. Also it has not come on record as to which employer of the accused had deputed him to guard the guest house on the date and time of the incident. Posting of the accused at the guest house, at the relevant time, remains unproved. None other than the prosecutrix has sought to prove the presence of the accused. Defence taken by the accused stands suggested to the witnesses.

23. Thus it would be absolutely unsafe to solely rely upon the testimony of the prosecutrix for holding the accused guilty of the charged offences. Prosecution evidence cannot be said to be reliable and believable.

24. Having perused the testimony of the prosecution witnesses on record it cannot be said that prosecution has been able to prove its case, beyond reasonable doubt, to the effect that accused wrongfully confined the prosecutrix in the guest house of M/s Unichem Laboratory and thereafter raped her and also threatened her with dire consequences, by leading clear, cogent, convincing and reliable material on record.

25. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. Prosecution witnesses cannot be said to be inspiring in confidence or worthy of credence. It cannot be said that the judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice.

26. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad,* (2010) 1 SCC 94, since it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

For all the aforesaid reasons, present appeal, devoid of merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

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

Shri Diwan Chand .....Appellant.

Versus

Smt. Simmi Saini .....Respondent.

FAO No. 417 of 2007.
Reserved on: 17.8.2015.
Decided on: 18.8.2015.

Hindu Marriage Act, 1955- Section 13- Husband filing a divorce petition against the wife on the ground of cruelty alleging that wife along with her relatives compelled him to leave the job- further, alleging that wife use to threaten to consume poison and implicate him in false case- further, alleging that the child born to the wife was not conceived from the lions

of appellant and lateron false entries recorded in the Hospital qua pregnancy and delivery of child- appellant opted voluntarily for DNA test- as per report appellant was biological father of child- result of genuine DNA test is said to scientifically accurate- appellant thus failed to establish the grounds showing cruelty towards him by wife- petition rightly dismissed- appeal also dismissed. (Para-7 to 14)

Cases referred:
Shobha Rani v. Madhukar Reddi AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476
Pankaj Mahajan vs. Dimple Alias Kajal (2011) 12 SCC 1
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288
Goutam Kundu Vs. State of West Bengal and another, AIR 1993 Supreme Court 2295
Eswaran Vs. Pichayee and others 1998 Cri. L.J. 3976
Devesh Pratap Singh Vs. Srimati Sunita Singh AIR 1999 Madhya Pradesh 174
Smt. Ningamma and another Vs. Chikkaiah AIR 2000 Karnataka 50
Smt. Kamti Devi and another Vs. Posshi Ram AIR 2001 Supreme Court 2226
Mrs. Teeku Dutta Vs. State and another AIR 2004 Delhi 205
Heera Singh Vs. State of U.P. and others, 2005 Cri. L.J. 3222
Sunil Eknath Trambake Vs. Leelavati Sunil Trambake AIR 2006 Bombay 140

For the appellant: Mr. N.K.Thakur, Sr. Advocate, with Mr. Rohit Bharoll, Advocate.
For the respondent: Mr. T.S.Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is directed against the judgment dated 30.8.2007, rendered by the learned Addl. District Judge, Una, H.P., in HMA Petition No. 22 of 2001.

2. Key facts, necessary for the adjudication of this appeal are that the appellant has instituted the petition under Section 13 of the Hindu marriage Act, 1955 (hereinafter referred to as the Act), for dissolution of marriage by decree of divorce. The marriage between the appellant and the respondent was solemnized on 25.1.1998, according to Hindu rites, customs and ceremonies. The respondent along with her brother and sister threatened the appellant to leave the job in Bhatinda. They compelled him to stay in his native village. The appellant had no alternative but to accede to the wishes of the respondent and her brother. He left the job and started living at his ancestral village and opened the cycle repair shop. He was mentally harassed by the respondent. She used to threaten him to consume poison and to jump into the well to falsely implicate the appellant in a criminal case. The respondent neither conceived from the loins of the appellant nor any child was born out of the womb of the respondent. The respondent, in connivance with Dr. Angra and one nurse, namely, Nirmal Bhatti alias Sundri working at Zonal Hospital Una, got incorporated wrong entries qua her pregnancy and wrongly got entered the factum of delivery of child on 2.2.2002.

3. The petition was contested by the respondent by filing reply. The allegations made in the petition were denied. According to the respondent, one male child was born on 2.2.2002 out of the wed-lock. The appellant had himself left the job. He used to consume alcohol and she used to object to his drinking habits.

4. The rejoinder was filed by the appellant. The issues were framed by the learned Addl. District Judge, Una on 27.9.2002 and 22.10.2005. The petition was dismissed by the learned Addl. District Judge, Una on 30.8.2007.

5. I have heard the learned counsel for the parties and also gone through the record and judgment dated 30.8.2007, carefully.

6. Mr. N.K.Thakur, Sr. Advocate, for the appellant has vehemently argued that his client has been subjected to physical and mental cruelty by the respondent. He then contended that child was not born out of the wed-lock on 2.2.2002. On the other hand, Mr. T.S.Chauhan, Advocate, for the respondent has supported the judgment of the learned trial Court dated 30.8.2007.

7. The appellant has appeared as PW-5. According to him, the marriage was consummated and no child was born from the wed-lock. He got his wife medically checked up at Bathinda. The doctor opined that the respondent could not conceive. He produced the medical reports Ext. P-1 to P-3. The factum of medical examination of the respondent and the alleged ultrasound at Bathinda, the opinion of the doctor regarding the non-ability of the respondent to conceive the pregnancy, are not borne out of the pleadings. He was given an opportunity to amend the pleadings, however, despite that these facts were not incorporated in the pleadings. The appellant has disowned the child. According to him, the entries made in Zonal Hospital, Una were fabricated. However, in his cross-examination, he admitted that the relations between the parties remained cordial for about 6 months.

8. Sh. Lal Ji has appeared as PW-1. According to him, after the solemnization of marriage, the appellant came back from Bathinda and started cycle repair shop. The brother of the respondent was running a *'Dhaba'* at Una. He used to intimidate the appellant. According to him, the respondent consumed some poisonous substance in order to implicate the appellant and his family members in a false case. In his cross-examination, he admitted that the appellant closed down his shop and his whereabouts were not known to anyone. He feigned ignorance about the date or month when the respondent consumed the poison. He further admitted that the threats were never advanced to the appellant in his presence.

9. Sh. Balwant Singh has appeared as PW-2. In his cross-examination, he admitted that the fact that the incident regarding consumption of poisonous substance by the respondent was hearsay as he heard this from someone else.

10. Dr. Satinder Chauhan, has appeared as PW-3. He has admitted that respondent was admitted in Emergency Ward. According to him, the respondent had consumed poison used to kill rats. In his cross-examination, he admitted that he had not preserved the gastric wash from the stomach.

11. Sh. Gurdev Singh, Superintendent from the Office of CMO, Una, has appeared as PW-4. He has proved Ext. PW-4/A and Ext. PW-4/B.

12. Smt. Shashi Bala, has appeared as RW-1. According to her, the compromise was effected 3-4 years back at the instance of the respondent. Both the parties were heard. The compromise was arrived at between the parties. The respondent told her that she was pregnant and her husband has not visited her for so many days. She was at the verge of

starvation. She advised her to call for her parents. The mother of the respondent took the respondent with her. She feigned ignorance about the fact that respondent had consumed some poisonous substance.

13. The respondent has appeared as RW-2. According to her, a son was born out of the wed-lock on 2.2.2002. The appellant used to drink. Whenever she used to object the appellant, he used to administer beatings to her. She accompanied her husband to Bathinda after her marriage. She denied the suggestion that the doctor opined that she could not conceive. She denied the suggestion that on 23.6.2001, she attempted to commit suicide. The respondent has produced copy of birth certificate Ext. R-6. As per the certificate, the date of birth of child is 2.2.2002.

14. Mr. Naresh Thakur, learned Senior Advocate for the appellant, has argued that the respondent has treated his client with physical as well as mental cruelty. According to PW-3 Satinder Chauhan, the respondent was admitted in the emergency ward at Zonal Hospital, Una on 23.6.2001. However, the fact of the matter is that the respondent has not initiated any criminal proceedings against the appellant. After the alleged consumption of poison, the respondent has never lodged any complaint against the appellant. The allegations made by the appellant about the cruelty are vague and sketchy. The stand taken by the appellant that the respondent used to force him to live at Una would not constitute cruelty. The appellant has not even examined his parents and relations to prove this fact.

15. The appellant himself has opted for DNA test. The report of the CFSL, Chandigarh is Ext. RY. According to the contents of the report, the appellant was biological father of Master Samaksh Saini. The appellant has admitted that at the time of filing of the petition, the respondent was living with him at village Ishpur at the matrimonial home. The petition was filed on 22.8.2001 and the child was born on 2.2.2002, as per the birth certificate Ext. RX. The child was born during the continuance of valid marriage between the appellant and the respondent. The appellant has failed to maintain the respondent. The respondent has approached RW-1 Shashi Bala that the appellant was not looking after him and she was on the verge of starvation. In these circumstances, RW-1 Shashi Bala had advised the respondent to call her parents.

16. Their Lordships of the Hon'ble Supreme Court in the case of **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term “cruelty” as under:

> “4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other

spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

17. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion

without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

18. Their Lordships of the Hon'ble Supreme Court in the case of **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, have explained the cruelty as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

19. Their Lordships of the Hon'ble Supreme Court in the case of **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, have explained cruelty as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety –

it may be subtle or even brutal and may be by gestures and word. That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> ".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> "5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

20. Their Lordships of the Hon'ble Supreme Court in the case of **Pankaj Mahajan vs. Dimple Alias Kajal** reported in (2011) 12 SCC 1, have illustrated cruelty as under:

> "36. From the pleadings and evidence, the following instances of cruelty are specifically pleaded and stated. They are:
>
> i. Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace.
>
> ii. Pushing the appellant from the staircase resulting into fracture of his right forearm.
>
> iii. Slapping the appellant and assaulting him. iv. Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him.
>
> v. Not attending to household chores and not even making food for the appellant, leaving him to fend for himself.
>
> vi. Not taking care of the baby.
>
> vii. Insulting the parents of the appellant and misbehaving with them.

viii. Forcing the appellant to live separately from his parents.

ix. Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises.

x. Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant.

xi. Always quarreling with the appellant and abusing him.

xii. Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant."

21. Their Lordships of the Hon'ble Supreme Court in the case of **Vishwanath Agrawal vs. Sarla Vishwanath Agrawal** reported in **(2012) 7 SCC 288** have explained cruelty as under:

"22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

28. In Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582 it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."

22. Their Lordships of the Hon'ble Supreme Court in **Goutam Kundu** Vs. **State of West Bengal and another**, AIR 1993 Supreme Court 2295 have held that it is a rebuttable presumption of law under Section 112 that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities. Their Lordships have laid down the following principles for the permissibility of blood test to prove paternity:

"22. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

26. From the above discussion it emerges:-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis"

23. The learned Single Judge of Madras High Court in **Eswaran** Vs. **Pichayee and others** 1998 Cri. L.J. 3976 have held that the parties cannot be compelled for subjecting themselves for blood test in maintenance proceedings. Their Lordships have held as under:

"30. No doubt, it is true that on 11-6-1990 Crl. M.P.No. 167 of 1989 filed by the petitioner was allowed. In pursuance of the said order, it is to be noted that the petitioner and the respondents were sent for the blood test. But, due to want of chemicals, the test was not conducted then. Subsequently, on receipt of a letter from the Forensic Science Department, again the petition was posted for enquiry. On 29-5-1991, on the date of the enquiry, as seen from the records, the petitioner was not present, when the matter was called in the forenoon. It was passed over and again in the afternoon the Magistrate called the matter. However, the petitioner was absent even in the afternoon. Therefore, the learned Judicial Magistrate had dismissed the application by giving reasons. The lower Court's order is as follows:-[Vernacular matter omitted]

31. Admittedly, the above order dated 29-5-1991 had not been challenged. The examination of the witnesses commenced from 6-2-1996 onwards and ended on 23-4-1996. During this period also the petitioner never took steps for blood group test. Therefore, it cannot be contended, in the light of the above fact situation, that the opportunity had been denied.

32. Moreover, as laid down by the Apex Court, the parties cannot be compelled for subjecting themselves for blood test in the proceedings under Section 125, Cr.P.C. It is held in Goutam Kundu v. State of West Bengal as follows :-

From the above discussion it emerges:-

(1) that Courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.(5) No one can be compelled to give sample of blood for analysis.

In view of what is stated above, the first ground urged by the learned counsel for the petitioner fails."

24. The learned Single Judge of Madhya Pradesh High Court in **Devesh Pratap Singh** Vs. **Srimati Sunita Singh** AIR 1999 Madhya Pradesh 174 has held that the rule of evidence contained in Section 112 raises a mandatory presumption that a child born during wedlock, no matter when the child could be begotten, is the legitimate issue of the husband

of the mother and no adverse inference can be drawn against the wife in refusing to submit herself to blood test. The learned Single Judge has held as under:

> *"8. The Petitioner/husband seeks annulment of marriage on the ground of pregnancy per alium i.e. concealed pregnancy. It is not the case of the husband that the wife was already pregnant at the time of marriage because that would be a ground for voiding the marriage by a decree of nullity under Section 12(1)(d) of the Act. A decree of divorce under Section 13(1)(i) of the Act can be obtained only on the ground that other party to the marriage, after solemnization of the marriage, had voluntary sexual intercourse with any person other t ban his or her spouse. In the instant case, the main emphasis for seeking a decree of divorce by the husband is on the admission contained in the statement of wife in her cross-examination that after marriage when the husband visited her parents' place between 8-1-86 to 12-1-86 the wife was in menstrual period and could not have conceived. Relying on the above part of the statement of the wife, the argument sought to be built up is that the wife became pregnant due to illegitimate sexual connection with a person outside the wed-lock sometime after 12-1-86 when the menstrual period might have been over. The rule of evidence contained in Section 112 of the Evidence Act raises mandatory presumption that a child born during wedlock, no matter when the child could be begotten, is the legitimate issue of the husband of the mother. The presumption can be dislodged by proof of non-access during the time of conception. The husband has admitted a consummation of marriage after it took place on 29-11-85 and also admitted access to each other between 29-11-85 to 12-1-1986. The child born on 31-10-1986 could have been conceived as the husband and wife had access to each other between the above period. As held by the Supreme Court in Dukhtar Jahan v. Mohammad Farouq, AIR 1987 SC 1049, the sole ground that the child had been born in seven months 'time after the marriage leads to no conclusion that the child was conceived even before the marriage. Giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event.*
>
> *9. The husband cannot derive much help from the admission made by the wife in her cross-examination that when the husband visited her while she was living in her parents' house between 8-1-1986 and 12-1-1986, she was in menstrual period. Merely because the wife states that she was in menstrual period at the time of visit of the husband, it cannot be conclusively held that she could not have conceived earlier to the above period as a result of her access to the husband before the aforesaid period.*
>
> *12. In view of the above medical opinion, the contention of the husband based on the alleged admission of the wife in her cross-examination about her menstrual period does not lead to a rebuttable presumption that the wife had conceived as a result of any illicit sexual intercourse with any person outside the wedlock. The presumption in Section 112 of the Evidence Act thus does not stand rebutted, in view of the admitted access between the husband and the wife during which she could have conceived and delivered a normal child.*
>
> *14. It is no doubt true that in the matrimonial Court below the husband had filed an application seeking directions of the Court to the wife to submit herself and her child to blood test, but the wife refused on the ground that there is no one in her family to take her for the test to New Delhi. On the*

basis of evidence discussed above, and the medical opinion, this Court does not find that any adverse inference can be drawn against the wife in refusing to submit herself to blood test."

25. The learned Single Judge of Karnataka High Court in **Smt. Ningamma and another** Vs. **Chikkaiah** AIR 2000 Karnataka 50 has held that to compel a person to undergo or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty. The learned Single Judge has held as under:

"21. Article 21 of the Constitution confers fundamental right of life and personal liberty. Life full of dignity and honour. In India chastity of the woman and paternity of the child have got their importance and pride places. No person in India will ever tolerate nor cherish or like to be called bastard nor a woman will tolerate to be called unchaste. Legitimacy of the paternity of a child or person and chastity of a woman are parts of the dignity and honour for each man and woman according to law. Article 21 confers right to life and provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life is not merely animal life. Right to life means life full of dignity and honour and right to live with honour and dignity. Right to personal liberty is also very important. To compel a person to undergo or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty particularly even when there is no provision either in the Code of Civil Procedure or theEvidence Act or any other law which may be said to authorise the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man's paternity. It will amount to nothing but interference with the right of personal liberty. Here as mentioned earlier, Section 112read with Section 4, Evidence Act really has the effect of completely closing and debaring the party from leading any evidence with respect to the fact which the law says that to be the conclusive of proof of legitimacy and paternity of child covered by Section 112 of Evidence Act, except by showing that during the relevant period of time as referred to in Section 112 the parties to the marriage had no access to each other, the allowing of medical test to test the blood group to determine paternity would run counter to the mandate of Article 21 of the Constitution as well and inherent powers are not meant to be exercised to interfere with the fundamental right of life and liberty of the person nor to nullify or stultify any statutory provision.

22. In the case of Revamma v Shanthappa, this Court had an opportunity to consider this question of medical examination as to whether the Court can compel a person to undergo medical examination. His Lordship Hon'ble H.B. Datar, J., as he then was had been pleased to observe at paras 4 and 5 are as under:

"4. In a case where a party alleges that a person is impotent or suffering from other such incurable disease, it is for the person making such an allegation to prove the same. A party cannot be compelled to undergo medical examination. As stated by the High Court of Gujarat, "There is no provision under the Hindu Marriage Act or the Rules framed thereunder, or in the Code of Civil Procedure, or by the Indian Evidence Act, or any other law

which would show any power in the Court to compel any party to undergo medical examination".

A medical examination for ascertaining whether a person is insane or impotent are all cases in which unless by the law of the land a person can be compelled to undergo medical examination, an order directing a person to medical examination would be clearly illegal and without jurisdiction. In P. Sreeramamurthy v P. Lakshmikantham, when an order was passed directing medical examination, it was held that there must be some statutory provision under which it would be open to the Court to compel medical examination of a party, thus restricting the enjoyment of personal liberty of the person. It was also held that in a case like this, it was not right to rely upon the general or inherent powers of the Court under Section 151 of the Civil Procedure Code. It may be rejected and that even medical examination is specifically provided as under the terms of the Indian Lunacy Act. In the absence of any provision, it is not competent to any party to compel the other party to undergo medical examination.

5. In the case of Ranganathan Chettiar, supra, it has been held that it is not open to the Court under Section 151 of the Code of Civil Procedure, to order a medical examination of a party against the consent of such party. To pass such an order is tantamout to treating a human being as a material object, which no Court should do under its inherent power. It is, thus, clear that it is not open to the Court to invoke Section 151 of the Code of Civil Procedure to order a medical examination against his consent. In that view the order directing the medical examination of the petitioner is one which has been passed by the learned Judge in excess of the jurisdiction and the same is liable to be set aside".

23. Thus considered in my view the Court below committed an error of jurisdiction and acted in excess of jurisdiction in directing the revision petitioners to subject themselves to medical examination for the blood test.

24. I am further to observe that the Court below has observed that if the parties or any of them fails to appear before the District Surgeon for medical test on 4-12-1996, adverse inference shall be or may be drawn as per law. Here again the Court below acted illegally in making this observation, because Section 4 provides and mandates that when one fact is said to be conclusively proved on establishment of another relevant fact, then it completely shuts down and rules out every sort of evidence to disprove that fact. Adverse presumption under Section 114 may furnish a circumstantial evidence to dislodge the conclusive proof, then that will be running counter to the provisions of Section 112 read with Section 4 of the Evidence Act. The Court below observed illegally that failure or refusal to surrender to medical test will result in raising adverse presumption against the party when in view of Section 112 read with Section 4 of the Evidence Act, every sort of evidence, other than referred in Section 112 is barred and closed including presumptive circumstantial evidence under Section 114 and then the presumption cannot be raised under Section 114 from the failure to surrender. What evidence can be lead so that conclusive presumption or doctrine of conclusive proof under Section 112 may not arise is of the fact that the parties to marriage had no access to each other or occasion to have access during the relevant period i.e., period when the child or person concerned whose paternity or

legitimacy in question was conceived as per the latter part of Section 112 of the Evidence Act. Further threat to raise such adverse presumption in such case will amount to interference with fundamental right under Article 21 of personal liberty by implicitly forcing an unwilling person to undergo the medical test i.e., blood group test against his wish and against his or her free will and liberty."

26. Their Lordships of the Hon'ble Supreme Court in **Smt. Kamti Devi and another** Vs. **Posshi Ram** AIR 2001 Supreme Court 2226 have held that Section 112 which raises a conclusive presumption about the paternity of the child born during the subsistence of a valid marriage, itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. Their Lordships have held as under:

"4. The marriage between appellant Kamti Devi and respondent Poshi Ram was solemnised in the year 1975. For almost fifteen years thereafter Kamti Devi remained childless and on 4-9-1989 she gave birth to a male child (his name is Roshan Lal). The long period in between was marked by internecine legal battles in which the spouses engaged as against each other. Soon after the birth of the child it was sought to be recorded in the Register under the Births, Deaths and Marriages Registration Act. Then the husband filed a civil suit for a decree declaring that he is not the father of the child, as he had no access to the appellant-Kamti Devi during the period when the child would have been begotten.

11. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

27. The learned Single Judge of Delhi High Court in **Mrs. Teeku Dutta** Vs. **State and another** AIR 2004 Delhi 205 has held that no party to legal proceedings can be subjected to any such test against his or her will. It infringes upon his or her right to privacy. The learned Single Judge has held as under"

"6. Additionally, it may be recalled that an inbuilt constitutional safeguard exists in the shape ofArticle 20(3) of the Constitution against a person accused of any offense being compelled to be a witness against himself. Right of privacy as enshrined in Article 21 of the Constitution also comes into play as and when any party to the proceedings is called upon to undergo any scientific

test for the purpose of collecting evidence. It is a fairly settled position that no party to a legal proceedings can be subjected to any scientific test against his or her will as it has the effect of infringing upon his or her right to privacy."

28. The learned Single Judge of Allahabad High Court in **Heera Singh** Vs. **State of U.P. and others**, 2005 Cri. L.J. 3222 has held that merely because of advancement in science and technology, provisions of Evidence Act, enacted more than 100 years back, does not lose significance. Before DNA test is conducted, consent of person concerned is necessary. The learned Single Judge has referred to maxim "Pater est quem nuptiae demonstrant" (father is one whom marriage indicates). The learned Single Judge has held as under:

"10. In view of the settled legal position, respondent No. 2 being guardian of respondent No. 3 having refused P.M.A. test, cannot be compelled for the same at the instance of the petitioner. The courts in the capacity of ad litum guardian of minor can also not direct such a test in the absence of direct and positive evidence of non-access as required by Section 112 of the Evidence Act The courts exercise protective jurisdiction on behalf of an infant and it would be unjust and unfair to direct to such a test to assist a litigant to establish and prove his or her claim at the cost of an infant. The infant cannot be allowed to suffer because of his incapacity. The Apex Court in the case of Smt. Dukhtar Jahan v. Mohammed Farooq, reported in AIR 1987 SC 1049 has observed as under:

"12..... This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice, to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman."

29. The learned Single Judge of Bombay High Court in **Sunil Eknath Trambake** Vs. **Leelavati Sunil Trambake** AIR 2006 Bombay 140 has held that DNA test to prove paternity of child can be ordered only in exceptional and deserving cases and if it is in the interest of child, it cannot be directed as a matter of routine. The learned Single Judge has further held that order directing DNA test of child to prove his paternity is not necessary and the factum of paternity can be proved by other evidence also. The learned Single Judge has held as under:

"6. *Merely because either of the parties have disputed a factum of paternity does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference or adverse inference on the basis of such evidence on record or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the Court can direct such test. DNA test, in any case, cannot be directed as a matter of routine. The Courts should record reasons as to how and why such test in the case is necessary to resolve the controversy and is indispensable. That is necessary since a result of such test, in matrimonial and succession cases, being negative will have an effect of*

branding a child as a bastard and the mother as an unchaste women as noted in Goutam Kundu v. State of West Bengal and Anr. (1993) 3 SCC 418. That may also adversely affect the child psychologically. The Courts, however, should not hesitate to direct DNA test if it is in the best interest of a child.

7. In the present case, the respondent-wife is seeking DNA test not in the interest of the child but in her own interest to establish that the petitioner-husband lives in adultery and is, therefore, not entitled for divorce. The learned Judge has not recorded the reasons as to why DNA is indispensable and that the other evidence produce on record is not sufficient to draw an inference or adverse inference in favour or against either of the parties. In the present case the documentary evidence in the form of birth certificate and school record is already produced on record which, according to the respondent, reflects that the petitioner and Meena are parents of child - Rupesh. The learned Judge has not recorded its opinion in respect of that evidence. I do not wish to express any opinion on merits of the case. However, in my opinion, in the absence of sufficient reasons for holding the DNA test necessary, to resolve the controversy involved in the matter the impugned order is liable to be set aside."

30. In the instant case, the appellant has failed to prove that the respondent has treated the appellant with cruelty.

31. Accordingly, there is no merit in this appeal, the same is dismissed. No costs.

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

Land Acquisition Collector and another. ...Appellants.

Versus

Bhimi Ram. ...Respondent.

RFA No. 365/2011
Reserved on: 17.8.2015
Decided on: 18.8.2015

Land Acquisition Act, 1894- Section 18- Property of the claimant was acquired and a compensation of Rs.3,32,68,516/- was awarded as market value of the houses/structures- a reference petition was filed pleading that structures were located adjacent to bazaar, offices of HPPWD, HPSEB, Rest House, Central School etc. and compensation was wrongly assessed- RW-1 had admitted before the Court that cost of the material was increased from 1999 to 2005 by 27.4%- however, this increase was not provided to the claimant- held, that Court had rightly awarded the increase of 27.4%- compensation is to be paid from the date of the notification and not from the date of the taking possession- no deprecation is to be made from the cost of the structure- appeal dismissed. (Para-8 to 10)

Case referred:
Union of India vs. Savjiram and another, (2004) 9 SCC 312

For the Appellants : Mr. Parmod Thakur, Addl. A.G.

For the Respondent : Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment dated 2.7.2010 rendered by the Additional District Judge, Fast Track Court, Kullu in Reference Petition No. 33 of 2009.

2. "Key facts" necessary for the adjudication of this appeal are that notification under section 4 of the Land Acquisition Act, 1894 was issued on 2.4.2005. It was given vide publicity. It was published in Rajpatra on 13.6.2005, Amar Ujala on 14.4.2005 and Hindustan Times on 15.4.2005. Public notice was issued on 12.5.2005. Notifications under sections 6 and 7 were issued on 10.11.2005. The Land Acquisition Collector awarded a sum of Rs. 3,32,68,516/- as market value of the houses/structures. He awarded 30% solatium and 12% additional amount was also awarded. Respondent filed a Reference Petition No.33 of 2009 before the Additional District Judge, Fast Track Court, Kullu against the award made by the Land Acquisition Collector. According to the respondent, acquired structures were situated adjacent to Sainj Bazar. Offices of HPPWD, HPSEB, Rest House, Central School etc. were adjacent to the acquired structures. One structure was constructed in the year 2002 and its value was not less than Rs. 40,00,000/-. The other structure was also constructed in the year 2002 and its value was not less than Rs. 60,00,000/-. The value of third structure was Rs. 20,00,000/-. He was also getting rent of Rs. 11,000/- per month.

3. Reply was filed by the appellants. According to the averments made in the reply, structures were situated at a distance of 2 KMs from Sainj Bazar. The houses were being used for residential purposes and no commercial activity was being carried out. The value of the houses was got assessed by the competent official from HPPWD.

4. Issues were framed by the Additional District Judge, Fast Track Court, Kullu on 11.12.2009 and the additional issues were framed on 17.3.2010. Award was made by the Additional District Judge, Fast Track Court, Kullu in favour of the respondent. Hence, the present appeal.

5. Mr. Parmod Thakur, learned Additional Advocate General, has vehemently argued that compensation was to be paid from the date of taking over the possession and not from the date of notification. According to him, the reference court has awarded the original cost of the house without making any depreciation and has also allowed 27.4% increase in the cost of material.

6. Mr. Naveen K. Bhardwaj has supported the award dated 2.7.2010.

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

8. Reference court has not relied upon the report furnished by PW-2 Nihal Singh. There was no proof that the property was rented out at the rent of Rs. 11,000/- per month. However, fact of the matter is that reference court has relied upon statement of RW-1 G.C. Gupta. According to him, value was assessed by him as per H.P.S.R. 1999. He has admitted that the cost of material has increased from 1999 to 2005 and the increase was to the extent of 27.4%. The increase of 27.4% was not provided to the respondent. Learned reference court has rightly held respondent entitled to the market value assessed by RW-1 G.C. Gupta without depreciation alongwith increase @ 27.4%. The compensation was to be

paid from the date of notification under section 4 of the Land Acquisition Act and not from the date of taking over possession of the property.

9. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Savjiram and another***, (2004) 9 SCC 312 have held that after calculating the cost of construction at the rate prevalent at the time of fixing of compensation or working out the present value of materials there is no scope for any further deduction. Their Lordships have held as under:

> **"[9] A bare reading of para 44 shows that it is a method of calculation indicated relating to the computation of the compensation. The compensation for houses and buildings are required to be calculated on (a) the present value of materials, (b) in addition to the cost of construction at present rates. Both the components for working out the compensation relate to present value of the materials and cost of construction at present rates less the value of any materials made over to the proprietor. Obviously, the calculation has to be done on the basis of the present value or the present rates, as the case may be. The expression 'present' means in existence at the time at which something is spoken or written, being in a specified place, thing. Grammatically, it means denoting a tense of verbs used when the action or event described is occurring at the time of utterance or when the speaker does not wish to make any explicit temporal reference. It also means the time being, now. Commonly, it denotes existence of a particular thing or a matter at the time of consideration. Obviously therefore after arriving at the cost of construction at the prevalent rate at the time of fixing the compensation or working out the value of the materials there is no scope for making any further deduction.**
>
> **[10] Generally speaking depreciation is an allowance for the diminution in the value to wear and tear of capital asset employed by an assessee in his business. Black's Law Dictionary (5th Edn.) defines depreciation to mean, inter alia :**
>
> **"A fall in value; reduction of worth. The deterioration, or the loss or lessening in value, arising from age, use and improvements, due to better methods. A decline in value of property caused by wear or obsolescence and is usually measures by a set formula which reflects these elements over a given period of useful life of property. Consistent, gradual process of estimating and allocating cost of capital investments over estimated useful life of asset in order to match cost against earnings."**
>
> **[14] To put it differently, depreciation is the measure of the effective life of an asset owing to use or obsolescence during given period.**
>
> **[15] Therefore, the stand of the appellant-Union with regard to depreciation has no substance.**
>
> **[16] The other relevant question which needs to be determined is the essence of what is provided in paras 43 and 44 of the Manual. A bare reading of para 43 shows that when any house, building or trees on the land to be acquired, should not be required by the Government. The owner is given the option of removing it within a reasonable period to be fixed by the Collector. The option is to be given by the Collector and**

it is for the owner to avail the option and remove the materials within such time as may be fixed by the Collector. Once the option of removing the articles is exercised, the value of such materials has to be deducted from the sum payable as compensation, in case payment has not been made already. In case compensation has already been paid, it is to be recovered from the owner prior to removal of articles. Under para 43 at first Government has to decide whether the house, building or trees standing on the land are required by the Government or not, and in case it is not required the option of removal is given. As provided in Para 44, from the compensation worked out on the basis of procedure laid down in the said para, value of materials made over to the proprietor has to be deducted. The combined reading of paras 43 and 44 make the following position clear. Firstly, the Government has to take a decision whether the house, buildings and trees standing on the land are required by the Government. In case it is not required, the owner is allowed the option to remove the house, building or the trees as the case may be, within a reasonable period. The period has to be fixed by the Collector and the value of materials removed is to be determined in the award. The amount determined has to be deducted from the sum payable as compensation, in case it has not been paid; and if it has already been paid, then there shall be recovery of the amount from the owner prior to the removal of the materials. The value of the materials made over to the proprietor has to be deducted from the compensation."

10. Thus, no deprecation could be made in view of the law laid down by their Lordships of the Hon'ble Supreme Court in the judgment citied hereinabove.

11. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Lok Nath Sharma ...Appellant

Versus

Surender Soni. ...Respondent

Cr.A. No. 58/2006
Reserved on: 17.8.2015
Decided on: 18.8.2015

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque for discharging his liability which was dishonoured- complainant admitted that words Doctor Lok Nath Sharma at the top and signature at the bottom are in one ink whereas the amount in figure and words and date are in different ink, which casts doubt about the issuance of cheque by accused- complainant had failed to prove that any advance money was taken by accused from him- no receipt was issued- there was discrepancy regarding the advancing of the loan- held, that accused was rightly acquitted by the trial Court. (Para-5)

For the appellant: Mr. Adarsh Sharma, Advocate vice counsel for the appellant.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 28.11.2005 rendered by the Judicial Magistrate 1st Class, Theog, District Shimla in case No. 224-1 of 2003.

2. "Key facts" necessary for the adjudication of this appeal are that appellant filed a complaint under section 138 of the Negotiable Instrument Act with the allegations that he was running a clinic at Baghi. Respondent was under liability to pay a sum of Rs. 1,30,000/- to him as an advance taken by him for purchasing the medicine etc. The respondent, as such, in order to discharge the liability issued a cheque dated 1.6.2003 for a sum of Rs. 1,30,000/- drawn at Central Bank of India Branch at Bangana, District Una. The complainant submitted the cheque to his banker, namely, UCO Bank branch at Baghi, Tehsil Kotkhai for its collection from the banker of the accused, but the complainant on 28.8.2003 received a letter alongwith memorandum from UCO Bank Baghi showing that the cheque has been dishonoured. Complainant issued a legal notice on 11.9.2003 to the accused and demanded the amount of cheque within 15 days from the date of receipt of notice. However, despite receiving the notice accused has not paid the amount of cheque, as such, a complaint was filed by the complainant.

3. Process was issued to the respondent. Notice of accusation was framed against the respondent. Learned Judicial Magistrate 1st Class, Theog dismissed the complaint on 28.11.2005. Hence, the present appeal.

4. Complainant, in addition to his own statement, examined two more witnesses. Statement of respondent was also recorded under Section 313 of Cr. P.C.

5. The cheque is Ext. PA. In the cheque the words Doctor Lok Nath Sharma at the top and signature at the bottom are in one ink whereas the amount in figure and words alongwith date as 1.6.2003 are in different ink. The handwriting is also different. This fact was admitted by the complainant while appearing as CW-1. It casts doubt about the issuance of cheque by the respondent. According to the complainant, he was running a clinic and the respondent has taken an advance of Rs. 1,30,000/- from him. Respondent issued cheque in the discharge of his liability. The transaction allegedly took place in the year 1995-96. Cheque is dated 1.6.2003. The complainant has miserably failed to prove that there was any such transaction which has taken place between him and the respondent. The complainant has also failed to prove that respondent has taken advance money from him. There is no receipt to this effect. He has not produced any record to show that there was any such transaction leading to payment of advance money. Initially, case of the complainant was that he has paid the entire amount to the respondent at Hamirpur. However, later on he has stated that the amount was paid in two installments of Rs. 80,000/- and Rs. 50,000/- respectively. The complainant has failed to prove that cheque Ext. PA was actually issued by the respondent in respect of any debt or legally enforceable liability. The Court below 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 rendered by the Judicial Magistrate 1st Class, Theog.

6. Accordingly, in view of the analysis and discussion made herein above, there is no merit in the appeal and the same is dismissed.

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

M/s Mahindra and Mahindra .....Petitioner.
Versus
Vikram Singh .....Respondent.

Cr.MMO No. 223 of 2014.
Date of Decision : 18th August, 2015.

Negotiable Instruments Act, 1881- Section 142- The trial Court had returned the complaint for presentation before the Court having jurisdiction over the places where cheque was dishonoured- held, that provisions of Section 142 of N.I. Act have been amended retrospectively and the proceedings can be initiated before the Court where cheque was presented for collection- since, cheque was presented within jurisdiction of the trial Court, therefore, the mere fact that it was sent for collection to Bilaspur will not take away the jurisdiction – order set aside.

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant petition is directed against the impugned order rendered on 22nd August, 2014 by the learned Additional Chief Judicial Magistrate, Court No.2, Shimla in Case No.3752-3 of 2014, whereby, he ordered for the returning of the complaint to the complainant/petitioner on the ground that the Criminal Court of competent jurisdiction within whose territorial limits, the bank where the cheque issued by the respondent/accused to the petitioner herein was sent for clearance is located, is vested with the jurisdiction to entertain, besides adjudicate upon it. The aforesaid conclusion qua the non-maintainability of the complaint instituted before it by the petitioner/complainant on the score of its lacking territorial jurisdiction, the learned Additional Chief Judicial Magistrate, Court No.2, Shimla has committed infraction of the mandate of the judgment of the Bombay High Court reported in **Mr. Ramanbhai Mathurbhai Patel vs. State of Maharashtra and another, Criminal Writ Petition No. 2362 of 2014, decided on 25th August, 2014** as well as of the mandate of the amended sub section 2(a) of Section 142 of the Negotiable Instruments Act and of Section 142A (1) of the Negotiable Instruments Act, whose provisions stand extracted hereinafter and which amended provisions mandate that the location of the bank where a negotiable instrument is delivered for collection through an account and wherein the payee maintains his/its account would be the necessary parameter besides the apt determinant for forming a conclusion qua the jurisdiction of the Court to entertain besides adjudicate upon a complaint arising from dishonour of negotiable instrument,. In other words, the location of the bank where the payee holds his account and presents the negotiable instrument for collection through account would vest, constitute or clothe jurisdiction in the court within whose territorial limits the bank aforesaid is situated. The provisions of amended sub Section (2)(a) of Section 142 and Section 142A of the Negotiable Instruments Act read as under:-

> "142 (2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction:-

> (a). if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be maintains the account, is situated; or
>
> 142A. (I) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or any judgment decree, order or directions of any court, all cases arising out of section 138 which were pending in any court, whether filed before it or transferred to it, before the commencement of the Negotiable Instruments (Amendment) Ordinance, 2015 shall be transferred to the Court having jurisdiction under sub-section (2) of section 142 as if that sub-section had been in force at all material times."

Since, the provisions engrafted in Section 142A(1) of the Negotiable Instruments Act contemplate that all cases arising out of Section 138 thereof as pending in any Court, before the commencement of the Negotiable Instruments (Amendment) Ordinance, 2015 shall stand transferred to the Court having jurisdiction under sub-section (2) of section 142 as if that sub-section had been in force at all material times. Obviously, then with the provisions of amended sub Section (2) (a) of Section 142 of the Negotiable Instruments Act having been given retrospectivity in operation, they bring within the amplitude, domain as well as within the ambit thereof, the instant complaint which though instituted in November, 2013, yet when in consonance with the diktat of Section 142A (1) of the Negotiable Instruments Act, it was pending in the Court of the learned Additional Chief Judicial Magistrate, Court No.2, Shimla, renders it hence amenable to be governed by the principles enunciated in Section 142(2)(a) of the Negotiable Instruments Act for determining on its anvill the jurisdictional competence of the Court aforesaid to entertain, try and adjudicate the instant complaint. With satiation of the principles of Section 142A(1) of the Negotiable Instruments Act envisaging the applicability of the provisions of Section 142(2)(a) of the aforesaid Act, to all cases arising out of Section 138 of the Act aforesaid as pending in any Court whether filed before it or transferred to it before the commencement of the Negotiable Instruments (Amendment) Ordinance, 2015 being triable by the Court having jurisdiction within the parameters enshrined in Section 142(2)(a) of the Act aforesaid, having stood begotten, comprised in the pendency at the apposite stage of the instant complaint before the learned Additional Chief Judicial Magistrate, Court No.2, Shimla even though instituted prior to coming into being on the statute book of Section 142(2)(a) of the Negotiable Instruments Act renders, hence, the Court of the Additional Chief Judicial Magistrate, Court No.2, Shimla, with jurisdictional competence to try the offence arising out of dishonour of negotiable instrument. As a concomitant then the provisions of amended sub section (2) of section 142 of the Negotiable Instruments Act acquire force or are to be construed to be invokable for bestowing jurisdiction for reasons assigned hereinafter, upon the Court of the learned Additional Chief Judicial Magistrate, Court No.2, Shimla to entertain, besides adjudicate upon the complaint instituted before it by the complainant/petitioner herein, arising from dishonour of the negotiable instrument issued to it by the respondent/accused. However, before proceeding to formidably conclude whether the Court of the learned Additional Chief Judicial Magistrate, Shimla had the requisite jurisdiction to entertain, besides adjudicate upon the complaint instituted before it by the petitioner herein/complainant, it is imperative to determine whether the parameter enshrined in Section 142(2)(a) of the Negotiable Instruments Act has stood satiation. In concluding whether satiation of the principles enunciated in Section 142(2)(a) of the aforesaid Act for, hence, bestowing jurisdiction upon the learned Additional Chief Judicial Magistrate, Court No.2, Shimla to entertain besides adjudicate upon the complaint instituted before it by the petitioner, has been begotten, the uncontroverted factum of the petitioner herein maintaining, while its being payee or holder

in due course of the dishonoured negotiable instrument, its account at Sate Bank of India, Boileauganj Branch, Shimla gains significance. With material on record portraying the palpable fact of the petitioner herein maintaining, while its being payee or holder in due course of the dishonoured negotiable instrument, its account at State Bank of India, Boileauganj, Shimla, whereto he presented the negotiable instrument for collection through account, necessarily then the parameter enunciated in Section 142(2)(a) of the Negotiable Instruments Act, of the Court within whose territorial limits the branch of the bank where the payee or holder in due course of the dishonoured negotiable instrument maintains his/its account and whereto presents it for collection through account, is situated being clothed, vested or enjoying jurisdiction to entertain, besides adjudicate upon the complaint preferred before it by the petitioner herein, stands satiated. As a corollary then with the State Bank of India, Boileauganj Branch, Shimla where the petitioner herein while its being payee or holder in due course of the dishonoured negotiable instrument is maintaining its account and whereto it had proceeded to present the negotiable instrument for collection through account, being located within the territorial limits of the Court of the learned Additional Chief Judicial Magistrate, Court No.2, Shimla, the latter court enjoyed besides stood clothed with jurisdiction to entertain besides adjudicate upon the complaint instituted before it by the petitioner herein. The petitioner herein was maintaining while its being payee or holder in due course of the negotiable instrument its account at State Bank of India, Boileauganj, Shimla, whereto it presented the cheque, handedover to it by the respondent/accused for encashment which came to be routed by the former bank for collection to PNB, Shimla wherefrom it was transmitted to PNB, Rani Kotla Branch, Bilaspur, where the respondent/accused held/maintained his account, obviously, for reiteration then when the location of the State Bank of India, Boileauganj Branch, Shimla, wherein the petitioner herein maintained while its being payee or holder in due course of the negotiable instrument , its account, is within the territorial limits of the jurisdiction of the learned Additional Chief Judicial Magistrate, Court No.2, Shimla, hence, vests the latter Court with jurisdictional competence to receive and adjudicate upon the complaint as instituted before him arising from the dishonour of negotiable instrument issued in its favour by the respondent/accused. The mere fact that the dishonoured negotiable instrument was sent for collection by SBI, Boileauganj Branch, Shimla to PNB, Branch Office Shimla wherefrom it was transmitted to Punjab National Bank, Rani Kotla, Bilaspur would not per se tantamount to a conclusion as erroneously formed by the learned Additional Chief Judicial Magistrate, Court No.2, Shimla, on a gross misinterpretation of the apposite statutory provisions of the aforesaid Act, that hence, the Judicial Magistrate within whose territorial limits the aforesaid drawee bank was located is vested with jurisdiction to entertain or adjudicate upon the complaint. While rendering the aforesaid pronouncements, the learned Additional Chief Judicial Magistrate, Shimla has paid reverence to the factum of the location of the bank where the respondent/accused holds his account than to the apposite parameters as enunciated in the afore referred discussion of the Court within whose territorial limits, the bank where the payee holds or maintains his/its account and whereto it presents the negotiable isntrument for collection through account being rather vested with jurisdiction to try the complaint arising from dishonour of negotiable instrument. The conclusion formed by the learned Additional Chief Judicial Magistrate is founded upon an erroneous interpretation of amended provisions of the sub section (2)(a) of Section 142 and of Section 142A(1) of the Negotiable Instrument Act and of the judgment of the Bombay High Court reported in **Mr. Ramambhai's case supra**. The pronouncement at page 16-A of the paper book that the Punjab National Bank, Branch Office, Shimla rather conveyed besides communicated to SBI, Boileauganj Branch, Shimla, the bank where the petitioner/complainant maintains its account that the cheque transmitted to it by the latter bank stands returned for insufficient funds in the account held by the respondent/accused

at PNB, Rani Kotla Branch, Bilaspur, was also a potent factor to have been borne in mind by the learned Additional Chief Judicial Magistrate, Shimla while determining whether hence the jurisdiction for the complainant being maintained at the instance of the petitioner herein vested hence with Courts at Bilaspur within whose local limits the Punjab National Bank, Rani Kotla Branch is located or whether the complaint was entertainable by the criminal court of competent jurisdiction at Shimla within whose territorial limits Punjab National Bank Shimla as well as State Bank of India, Boileauganj Branch, Shimla where the account of the petitioner is maintained, are located, especially with the latter bank having received at Shimla a communication from the former bank that the cheque presented by the petitioner for collection of funds from the account of respondent/accused for want of sufficient funds stood dishonoured. However, the learned Additional Chief Judicial Magistrate having not paid reverence to the aforesaid imperative facts, rather having in a cursory manner on the mere fact of the negotiable instrument having been drawn at Punjab National Bank, Branch Officer, Rani Kotla, Bilaspur, has fallaciously concluded that hence the Courts within whose territorial limits the drawee bank is situated would have the jurisdiction. The error in its reasoning is apparent and it necessitates interference. Moreover, the learned Additional Chief Judicial Magistrate besides infracted the mandate of the Bomay High Court in a case reported in ***Mr. Ramanbhai Mathurbhai Patel vs. State of Maharashtra and another, Criminal Writ Petiton No. 2362 of 2014, decided on 25th August, 2014*** wherein at paragraph the apposite pronouncements exist. The said paragraph stand extracted hereinafter:-

> "8. It is thus clear that in the present case by issuing cheques payable at all branches, the drawer of the cheques had given an option to the banker of payee to get the cheques cleared from the nearest available branch of bank of the drawer. It, therefore, follows that the cheques have been dishonoured within the territorial jurisdiction of Court ot Matropolitan Magistrate at Kurla. In view of the judgment of Hon'ble Supreme Court in the matter of Dashrath v. State of Maharashtra (Cr. Appeal No.2287 of 2009), the learned Metropolitan Magistrate of Kurla Court has jurisdiction to entertain and decide the complaint in question."

The existence of a dicta in the hereinabove extracted paragraph No.8 and its conveying that the place where the cheque stands dishonoured would be the necessary parameter for determining the jurisdiction of the Criminal Court of competent jurisdiction to maintain or entertain or adjudicate upon a complaint stands extantly established. Its substantiation is meted out by the existence of a communication at page 16-A of the paper book, meted out by the Punjab National Bank, Branch Shimla to the State Bank of India, Boileauganj Branch, Shimla, where the petitioner herein maintains its account, of the cheque presented before it by the petitioner herein having stood dishonoured for insufficient funds in the account of the respondent/accused, hence, facilitating an inference that when Shimla is the place where a communication was received by the petitioner herein qua the dishonour of negotiable instrument, concomitantly then the rendition of a communication to the petitioner, at Shimla qua the fact of the negotiable instrument issued to it by the respondent/accused having stood dishonoured, constituted the aforesaid place being construable to be the location where the negotiable instrument stood dishonoured. Consequently, the Court of the learned Additional Chief Judicial Magistrate, Court No.2, Shimla within the territorial limits of whose jurisdiction Punjab National Bank, Branch Office, Shimla where from a communication qua the dishonour of negotiable instrument emanated, is located would have the necessary jurisdiction to entertain and adjudicate upon the complaint. Accordingly, the instant petition is allowed and the impugned order of 22nd

August, 2014 is quashed and set aside. The learned Additional Chief Judicial Magistrate, Court No.2, Shimla is directed to adjudicate upon the complaint instituted by the petitioner herein before him, if it is on record and in case it is returned to the complainant/petitioner herein, the same on its being re-presented by the petitioner/complainant before it be entertained and be decided in accordance with law. The parties are directed to appear before the learned Additional Chief Judicial Magistrate, Court No.2, Shimla on 2nd September, 2015. All pending applications also stand disposed of. Dasti copy.

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

Narinder Kumar .....Petitioner.

Versus

Tej Ram alias Taru Ram and others .....Respondents.

CMPMO No.201 of 2015.
Judgment reserved on: 14.08.2015.
Date of decision: August 18th, 2015.

Indian Evidence Act, 1872- Section 112- Plaintiff filed a suit seeking declaration that defendant No. 6 is neither legitimate nor illegitimate son and his name recorded as father of the defendant No. 6 in the birth certificate of M.C. Mandi and Gram Panchayat be declared wrong- application was filed by him during the pendency of the suit for conducting DNA test which was allowed by the trial Court- held, that the mother of defendant no. 6 had herself admitted that she was not married to the plaintiff and defendant No. 6 was born out of sexual relation between her and the plaintiff - it was necessary to conduct the DNA test to ascertain the truth regarding the allegations made by the mother and to save defendant No. 5 from possible stigma of being called a bastard in the society- - petition dismissed.

(Para-4 to 8)

Cases referred:

Bhabani Prasad Jena versus Convenor Secretary, Orissa State Commission for Women and another (2010) 8 SCC 633

Dipanwita Roy versus Ronobroto Roy (2015) 1 SCC 365

For the Petitioner : Mr.Naveen K.Bhardwaj, Advocate.

For the Respondents : Mr.Sanjeev Kuthiala, Advocate with Ms.Ambika Kotwal, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner is a minor and by medium of this petition under Article 227 of the Constitution of India has taken exception to the order passed by the learned trial Court whereby it has directed him to undergo Deoxyribonucleic Acid (DNA) test.

The facts, in brief, may be noticed.

2. The plaintiff/respondent No.1 filed a suit for declaration to the effect that defendant No.6 (petitioner herein) was neither his legitimate or illegitimate son and,

therefore, his name as entered in the records of Zonal Hospital, Mandi, in labour register dated 27.07.2004 as father of the petitioner and on the basis of this entry, the entry in the birth register of M.C., Mandi vide serial No.1536 dated 31.07.2004 and further the entry to this effect in the Office of Gram Panchayat, Dushad, Sub-Tehsil Sainj, be declared illegal and wrong.

3. During the pendency of the suit, the plaintiff filed an application under Section 45 of the Indian Evidence Act readwith Section 151 of the Code of Civil Procedure with a prayer that the DNA test of the petitioner be conducted, which application stands allowed by the trial Court. The order has been assailed on the ground that in case the petitioner is compelled to undergo DNA test and the results appear to be positive i.e. the petitioner is not the son of respondent No.1, then in that event, the petitioner would be declared a "bastard" and it would be difficult for him to stay in the society.

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

4. It has to be remembered that in a matter where paternity of a child is in issue before the Court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the Court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes, the result of such a scientific test may bastardize an innocent child even though his mother and her spouse were living together during the time of conception. Any order for DNA test can be given by the Court only if a strong prima facie case is made out for such a course.

5. In ***Bhabani Prasad Jena*** *versus* ***Convenor Secretary, Orissa State Commission for Women and another (2010) 8 SCC 633***, the Hon'ble Supreme Court has held that whenever there is a conflict between the right of privacy of a person not to submit himself to medical examination and duty of the Court to reach the truth, the Court must exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.

6. In ***Dipanwita Roy*** *versus* ***Ronobroto Roy (2015) 1 SCC 365***, the Hon'ble Supreme Court was dealing with a case pertaining to the alleged infidelity of the appellant therein and the husband wanted to prove and establish the ingredients of Section 13(1)(i) of the Hindu Marriage Act, 1955, namely, that after the solemnization of the marriage of the appellant with the respondent, the appellant therein had voluntarily engaged in sexual intercourse with a person other than the respondent. The Hon'ble Supreme Court held that the prayer made by the respondent for conducting DNA test of the appellant's son was aimed at the alleged adulterous behaviour of the appellant and, therefore, the issue of legitimacy was also incidentally involved. It was further held that depending on the facts and circumstances of each case, it will direct the holding of a DNA examination, but then it was specifically held that if the directions to hold such test can be avoided, it should be so avoided for the reasons that the legitimacy of a child should not be put to peril. It is apt to reproduce para-16 of the judgment which reads thus:-

> "16. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena v. Orissa State Commission for Women (2010) 8 SCC 633 and Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik (2014) 2 SCC 576 that depending on the facts and circumstances of the case, it

would be permissible for a court to direct the holding of a DNA examination to determine the veracity of the allegation(s) which constitute one of the grounds, on which the party concerned would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril."

7. The Court here is dealing with a case where the mother herself admits that she was never married to the plaintiff but would claim that respondent No.1 was having access to her. It is pleaded in the written statement that the plaintiff's brother Maga was married to the sister of defendant No.5 named Leela Devi and on account of such relations the plaintiff and defendant No.5 were on visiting terms and developed illicit relations out of which the petitioner was conceived and thereafter born at Zonal Hospital, Kullu.

8. In the instant case, though the petitioner is born out of the alleged sexual relationship between respondent No.1 and defendant No.5, he has every right to live with all dignity and respect in the society. Therefore, in order to ascertain the truth regarding allegations made by respondent No.1 and to save defendant No.5 from possible stigma that could be attached to her and further to save the petitioner from being called "bastard" in the society, in my view, it is just and necessary to conduct the DNA test.

9. 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. Pending application, if any, also stands disposed of. Interim order dated 05.06.2015 is vacated.

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

Shri Ram Transport Finance Co. Ltd. . ...Petitioner

Versus

Krishan Lal .....Respondent.

CMPMO No. 264 of 2014.
Judgment reserved on: 13.8.2015
Date of Decision: August 18, 2015.

Arbitration and Conciliation Act, 1996- Section 8- Plaintiff filed a suit against the defendant in which defendant filed an application for referring the dispute to the arbitration- held, that although, plaintiff had filed a suit for injunction but his intention was to defeat the clause of the agreement which entitled the defendant to take the possession- however, defendant had filed a written statement showing its intention to submit itself to the jurisdiction of the Court and had thereby waived its right to seek reference to the arbitration- petition dismissed. (Para-6 to 15)

Cases referred:

Rashtriya Ispat Nigam Limited and another vs.Verma Transport Co. (2006) 7 SCC 275
Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others (2011) 5 SCC 532

For the Petitioner : Mr. Ashwani Kaundal, Advocate.

For the Respondent : Mr. R.K. Bawa, Senior Advocate, with Mr. Amit Kumar Dhumal, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India taking exception to the order dated 4.4.2014 passed by learned Civil Judge (Junior Division), Kandaghat, District Solan, H.P. in CMA No. 46-K/6 of 2014 whereby he dismissed the application filed by the petitioner under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 (for short 'Act') for referring the matter to the arbitral Tribunal.

2. The respondent/plaintiff filed a suit against the petitioner /defendant under Sections 38 and 39 of the Specific Relief Act for permanent prohibitory and mandatory injunction and claimed the following reliefs:

> *"(i) A decree for permanent prohibitory injunction may kindly be passed in favour of the present plaintiff and against the defendant, restraining the defendant from lifting/taking the vehicle No. HP-13-0986 from the possession of the plaintiff forcibly and from putting the same for sale either by himself or through their employee, officials, agents, servants and representatives etc. in the interest of justice.*
>
> *(ii) Further a decree for mandatory injunction may kindly be passed in favour of the plaintiff and against the defendant directing the defendant to supply and disclose the exact statement of loan account of the plaintiff and show correct total outstanding loan amount in the loan account of the plaintiff intends to one time settlement with the defendant and also issue to NOC regarding the clearance of the loan taken by the plaintiff in the interest of justice."*

3. The petitioner filed an application under Section 8 read with Section 5 of the Act for referring the dispute to the Arbitration in terms of the Clause 15 of the loan agreement. The learned Court below rejected the application on the ground that the relief claimed in the suit did not dispute or even question the agreement entered into between the parties on 31.3.2011 and, therefore, the dispute being independent of the agreement arrived at between the parties could not be referred to the arbitration.

4. This order has been questioned on number of grounds as taken in the memorandum of the petition.

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

6. The Loan-cum-Hypothecation Agreement is not disputed even by the respondent and Clause 15 thereof reads as under:

> "**15. Arbitration:**
>
> *All disputes, differences and/or claims arising out of these presents or as to the construction, meaning or effect here of or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Ludhiana in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof or any statute enacted for replacement*

thereof and shall be referred to the sole arbitration of a person to be nominated/appointed by Shriram. In the event of death, refusal, neglect, inability or incapability of the persons so appointed to act as an arbitrator, Shriram may appoint a new arbitrator. The award including the interim awards of the arbitrator shall be final and binding on all parties concerned. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings and shall conduct arbitration proceedings in such manner as he considers appropriate. Any proceedings to be initiated in any court of law in pursuance of this arbitration shall be instituted and held in the Court at Ludhiana only."

7. In the event of the borrower i.e. the defendant committing any act of default, Clause 6 of the agreement comes into operation which apart from creating other rights in favour of the petitioner also creates its right to take possession of the assets as is evident from the perusal of Clause 6 (b), which reads thus:

"6(b). Repossession of Asset: To take possession of the hypothecated assets from where so ever it may be and remove the hypothecated asset including all accessories, bodywork and fittings and for the said purpose, it shall be lawful for Shriram or Shriram authorized representatives, servants, officers and agents forthwith or at any time and without notice to the Borrower to enter upon the premises, or factory, office, garage or godown where the hypothecated assets shall be lying or kept and to take possession or recover or receive the same and if necessary to break open such place of storage; Shriram will be within its rights to use a tow-van to carry away the assets. Any damage to the land or building or factory, office, godown or other equipment/assets kept there, caused by removal of the asset shall be the sole responsibility of the Borrower. Shriram shall be authorized to cause any operations involving the asset to be stopped in order to take possession of the hypothecated asset. Shriram shall not be liable for any damage or loss caused to the Borrower on account of the same."

8. The moot question, therefore, is as to whether the respondent/plaintiff by clever drafting of the plaint purporting to be a suit for injunction can avoid the conditions as incorporated in the agreement including Clause 15 providing for arbitration and Clause 6 granting certain rights to the petitioner in the event of default of the respondent including its right to take over possession of the assets.

9. It is more than settled that clever drafting, illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. The respondent though has innocently claimed that the suit was simpliciter for injunction but the intent thereof is only to tide over and defeat Clause 6 of the agreement, which as noticed above apart from creating any rights in favour of the petitioner also creates a right to take repossession of the assets in the event of the borrower i.e. the respondent committing any act of default.

10. That apart, once the respondent does not dispute the existence of a loan agreement, then the relationship inter se them would be governed only by the agreement and the respondent could not have resorted to a pre-emptary and preventive action by resorting to the provisions of the Specific Relief Act so as to defeat the applicability of Clause-6 (supra). The suit in such circumstances would, therefore, ordinarily be not maintainable in view of the arbitration clause as contained in Clause 15 of the agreement.

11. It only those suits which are outside the purview of the arbitration clause for example, damages etc. that could be maintained by the plaintiff, but in no event a suit claiming injunction so as to defeat the provisions of Clause-6 of the agreement could be maintained.

12. Learned senior counsel for the respondent would then argue that after filing of the petition before this Court, the petitioner has filed its written statement, therefore, the instant petition is not maintainable since the petitioner has already submitted its defence. Notably, the learned counsel for the petitioner has not disputed the filing of the written statement.

13. The Hon'ble Supreme Court in ***Rashtriya Ispat Nigam Limited and another*** *vs.* ***Verma Transport Co. (2006) 7 SCC 275*** has held that the expression "first statement on the substance of the dispute" contained in Section 8 (1) of the 1996 Act must be contradistinguished with the expression "written statement". It was held that it implies submissions of the party to the jurisdiction of the judicial authority. It was further held that if an application is filed before actually filing the first statement on the substance of the dispute, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the Court. It was held that in view of the changes brought about by the 1996 Act, what is necessary is disclosure of the entire substance in the main proceeding itself and not taking part in the supplemental proceedings. It was also held that waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the case before the Hon'ble Supreme Court, the court had already passed an interim ex parte injunction and the appellants were bound to respond to the notice issued by the Court and while doing so, they raised a specific plea of bar of the suit in view of the existence of an arbitration agreement. It was further held that filing of a reply to the injunction application could not have been a ground to refuse to entertain the plea taken by the appellants that the suit should be referred to the Arbitral Tribunal. It was held as under:

> *"33. Filing of a reply to the injunction application could also not have been a ground to refuse to entertain the plea taken by the Appellants that the suit should be referred to arbitral tribunal particularly when in its reply to injunction application, the appellant categorically stated :*
>
> > *"1. That the present application under Order 39 Rules 1 and 2 read with Section 151 CPC is liable to be dismissed on the short ground that the plaintiff has himself admitted the existence of the arbitration clause and therefore, the present application under Order 39 Rules 1 and 2 read with Section 151 CPC is not maintainable and consequently the order of this Hon'ble Court is liable to be vacated."*
>
> *36. The expression 'first statement on the substance of the dispute' contained in Section 8(1) of the 1996 Act must be contra-distinguished with the expression 'written statement'. It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, is needed is a finding on the part of the judicial authority that the party has waived his right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable. We would deal with this question at some details, a little later.*

38. In Janki Saran Kailash Chandra (supra), an application for time to file written statement was considered to be a step in the proceedings. We have noticed hereinbefore the respective scope of Section 34 of the 1940 Act vis- `-vis the scope of Section 8 of the 1996 Act. In view of the changes brought about by the 1996 Act, we are of the opinion that what is necessary is disclosure of the entire substance in the main proceeding itself and not taking part in the supplemental proceeding.

39. By opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceeding are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in Food Corporation of India (supra), the distinction between the main proceeding and supplemental proceeding must be borne in mind.

40. We may notice that a distinction has been made between supplemental proceedings and incidental proceedings by one of us in Vareed Jacob v. Sosamma Geevarghese and Others [(2004) 6 SCC 378]."

14. In ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others (2011) 5 SCC 532*** it was held that mere filing of objections/counter affidavit opposing application for interim relief does not amount to a statement on substance of dispute. It was held as under:

"25. *Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as `submission of a statement on the substance of the dispute', if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him.*

28. In this case, the counter affidavit dated 15.12.1999, filed by the appellant in reply to the notice of motion (seeking appointment of a receiver and grant of a temporary injunction) clearly stated that the reply affidavit was being filed for the limited purpose of opposing the interim relief. Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court."

15. From the aforesaid exposition of law it can conveniently be held that filing of written statement would amount to "submission of a suit on the substance of the dispute" whereby the petitioner has shown its intention to submit itself to the jurisdiction of the Court and has thereby waived its right to seek reference to the arbitration. Therefore, the matter was although arbitrable and was required to be referred to the arbitration, but the petitioner by filing the written statement has shown its intention to submit itself to the jurisdiction of the Court and thereby waived its right to seek reference to arbitration.

16. Having said so, I find no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Interim order dated 7.10.2014 is vacated. Pending application(s) if any, stands disposed of.

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

Subhash Chand & another .....Appellants.

Versus

Surender Singh & ors. .....Respondents.

FAO No. 358 of 2007.
Reserved on: 17.8.2015.
Decided on: 18.8.2015.

Indian Succession Act, 1925- Section 276- Petitioners applied for the probate of the Will, which was contested- the probate was ultimately granted in favour of the petitioners- there was no evidence to show that beneficiary had played a dominant role at the time of execution of the Will- mere fact that natural heirs have been excluded, will not make the Will suspicious - beneficiary was looking after the deceased being the grandson – deceased was in sound disposing state of mind and had died more than two years after the execution of the Will- held, that probate was rightly granted by the trial Court. (Para-13 to 15)

Case referred:
Gurdev Kaur and others vrs. Kaki and others, (2007) 1 SCC 546

For the appellants: Mr. Rajesh Kumar, Advocate.
For the respondents: Mr. K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate, for respondent No. 1.
Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG for respondent No. 3-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 30.6.2006, rendered by the learned District Judge, Hamirpur, H.P. in Probate case No.4/2004.

2. Key facts, necessary for the adjudication of this appeal are that respondent Surender Singh instituted a petition under Section 276 of the Indian Succession Act, 1925, seeking probate of Will dated 13.3.2001, executed by Sarwan Singh son Sh. Biri Singh son of Sh. Lala, resident of Tika Garli, Mouza Garli, Tehsil Barsar, Distt. Hamirpur, H.P. He was the grandson of late Sh. Sarwan Singh, the testator of the Will, who executed Will in his favour on 13.3.2001. The testator died on 30.5.2003. The Will was duly registered. He was entitled to get movable and immovable property of Sarwan Singh, deceased. He approached the authorities to make payment on the basis of Will, however, they asked him to produce the probate of Will dated 13.3.2001.

3. The respondent No. 2, general public was duly served by way of publication. The appellants filed the reply. They have denied the relationship of respondent No. 1 with the deceased. According to them, they were only children of deceased Sarwan Singh. The Will was outcome of fraud and mis-representation. The appellant No. 2 was married and she was living at Village Dugha. The appellant No. 1 was living at Delhi. They were the only legal heirs of deceased Sarwan Singh. The respondent No. 3 Executive Engineer did not file any reply.

4. The rejoinder was filed by respondent No. 1. Issues were framed by the learned trial Court on 28.6.2005. The learned trial Court granted the probate of Will Ext. PW-1/A to the respondent No.1. Hence, this appeal.

5. Mr. Rajesh Kumar, Advocate, for the appellants has vehemently argued that respondent No.1 Surender Singh has failed to prove Will Ext. PW-1/A, dated 13.3.2001. The Will Ext. PW-1/A was surrounded with suspicious circumstances. He has also submitted that by way of Will, the natural heirs could not be disinherited from the property. On the other hand, Mr. K.D.Sood, Sr. Advocate, for respondent No. 1 has supported the judgment dated 30.6.2006 of the learned trial Court.

6. I have heard learned counsel for the parties at length and gone through the records and judgment very carefully.

7. The Will is Ext. PW-1/A. It was duly registered with Sub Registrar, Barsar.

8. According to PW-1 Surender Singh, he was present at the time of execution of Will Ext. PW-1/A by Sarwan Singh. He has proved the copy of Will Ext. PW-1/A.

9. Sh. Dev Raj, PW-2 has deposed that the copy of Will Ext. PW-1/A was true and correct, as per Will dated 13.3.2001, registered in the office of Sub Registrar, Barsar.

10. PW-3 Julfi Ram has scribed the Will at the instance of Sarwan Singh. The Will Ext. PW-1/A was executed by Sarwan Singh in sound disposing state of mind. The contents of the will were read over and explained to him and Sh. Sarwan Singh after admitting the contents of the same to be true and correct had appended his signatures in presence of the witnesses and witnesses appended their signatures in the presence of Sarwan Singh. He entered the Will against Sr. No. 73 dated 13.3.2001 in his register and also obtained the signatures of Sarwan Singh. He denied the suggestion in the cross-examination that Sarwan Singh was under mental pressure at the time of execution of Will Ext. PW-1/A.

11. PW-5 Rattan Chand and PW-6 Joginder Singh were the marginal witnesses of the Will. According to them, Will Ext. PW-1/A was scribed in their presence by Sh. Julfi Ram. The contents of the same were read over and explained to Sarwan Singh. He after admitting the contents of the Will Ext. PW-1/A as true and correct singed the same in their presence and both of them in the presence of Sarwan Singh put their signatures on the Will. The Will Ext. PW-1/A was executed by Sarwan Singh in a sound state of mind. It was presented before the Registrar for registration. The contents of the Will were read over and explained by Sub Registrar to Sarwan Singh, which were admitted to be true and correct by Sarwan Singh. He admitted his signatures as true and correct.

12. RW-1 Subhash Chand has not stated that the Will Ext. PW-1/A was result of fraud and misrepresentation of facts and outcome of undue influence. He has not deposed that Sarwan Singh was not in sound disposing state of mind at the time of execution of Will Ext. PW-1/A. The Will Ext. PW-1/A dated 13.3.2001 was duly executed. It was scribed by PW-3 Julfi Ram. PW-5 Rattan Chand and PW-6 Joginder Singh were the marginal witnesses

of the Will. It was registered before the Sub Registrar, Barsar, Distt. Hamirpur. The contents of the Will were also explained to Sarwan Singh. He has appended his signatures over the same. PW-2 Dev Raj has testified that the copy of Will Ext. PW-1/A was true and correct, as per Will dated 13.3.2001, registered in the office of Sub Registrar, Barsar.

13. There is no tangible evidence on record to show that Surender Singh has played a dominant role at the time of execution of the Will. The appellants could not explain the suspicious circumstances surrounding the Will Ext. PW-1/A. Merely that the natural heirs have been excluded will not make the Will suspicious. It has come on record that Surender Singh was looking after Sarwan Singh. The appellant No. 2 after her marriage had gone to village Dugha. The appellant No. 1 was residing at Delhi. Surender Singh was looking after Sarwan Singh, being the grandson. The Will has been executed in his favour by Sarwan Singh since he was looking after him. The appellant Subhash Chand was at Delhi for the last 20 years. Appellant Subhash Chand could not prove that he was looking after his father. The appellants have not even disputed the signatures of Sarwan Singh on Will Ext. PW-1/A. The Will was duly executed and attested on 13.3.2001.

14. Their lordships of the Hon'ble Supreme Court in the case of ***Gurdev Kaur and others vrs. Kaki and others,*** reported in ***(2007) 1 SCC 546,*** have held that the Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. The contents of the Will have to be appreciated in the context of the circumstances, and not vis-a-vis the rules for intestate succession. Their lordships have held as under:

> "21. When execution of the Will is fully proved then in order to ascertain the wishes of the testator we have to look to the text of the Will. The intention of the testator has to be discerned from the language used in the Will. In view of such clear and unambiguous language used in this Will perhaps, no other interpretation was possible. The Trial Court clearly arrived at a conclusion that the deceased Chanan Singh had executed the Will in favour of his wife, Bhagwan Kaur.
>
> 28. The findings arrived at by the High Court are totally erroneous. The Court does not sit in appeal over the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind.
>
> 77. The High Court has clearly deviated from the settled principle of interpretation of the Will. The Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will, that the Court looks into the nature of the bequest.
>
> 78. The learned Single Judge of the High Court has not even properly appreciated the context of the circumstances. The contents of the Will have to be appreciated in the context of his circumstances, and not vis-`-vis the rules for intestate succession. It is only for this limited purpose that the Court examines the nature of bequest. The Court does not substitute its own opinion for what was the testator's Will or intention as manifested from a reading of the written instrument. After all, a Will is meant to be an

expression of his desire and therefore, may result in disinheritance of some and grant to another. In the instant case, wife of the testator Bhagwan Kaur alone had lived with the deceased and only she had looked after him throughout his life. The other daughters were all happily married a long time ago and in their weddings the testator had spent huge amount of money. In his own words, he had spent more than what they would have got in their respective shares out of testator's property.

79. If a Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Statute, a presumption of due execution and attestation applies."

15. In the instant case, the Will was executed by Sarwan Singh on 13.3.2001 and Sarwan Singh died on 30.5.2003. The testator, Sarwan Singh was in sound disposing state of mind at the time of execution of the Will. The learned District Judge, has rightly granted probate of Will Ext. PW-1/A dated 13.3.2001 after correctly appreciating the oral as well as documentary evidence on record.

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

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

Harbrinder Singh ...Petitioner

Vs.

Smt. Rabinder Sidhu and others. ...Respondents

CMPMO No. 150 of 2015
Judgment reserved on : 13.8.2015
Decided on: August 19th, 2015.

Code of Civil Procedure, 1908- Order 6 Rule 17- In a suit for injunction, the defendants conceded in the written statement that plaintiffs were owners in possession of half share of the property and they had inherited 1/4th share in the property- Defendants sought amendment of written statement claiming his share to the extent of ½ half share against the conceded share of 1/4th – application allowed by the trial court – no cause shown in the application, which necessitated the amendment- it was also not shown as to how the amendment was necessary for the just decision of the case – amendment sought was not clarificatory as claimed but would withdraw the admission about the share in the property - amendment wrongly allowed – petition allowed and application dismissed. (Para 12 to 15)

Case referred:
Jai Singh and other vs. Municipal Corporation of Delhi and another (2010) 9 SCC 385

For the Petitioner : Mr.Umesh Kanwar, Advocate.
For the Respondents : Ms. Sunita Sharma, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Article 227 of the Constitution of India is directed against the order dated 4.12.2014 passed by learned Civil Judge (Junior Division), Kandaghat,

District Solan, H.P. in case No. 4-S/1 of 14/10 whereby the application filed by the respondent herein for amendment of the written statement has been allowed.

2. The petitioner has taken the exception to the order on the ground that apart from the delay there are certain admissions which have illegally been permitted to be withdrawn as a consequence of the application for amendment having been allowed.

3. Learned counsel for the respondent on the other hand would support the order passed by the learned trial Court.

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

5. The petitioner has placed the amendment sought for by the respondent in a tabular form and is reproduced as under:

Para No.1. That the plaintiffs are owners in possession of ½ share in the property known as Kothi No. 20, survey No. 69 situated in Dagshai Cantt., Tehsil and District Solan, H.P. as per G.L.R. hereinafter referred to as the suit property. The suit property stands is in the name of S. Gurdial Singh in the record who died on 02.05.1997 and left behind widow one son and two daughters i.e. the plaintiffs, defendants No.2 and Shri Gurbax Singh, father of defendant No.1. Shri Gurbax Singh had also died and after his death the defendant No.1 has inherited his 1/4th share in the suit property. **Para No.2**. That the predecessor in interest of defendant No.1 filed suit for partition of the suit property in the court of Civil Judge (Junior Division), Chandigarh and the said Hon'ble Court has decided preliminary decree and held that the plaintiff and defendants in that suit are in possession of their 1/4th share each in the suit property. Accordingly, the plaintiffs are owners in possession of ½ shares in the suit property.	Stand in the un-amended written statement "That the contents of para 1 to 3 of the plaint are matter of record and formal, hence not disputed." **Amendment sought:** That the contents of para 1 to 3 of the matter of record and formal hence not disputed. It is further submitted that earlier predecessor of the defendant No.1 late Shri Gurbax Singh Sandhu and the defendant No.2 were owner in the said property to the extent of 1/4th share each. It is further submitted that late Shri Gurbax Singh Sandhu has duly executed a registered Will in favour of the applicant/defendant No.2 on dated 03.02.2006 (copy enclosed). As such, now the defendant No.2 is co-owner in the suit property to the extent of ½ share.

6. It is not in dispute that the suit was filed somewhere in August, 2010, whereas, the present application came to be filed only on 6.4.2015. Now, in case the contents of the application for amendment annexed as Annexure P-7 is perused, it is simply stated that the respondent intends to amend the written statement and thereafter the amendment as proposed is set out.

7. The learned Court below allowed the application by negating the plea of the petitioner that by proposed amendment the admissions made in the written statement

would be withdrawn. It was further held that no prejudice would be caused to the petitioner in case the amendment is allowed.

8. Rule 17 of Order 6 CPC reads as follows:

> "***17. Amendment of Pleadings.-*** *The Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*
>
> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*

9. On the basis of the judgments delivered by the Hon'ble Apex Court it can be safely taken to be settled that the following principles should normally be kept in mind in dealing with the applications for amendment of the pleadings -

(i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;

(ii) The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;

(iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

(iv) Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;

(v) Amendment of a claim or relief barred by time should not be allowed;

(vi) No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;

(vii) No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

(viii) The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

(ix) Error or mistake, which if not fraudulent, should not be made the ground for rejecting the application for amendments of pleadings."

These are only illustrative and not exhaustive.

10. It is a trite proposition of law, culled out from the various pronouncements, that *bona fide* amendments, vital for adjudication of the real question in controversy between the parties, should be allowed. It is also equally settled that the Court should be liberal in granting amendment, but the question herein is as to whether the respondent can without setting forth any ground for amendment be permitted to do so?

11. The application moved by the respondent is extracted below:

> *"1. That the above titled suit is pending in this Hon'ble Court and the same is fixed for today i.e. 6.14.2013.*
>
> *2. That the plaintiff has filed the present suit in respect of Kothi No. 20, Survey No. 69, situated in Cantonment Board Dagshai, Tehsil and*

District Solan, H.P. in the above suit the plaintiff have claimed themselves to be owner of ½ share in the said Kothi. It is further submitted that earlier the predecessor of the defendant No.1 late Sh. Gurbax Singh Sandhu and the defendant No.2 were owner in the said property to the extent of 1/4th share each. It is further submitted that late Sh. Gurbax Singh Sandhu has duly executed a registered Will in favour of the applicant/defendant No.2 on dated 3.2.2006 (copy enclosed). As such, now the defendant No.2 is co-owner in the suit property to the extent of ½ share.

3. *That the applicant intend to amend para No.1 of the reply on merit, by adding the following facts therein, as under:*

> *"1. That the contents of para 1 to 3 of the matter of record and formal hence not disputed. It is further submitted that earlier the predecessor of the defendant No.1 late Sh. Gurbax Singh Sandhu and the defendant No.2 were owner in the said property to the extent of 1/4th share each. It is further submitted that late Sh. Gurbax Singh Sandhu has duly executed a registered Will in favour of the applicant/defendant No.2 on dated 3.2.2006 (copy enclosed). As such, now the defendant No.2 is co-owner in the suit property to the extent of ½ share."*

4. *That the above amendment is necessary for the purpose of determining the real question in controversy between the parties.*

5. *That the above amendment is bonafide, formal and does not change the nature of the suit in any way.*

6. *That the above amendment could not be made earlier inspite of due diligence of the applicant.*

7. *That the respondents/plaintiffs are not going to suffer any harm in case the above amendment is allowed, whereas the interest of the applicant/defendant will greatly be jeopardized in case the above amendment is not allowed.*

8. *That the present application for amendment is supported by an affidavit.*

It is, therefore, very humbly prayed that in view of the above made submissions, this Hon'ble Court may kindly allow the present application for the amendment of the written statement filed by defendant No.2, as prayed above and in the interest of justice."

12. It is evident from a bare perusal of the aforesaid application that there is not even a whisper in the entire application as to what has necessitated the application and how the amendment is necessary for the purpose of determining the real question in controversy.

13. Having failed to satisfy the Court on the aforesaid point, the learned counsel for the respondent would then vehemently argue that the proposed amendment was only clarificatory and expansion of the defence already taken. This submission however, cannot be accepted for the simple reasons that in the original written statement, the respondent/defendant had conceded that the plaintiffs were the owners in possession of the half share in the property. The property stood in the name of sardar Gurdial Singh, who

had left behind, widow, one son and two daughters i.e. the plaintiffs, defendant No.2 and Gurbax Singh, father of defendant No.1, who too had died and after his death, the defendant No.1 had inherited his 1/4th share in the suit property. He had further conceded that his predecessor in interest had filed a suit for partition wherein a preliminary decree had been passed and the plaintiff and defendants were held to be in possession of their 1/4th share each in the suit property and in this way, the plaintiffs were the owners in possession of the half share in the suit property.

14. The defendant/ respondent conceded this position by admitting the contents of paras 1 to 3 of the plaint as being formal and a matter of record and had not disputed the same. Whereas, now in the amended written statement, he has clearly introduced an explanation by claiming that earlier his predecessor late Sh. Gurbax Singh and defendant No.2 were the owners to the extent of 1/4th share each but late Sh.Gurbax Singh had duly executed a registered Will in his favour on 3.2.2006 and as such, now he was a co-owner of the suit property to the extent of half share. Not only there was an enhancement in his share but even the Will which is alleged to have executed on 3.2.2006 was introduced for the first time. That apart, it appears that the application was malafide and had been introduced only after a substantive suit was filed by the opposite party in December 2012 for mandatory and permanent injunction at Chandigarh. The amendments as sought for cannot by any stretch of imagination be said to be clarificatory and therefore the learned Court below has ignored the well settled principles of law to the effect that the only those amendments which are germane to the dispute/issues involved in the suit can be allowed and that too, when atleast some foundation qua the same is raised in the pleadings. After all, the amendment cannot be allowed as a matter of right.

15. The learned counsel for the respondent would however, contend that this Court in exercise of supervisory jurisdiction under Article 227 cannot correct all errors of judgment of a Court or Tribunal, acting within the limits of its jurisdiction and correctional jurisdiction can be exercised only where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. Powers cannot be exercised like a “bull in a china shop”.

16. There can be no quarrel with the proposition as canvassed by the learned counsel for the respondent. But this Court in exercise of its jurisdiction under Article 227 of the Constitution can always go into the legality and propriety of the order especially when there is a grave dereliction of duty or flagrant abuse of fundamental principles of law and justice as held by the Hon’ble Supreme Court in ***Jai Singh and other*** vs***. Municipal Corporation of Delhi and another (2010) 9 SCC 385.*** Therefore by intermingling an order which is palpably wrong and against the settled principles of laws, this Court while setting aside the same would not be acting like a “bull in a china shop”.

17. In view of the aforesaid discussion, the order dated 4.12.2014 passed by learned Civil Judge (Junior Division), Kandaghat, District Solan, H.P. in Civil Suit No.4-S/1 of 14/10 allowing the amendment of written statement cannot be sustained and is therefore, set-aside. Resultantly, the present petition is allowed, leaving the parties to bear their own costs. Interim order dated 14.5.2015 is vacated. Pending application(s) if any, stands 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.: 4268 of 2013 and other connected matters.
Reserved on: 06.08.2015
Date of Decision : 19.08.2015

Cr. Appeal No. 4268 of 2013	
Sandeep Kumar and another	.....Appellants.
Versus	
State of Himachal Pradesh	....Respondent.
Cr. Appeal No. 170 of 2014	
State of H.P.	.....Appellant.
Versus	
Sandeep Kumar & others	....Respondents.
Cr. Appeal No. 172 of 2014.	
State of H.P.	.....Appellant.
Versus	
Sandeep Kumar and others	.....Respondents.

Indian Penal Code, 1860- Sections 302, 323, 147 read with Section 149- Complainant had come to the college as usual- he called 'A' to come with the vehicle- 4-5 boys and girls boarded the vehicle - when they were at some distance, accused came from behind on a bike and stopped his bike in front of the vehicle- he started misbehaving with a girl sitting in the vehicle- accused threatened the occupants of the vehicle- accused formed an unlawful assembly and started beating the members of the complainant party- 'R' became unconscious and was taken to hospital, where he was declared brought dead- eye-witnesses supported the prosecution version- their testimonies corroborated each other- medical evidence showed that deceased had died due to haemorrhagic shock as a result of haemothorax due to laceration of lung and sub-arachnoid haemorrhage (brain)- there were no contradictions in the testimonies of the prosecution witnesses- defence version that injuries were sustained in an accident was not believable as no damage was noticed to the motorcycle- accused had knowledge that banging the head of the deceased against the concrete would cause fatal injury on the head and therefore, they are liable for the commission of offence punishable under Section 304 Part-II of the IPC besides for offences punishable under Sections 147, 323 read with Section 149 IPC. (Para-15 to 21)

For the Appellants/accused: Mr. T.S.Chauhan, Advocate in all the appeals.
For the respondent/State: Mr. P.M.Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

The accused faced trial for theirs having allegedly committed offences punishable under Sections 302, 323, 147 IPC read with Section 149 IPC. However, the learned trial Court convicted the accused for offences punishable under Section 304 Part-II of the IPC besides for offences punishable under Section 147, 323 IPC read with Section 149 IPC. The learned trial Court, however, extended to the accused the benefit of Section 4 of the Probation of Offenders Act, 1958.

2. The accused No. 1 and 2 are aggrieved by the judgement of the learned trial Court whereby it has recorded findings of conviction against them qua offences punishable under Section 304 Part-II of the IPC besides for offences punishable under Sections 147, 323 IPC read with Section 149 IPC. However, through Criminal Appeal No. 4268 of 2013 the accused have assailed the findings of conviction recorded against them for theirs having committed offences punishable under the aforesaid provisions of law.

3. The State of Himachal Pradesh is aggrieved by the judgement of the learned trial Court whereby it has extended the benefit of Section 4 of the Probation of Offenders Act, 1958 to the accused. Hence, through appeal No. 170 of 2014 the State of Himachal Pradesh seeks reversal of the order rendered by the learned trial Court affording to the accused the benefit of Section 4 of the Probation of Offenders Act. Besides, the State of Himachal Pradesh stands aggrieved by the impugned judgement rendered by the learned trial Court whereby it found the accused guilty for theirs having committed punishable under Section 304 Part-II of the IPC besides for offences punishable under Sections 147, 323 IPC read with Section 149 IPC. Consequently, through appeal No. 172 of 2014 instituted before this Court by the State of H.P., the latter seeks the interference of this Court for setting aside the conviction of the accused under Section 304 Part-II of the IPC alongwith offences punishable under Sections 147, 323 IPC read with Section 149 IPC and substitution thereof with findings of conviction against the accused for theirs having committed offences punishable under Sections 302, 323, 147 IPC read with Section 149 IPC.

4. The prosecution story, in brief, is that on 26.09.2012 at about 11.00/11.30 a.m shri Prithi Chand received a telephonic call from Ramesh Chand, father of Rohit Kumar, who told that there was a quarrel with his son and his son was taken to hospital at Barsar. On this, he tried to inquire about Rohit Kumar, but he could not find any clue and thereafter he hired a vehicle and started going towards Police Post Deotsidh. After 20-25 minutes when he reached near a bridge at Shahtalai he received a telephonic call of Jagdev that a quarrel had taken place with Rohit and he has died. Then he came back and went to the house of Rohit Kumar. After some time, Arun, Rajnish and Sagar, etc. brought the dead body of Rohit to his house in a vehicle and on inquiry they told that Rohit had died because of quarrel. Thereafter Prithi Chand informed the police at Police Post Deotsidh. On this Inspector Anant Ram alongwith other police officials went to the spot. While reaching at the spot police recorded the statement of complainant Arun Kumar Ext.PW-1/A under Section 154 Cr.P.C in which he disclosed that he is studying in B.Com 2nd year in Baba Balak Nath Degree College, Chakmoh. On 22.09.2012 he had come to the college as usual. Since bus service to Shahtalai is very limited, he called Ashok Kumar alias Raj Kumar to come to Chakmoh with his vehile. After half an hour Ashok Kumar reached with his vehicle near the rain shelter at Chakmoh. 4-5 girls and boys sat in the said vehicle and started going towards Shahtalai at 2.30 p.m. When they were at some distance from Deotsidh, accused Sandeep Kumar alias Mintu, came from behind on a bike and stopped his bike in front of their vehicle and started misbehaving with a girl named Renu in the vehicle. They objected to it. On this, Sandeep Kumar threatened that he will see them at Chakmoh. He kept revenge with them. On 26.09.2012 he alongwith Ravinder and Rajnish came to the college in a private bus as usual and at 9.50 a.m after reaching the rain shelter they got down from the bus and sat in the rain shelter. In the mean time Rohit Kumar, came on his bike and sat with them. At about 10.15 a.m six boys came sitting on two bikes from the side of Chakmoh and straightway came to them and started altercation on account of old enmity. At the same time those boys named Dinesh Kumar, Sandeep Kumar, Ajay Kumar and three other boys whose names he does not know but he can identify them formed an unlawful assembly and in prosecution of the common object of such assembly started beating Rajnish

and Rohit with fist and kick blows. They gave beatings to Rohit so mercilessly that he fell down after becoming unconscious and then those boys fled away from the spot. Thereafter, he arranged a vehicle from Chakmoh and took Rohit in unconscious condition alongwith Rajnish and Sagar firstly to the hospital at Bijhar and then to Barsar where they had disclosed that accident had taken place and this was stated because of fear and they wanted quick treatment of Rohit by the doctors by disclosing it an accidental case. But when the doctors in the hospital at Barsar declared Rohit dead they brought him to his native village at Shahtalai. They narrated the whole incident to Prithi Chand Dhiman and members of family of Rohit.

5. The aforesaid statement Ext. PW1/A was sent through Constable Anil Kumar to Police Station Barsar for registration of a case, on which FIR Ext.PW25/A was recorded and endorsement Ext.PW25/B was made to this effect. The investigation of the case was entrusted to ASI Yudhbir Singh (PW-28) by the Inspector/SHO. However, Inspector Anant Ram (PW-29) made an application Ext.PW29/C to the Medical Officer for conducting medical examination of injured Arun Kumar and Rajnish, on which their medical examination was conducted by Dr. R.P. Sharma (PW2) vide MLCs Ext. PW20/A and Ext.PW20/B. The investigating officer ASI Yudhbir Singh (PW28) visited the spot and prepared the site plan Ext. PW28/A on the identification of Arun Kumar. At the spot Rajnish Kumar produced his T-Shirt Ext.P1 to the investigating officer and after sealing the same in a cloth parcel Ext.P2 with seal impression T, it was taken into possession vide recovery memo Ext.PW1/B and the impressions of sample seal were taken on a piece of cloth Ext. PW28/B. He also recorded the statements of the witnesses under section 161 Cr. P.C. The investigating officer (PW28) interrogated accused Sandeep Kumar alias Mintu, Dinesh alias Happy and Ajay Kumar alias Aju and arrested them. On 27.09.2011 he (PW28) also arrested accused Rohit Kumar alias Rohtu, Vijay Kumar alias Rinku and Manoj Kumar alias Pammu. Thereafter, Inspector Anant Ram (PW29) prepared inquest papers Ext. PW29/E and Ext. PW29/F and dead body of deceased Rohit Kumar was sent through HC Vinod Kumar and Constable Kulwinder to R.H., Hamirpur for conducting his postmortem examination vide application Ext. PW29/D, on which his post mortem examination was conducted by Dr. Rakesh Dhiman (PW22) vide post mortem report Ext. PW22/A and then the dead body of the deceased was handed over to Tilak Raj vide Spurdari memo Ext. PW29/G. According to Dr. Rakesh Dhiman (PW22) all the injuries on the person of deceased were ante-mortem and were possible by fist and kick blows, whereas, injuries No.2 to 7 are possible if a person is banged against the wall or other hard surface and all the injuries on the person of deceased individually as well as in combination of others were sufficient in the ordinary course of nature to cause of death of a person. During post mortem examination of deceased Rohit, Dr. Rakesh Dhiman (PW22) had preserved his shirt (Ext.P15), vest (Ext. P16), underwear (Ext.P17) and pant (Ext.P18), which were packed in a cloth parcel (Ext.P14). After conducting post mortem of deceased PW22 Dr. Rakesh Dhiman reserved his final opinion for want of RFSL report and on receipt of report Ext. PW22/B he had given his opinion Ext.PW22/C to the effect that the deceased died due to haemorrhagic shock as a result of (1) haemothorax due to laceration of lung and (2) sub-arachnoid haemorrhage (brain). During investigation on 28.09.2012 the investigating officer had taken into possession the Motercycle Hero Honda (A/f) vide recovery memo Ext. PW7/A from Rajeev Kumar, which was got mechanically examined through Ramesh Chand (PW9) vide report Ext.PW9/A. He had also taken into possession the Motorcycle bearing registration No. HP-21-A-3247 along with its documents from Harbans Lal (PW12) vide recovery memo Ext. PW7/B.

6. On the request of police, Shri Tek Chand (PW21), Assistant Director, RFSL, Gutkar, visited the spot and conducted crime scene investigation in the presence of police and during investigation the blood was noticed by the expert with the help of forensic kit

and the same was collected with the help of cotton thread and preserved the same in four small paper packets (Ext. P3 to Ext. P6) and after sealing in a cloth parcel Ext. P7 with seal impression Y, it was taken into possession by the police vide recovery memo Ext. PW5/A. Thereafter Shri Tek Chand (PW21) also collected three white buttons (Ext.P10 to Ext. P12) near the stairs of gate No.2 and wrapped the same in small paper (Ext.P13) and put the same into empty match-box (Ext.P9) and packed in a cloth parcel (Ext.P8) and after sealing the same with seal Y taken into possession vide recovery memo Ext. PW5/B. He also made notes on small papers, which are Ext. PW21/A to Ext. PW21/E and issued his reports Ext. PW21/F and Ext.PW21/G. As per RFSL report Ext. PW2/F scuffle leading to injuries to the deceased might have occurred in the vicinity of rain-shelter and as per RFSL report Ext. PW21/G human blood was found on the shirt of deceased and blood lifted from the right side of boundary wall near gate and other places was found to be human blood. Sushil Sharma (PW6) also remained associated with the police during investigation by the expert and clicked photographs Ext.A1 to Ext. A24.

7. On 30.09.2012 during investigation Ramesh Kumar (PW13) produced the Motorcycle of the deceased Rohit Kumar. After mechanical examination and taking into custody police handed over the same on spurdari to him (PW13) vide memo Ext. PW8/A. Police also clicked photographs Ext. A25 to Ext. A27 of the Motorcycle before handing over the same on spurdari. On 15.10.2012 during investigation Patwari Shri Vijay Lakhanpal (PW15) visited the spot and conducted demarcation vide report Ext. PW15/A and produced Jamabandi Ext.PW15/B of land bearing Khasra No. 2225 and Tatima Ext. PW15/C to the police. On 14.10.2012 and 15.10.2012 during investigation Constable Raj Kumar (PW26) conducted videography of recording of statements of witnesses as well as the dead body of deceased Rohit Kumar and prepared CDs Ext. PW26/A and Ext. PW26/B of the same. The investigating officer ASI Yudhbir Singh (PW28) and HC Vinod Kumar deposited the case property with the MHC (PW25), who entered the same in the Malkhana Register, the abstracts of which are Ext. PW25/C and Ext. PW25/D. On 29.09.2012 and 01.10.2012 MHC (PW25) sent the said case property to RFSL, Gutkar (Mandi) through Constable Rajeev Kumar (PW23) vide RC Ext. PW25/E and through HHC Ashwani Kumar (PW27) vide RC Ext. PW25/F alongwith dockets Ext. PW29/H and Ext. PW29/K and letter Ext. PW29/J. RFSL reports Ext. PW29/L and Ext. PW21/G were received in Police Station Barsar vide letters Ext. PW29/M and Ext. PW29/N and the crime scene report was also received by the police vide letter Ext. PW29/O. As per report of RFSL Ext. PW29/L, the buttons Ext. P10 to Ext. P12 recovered from the spot of incident were found similar to the buttons on the shirt of deceased Ext. P15.

8. After completion of the necessary investigation, into the offences, allegedly committed by the accused/appellants, challan was filed before the learned trial Court under Section 173 of the Code of Criminal Procedure.

9. The accused/appellants were charged by the learned trial Court for theirs having committed offences punishable under Sections 302, 323, 147 IPC read with Section 149 IPC, to which they pleaded not guilty and claimed trial.

10. In order to prove its case, the prosecution examined as many as 29 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. . On closure of proceedings under Section 313 Cr.P.C., the accused were given an opportunity to adduce evidence, in, defence, and they chose not to adduce any evidence in defence.

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

12. The learned Deputy Advocate General has contended that the affording by the learned trial Court to the accused the benefit of Section 4 of the Probation of Offenders Act, 1958 being hinged upon untenable grounds besides irreverence to the gravity of the offence hence necessitates interference by this Court. He has further argued that the findings of acquittal recorded against the accused for theirs having committed offence punishable under Section 302 IPC is not anvilled upon proper appreciation of evidence, as such, necessitates interference by this Court. He has vociferously argued before this Court that this Court in exercise of its appellate jurisdiction substitute the conviction of the accused under Section 304 Part-II of the IPC alongwith offences punishable under Section 147, 323 IPC read with Section 149 IPC with findings of conviction against them under Sections 302, 147, 323 read with Section 149 IPC.

13. On the other hand learned counsel for the accused/appellants No. 1 and 2 has vehemently contended that the affording to the accused by the learned trial Court the benefit of Section 4 of the Probation of Offenders Act, 1958 stands anvilled upon a mature and balanced appreciation of evidence on record and does not necessitate any interference by this Court. He has also argued that the conviction of the accused No. 1 and 2 under Section 304 Part-II of the IPC alongwith for offences punishable under Sections 147, 323 IPC read with Section 149 IPC is not based on a proper appreciation of evidence on record, hence, necessitates interference. He contends with force before this Court that the judgement of the learned trial Court recording findings of conviction against the accused No. 1 and 2 under Section 304 Part-II of the IPC besides for offences punishable under Sections 147, 323 IPC read with Section 149 IPC be set-aside and replaced by findings of acquittal.

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

15. The instant case is hinged upon a vivid and graphic narration qua the incident having been rendered by the eye witnesses to the occurrence. The eye witnesses to the occurrence are PW-1, PW-2 and PW-3. PW-1 and PW-3 besides having ocularly witnessed the occurrence, also during the course of the ill fated incident sustained injuries on their respective persons. The principal eye witness who has supported the prosecution case is PW-1. He in his examination in chief has deposed that in the year previous to the recording of his deposition he was studying in B.Com, second year, in Baba Balak Nath Degree College, Chakmoh. He has proceeded to depose that the deceased Rohit was a resident of his village. On 22.09.2012 he had come to College as usual. His classes concluded at 2.00 p.m. Since bus service to Sahtalai is limited hence he called Ashok Kumar alias Raj Kumar to come to Chakmoh near rain shelter alongwith his vehicle. After elapse of half an hour Ashok Kumar reached there alonwith his vehicle. Subsequently, 4-5 boys and 4-5 girls sat in the vehicle and started towards Sahtalai. He deposes that when they were at some distance away from Deotsidh accused Sandeep Kumar alias Mintu, who is resident of village Jaral came from behind on a bike alongwith his two friends and stopped his bike in front of their vehicle. He proceeded to depose that thereafter Sandeep Kumar started teasing Renu. In his deposition he records the fact of theirs having objected to it and to permit them to go. However, the accused has been deposed by him to have threatened them that he will see them at Chakmoh. Thereafter he deposes that they went to their houses. He continues to depose that on 25.09.2012 after attending college, he reached near rain shelter Chakmoh at about 2.00 p.m where he was called by Sandeep alias Mintu and the latter started altercation on account of the incident of 22.09.2012. The accused is alleged to have slapped him twice or thrice. However, PW-1 deposes that he returned to his house. He continues to depose that on 26.09.2012 he boarded a private bus alongwith Ravinder and Rajnish to come to their college. When they arrived near rain shelter at about

9.50 a.m and sat there then after some time deceased Rohit, student of B.Com second year also arrived there on his bike and sat alongwith them in the rain shelter. He deposes that when they were talking to each other then at about 10.15 a.m six boys came from the side of Chakmoh on two bikes and they stopped their bikes near rain shelter. Ajay alias Aju, Sandeep alias Mintu and Dinesh alias Happy have been deposed by him to be occupying one bike driven by Ajay Kumar. The registration number of that bike was HP21A-3247. Besides he deposes that another bike with applied for scribed on its number plate was occupied by Rohit alias Rohtu, Vijay alias Rinku and Manoj alias Pammu. He identified the accused in Court, though he deposes that the names of the aforesaid accused Rohit alias Rohtu, vijay alias Rinku and Manoj alias Pammu were disclosed to him by his friend subsequently yet he deposes that he can identify them. He deposes that all the aforesaid six boys came to him and accused Sandeep alias Mintu started altercating with him on account of the incident of 22.09.2012 besides started belabouring him. Subsequently, they belaboured Rajnish. Thereafter he deposes that they started belabouring deceased Rohit with fist and kick blows. The accused have been deposed by him to have caught deceased Rohit and pushed him with force begetting his head striking against the wall of rain shelter. The deceased Rohit in sequel to his having been struck against the wall of the rain shelter has been deposed by PW-1 to have been rendered unconscious. On noticing that Rohit had become unconscious PW-1 deposed that the accused persons fled away from the site. However, PW-1, Ravinder, Rajnish and Sagar took Rohit to hospital at Bijhar and then to Barsar. At the aforesaid places he deposes that they told to doctors that Rohit had met with an accident. He deposes that they did not tell the doctors regarding the beating meted to Rohit by the accused persons as they were frightened that in case they told the aforesaid fact to the attending doctors then the deceased would not receive immediate medical treatment. The deceased was declared dead at Barsar hospital and thereafter they brought the body of the deceased to his house. On arriving there PW-1 deposes that they told the entire incident to Prithi Chand Dhiman and the family members of Rohit. After elapse of some time police reached the house of Rohit at village Maura near petrol pump and at about 3.00 p.m he made a complaint Ext.PW-1/A to the police. He deposes that he and Rajnish also sustained injuires in the aforesaid occurrence hence the police brought them to hospital at Barsar where they were medically examined. He has proved his signatures on MLC Mark-A. The police has been deposed to have reached alongwith them at the site of occurrence at about 6.30 p.m. The site plan was prepared by the police besides the police clicked photographs. The shirt which Rajnish was wearing and which begot tearings on account of beatings delivered upon him by the accused was handed over to the police. Blood stains were existing on the shirt. He deposes that the shirt was sealed in a parcel by the police. The sealed parcel was sealed with seal impression 'T'. The seizure memo Ext.PW-1/B was prepared qua the aforesaid article in his presence and in the presence of Prithi Chand . He deposes that both signed the same. The seal after use has been deposed to have been handed over to Prithi Chand. Shirt Ext.P1 and parcel to this effect Ext.P-2 have been identified by the witness. In his cross-examination he has deposed that the distance between rain shelter and college is about 100-150 meters. He has further stated that the classes started at 10.00 a.m. He has in his cross-examination admitted qua the incident of 22.09.2012 he had not reported the matter to the police yet F.I.R. to the said effect was recorded on 27.09.2012. In his cross-examination he has also admitted the fact that accused Sandeep Kumar was not a student of BBN College, Chakmoh.

16. The testimony of PW-1 qua the incident which occurred on 26.09.2012 has stood corroboration on all scores by another eye witness PW-2. PW-2 has also identified the accused persons in Court. Besides PW-3 another injured eye witness to the occurrence has too lent corroboration to PW-1 and PW-2 qua the ill fated incident which took place on 26.09.2012. He has also alike PW-2 identified the accused in Court. PW-10 is Miss Renu

Devi, to whom an attribution exists in the deposition of PW-1 of hers having been teased by accused Sandeep on 22.09.2012, which act of the accused invited dissuasion from PW-1 and led to threatenings having meted out to the latter by the accused and which incident is constituted by the prosecution to be the bedrock of the vendetta reared by the accused against PW-1 and its spurring the ill fated incident. However, PW-10 has not supported the prosecution case.

17. PW-20, who conducted the medical examination of PW-1 and PW-3, has pronounced in their respective MLCs comprised in Ext.PW-20/A and Ext.PW-20/B the following injuries:-

Ext.PW-20/A.

Swelling and tenderness over right temporal region and the size of the injury was 5x5 cms. I advised X-Ray skull both AP and Lateral view. After the radiologist opinion no fracture was found. Hence, I came to the conclusion that the injury was simple in nature.

Ext.PW-20/B.

1. Swelling and tenderness over right parotid region. The size of the injury was 3 x 4 cms.
2. Contusion and abrasion with defused margin on left temporal region and no lateral side of left eye.
3. Contusion over upper and lower eye lids of right eye.
4. Injury and tenderness over upper central incisor tooth.

He advised X-ray for injury Nos. 1 and 2 and for dental opinion with respect to injury No.4. After receipt of report of Radiologist and that of dental surgeon, no fracture was detected. As such, he opined that all the injuries were simple in nature, caused within a probable duration of 4 to 12 hours prior to the time of examination.

18. PW-22 has proved post mortem report Ext.PW-22/A prepared by him . In Ext.PW-22/A he has recorded the factum of his having observed on the body of the deceased hereinafter extracted ante-mortem injuries:-

1. Multiple contusion in an area of 8 x 6 cm on forehead left side with size 1-2 cm each and reddish in colour.

2. Lacerated wound 1x0.2 cm on left upper eye lid, clotted blood was present on the wound, eye ball showed no injury.

3. Contusion 3 x 2 cm on left temporal area just in front of left pinna and reddish blue;

4. Contusion 1 x 1 cm on nose and reddish blue;

5. Contusion 6 x 4 cm on left parietal area of skull and reddish blue in colour.

6. Abraded contusion 12 x 8 cm on mid sternal area and reddish blue;

7. Contusion 5 x 4 cm on left upper abdomen and reddish blue.

No other external injuries were seen.

Cranium and Spinal Cord:

Scalp, Skull and Vertebrae :- On reflecting scalp 6 x 4 cm on left pariental area and 5 x 3 cm on forehead without any fracture of skull.

Membrane and Brain – showed gross sub-arachnoid haemorrage.

Thorax:-

Walls, ribs and cartilages:- Fracture of 3rd, 4th and 5th rib on left side chest in mid clavicular region.

Pleurae – Rupture of pleaura on left side and haemothorax two litre blood present.

Larynx trachea and right lung: - showed congestions.

Left Lung- Showed laceration of upper lobe 3 x 2 x 1 cm.

Pericardium, heat and large vessels were normal.

ABDOMEN.

Walls, Peritoneum, small, large intestines and organ of generation were normal.

Mouth, pharynx and oseophagus showed congestion.

Stomach and its contents:- Yellowish fluid was present.

Liver, Spleen and Kidneys were pale.

He has deposed that the demise of the deceased is attributable to haemothorax due to laceration of lung and sub-arachnoid hemorrhage. Besides he deposes that on receipt of chemical examination report Ext.PW-22/B he in Ext.PW-22/C attributed the demise of the deceased due to hemorrhagic shock as a result of 1) haemothorax due to laceration of lung and 2) sub-arachroid hemorrhage (brain).

19 The fulcrum of the prosecution case rests upon the deposition of eye witnesses to the occurrence. The ocular witnesses to the occurrence are PW-1, PW-2 and PW-3. Each of the aforesaid eye witness to the occurrence have rendered a graphic account qua the ill fated occurrence which took place on 26.09.2012 bereft of any inter se or intra se contradictions. Consequently, with their testimonies qua the incident being bereft of any inter se or intra se contradictions qua the incident renders their testimonies to be both credible as well as inspiring. As such, theirs having deposed in unison while each having attributed an inculpatory role to the accused of theirs having belaboured PW-1 and PW-3 besides having belaboured the deceased as also theirs having given him a hard push sequelling his striking against a concrete wall of the rain shelter begetting his being rendered unconscious and ultimately succumbing to the injuries sustained on his head, fillips an apt inference especially when the demise of the deceased has been attributed in Ext.PW-22/C to both (a) haemothorax due to laceration of lung and (b) sub--arachnoid hemorrhage (brain), that the hard push meted to the deceased by the accused sequelling his head to bang against the concrete wall of the rain shelter, begot his demise. The effect, if any, of the complainant having rendered to both PW-18 and PW-19, to whom the deceased was brought by the complainant and his companions, for affording medical treatment, the reasons for the occurrence of injuries on his person arising from an accident, and its hence purportedly benumbing the efficacy of the prosecution version comprised in the testimonies of the eye witnesses, gets eroded in the face of an explanation having been rendered by PW-1 in his testimony that the gravity of the critical condition of the deceased necessitating prompt and immediate medical treatment which would have remained unpurveyed in case a true narration of the occurrence was divulged to both PW-18 and PW-19 especially when the explanation appears to be not specious so as to discardable moreso when there is no emanation in the testimonies of PW-18 and PW-19 qua the fact that for ascertaining the truth or otherwise of the narration qua the cause of injuries meted to them by PW-1 they had embarked upon a thorough and in-depth examination of the injuries existing on the body of the deceased. The propagation by the defence of the injuries suffered by the deceased being attributable to an accident suffered by the motor cycle on which he was borne stands overwhelmed by Ext.PW-9/A wherein there is no disclosure of the motorcycle on which the deceased was atop having suffered any damage connotative of its having faced

an accident. In face thereof the mere revelation to both PW-18 and PW-19 by PW-1 of the injuries existing on the body of the deceased being attributable to an accident does not hence render the graphic account qua the occurrence rendered by the eye witness to be bereft of credibility. Besides the factum of pronouncement in Ext.PW-20/A and Ext.PW-20/B of injuries existing on the body of PW-1 and PW-3 renders the said enunciation to be in consonance with the version spelt out by both qua the occurrence wherein there is an attribution of an inculpatory role to the accused of theirs having belaboured both the witnesses aforesaid. Since the defence has omitted to cross-examine PW-1 and PW-3 qua the narration comprised in their respective examinations in chief of theirs having come to be belaboured by the accused necessarily then it is to be concluded that the injuries received by PW-1 and PW-3 are attributable to the accused. Besides when the presence of the deceased alongwith the PWs aforesaid remains uncontroverted, it has to be concomitantly concluded that he too was belaboured by the accused. Apart therefrom the motor cycle on which the deceased was borne omits to pronounce as canvassed by the defence of it having suffered any damage in sequel to its having suffered an accident on account of whose occurrence the deceased purportedly suffered injuries on his head. As a corollary with want of evidence conveying the factum of the motor cycle on which the deceased was borne suffering any damage, the espousal by the defence that it, with the deceased borne on it suffered an accident sequelling head injuries on his person to which he succumbed, gets waned as well as benumbed. With this Court imputing implicit reliance to the testimonies of the eye witnesses, the vendetta reared by the accused Sandeep arising from an incident which occurred on 22.09.2012 hence spurring the occurrence on the ill fated day, though was concerted to be proved by the prosecution by examining PW-10, the college girl whose teasing by accused Sandeep was resisted by PW-1 leading the former to leave the site of occurrence with an articulation by him to avenge his ignominious exit by wreaking reprisal upon PW-1 and his companions, yet even though PW-10 has not supported the prosecution case besides the occurrence of 22.09.2012 remains unreported, nonetheless even though the said occurrence purportedly comprising the motive for Sandeep to launch the assault on the deceased as well as on PW-1 and PW-3 may not have received sustenance from the evidence on record, yet when the testimonies of PW-1 and PW-3 qua the ill fated occurrence on 26.09.2012 remains unimpeached, as such, credible, naturally then the effect if any of the motive aforesaid in nursing the ill fated occurrence fades into oblivion nor can it discount the testimonies of the eye witnesses to the occurrence.

20 The presence at the site of occurrence of all the accused stands mainifested in the testimonies of PW-1 and PW-3 both of whom have identified all the accused in Court. Even though Ext.PW-1/A and the F.I.R qua the incident omits to record therein the names of accused No. 4 to 6 Vijay Kumar, Manoj Kumar and Rohit Kumar, nonetheless the omission or non-inclusion of the names of the accused aforesaid in the complaint or in the F.I.R qua the incident does not rear an inference of their inculpation being contrived or engineered especially when the complainant has explained the reasons for the non inclusion of their names in the complaint, rather when he has stated that he does not recall their names yet has bespoken that they had come on a bike and can identify them later which he proceeds to do so in Court alongwith PW-2 and PW-3.

21. The deposition of PWs 1 to 3 underlines the evident fact of the accused having belaboured the deceased and theirs having pushed him against the concrete wall of the rain shelter sequelling injuries on his head begetting his demise. However, the push as meted out by the accused to the deceased has not been deposed by the ocular witness to the occurrence to be with the intention that it would beget the sequel of the head of the accused banging against the concrete wall of the rain shelter nor is there evidence on record that the accused clutched the head of the deceased and banged it against the concrete wall of the

rain shelter. The accused being unarmed and theirs having hence not at the stage of theirs commencing to belabour the deceased nursed any intention to dispense with his life construed in conjunction with the fact that they had given a hard push without clasping or clutching his head which in case they did would have spurred an inference of theirs intending to hence by clasping it and then subsequently bang it against the concrete wall of the rain shelter beget the fatal injuries on his head, yet when they did not either hold or clutch his head and then banged it against the concrete wall of the rain shelter rather when they merely delivered a hard push to the deceased which was not intended to be with the intention to strike his head against the concrete wall of the rain shelter, it cannot be held that as such they bore the necessary mens rea in their mind to dispense with the life of the deceased. Cumulatively it is to be held that though they had knowledge that in case their hard push meted by them to the deceased would have the ensuing effect of the head of the deceased banging against the concrete wall of the rain shelter, yet they did not have the requisite mens rea to commit an offence under Section 302 IPC, as such, the incriminatory role attributed to the accused by PW-1 is encompassed within the domain of Section 299 of the IPC. Consequently, they are amenable to punishment under Section 304 Part-II of the IPC besides for offences punishable under Section 147, 323 IPC read with Section 149 IPC. Since all the accused were present together at the site of occurrence when the deceased was given a hard push resulting in his head banging against the concrete wall of the rain shelter sequelling injuries on his head to which he ultimately succumbed besides when each of the accused has been deposed by the ocular eye witness to have caught hold of deceased Rohit and then pushed him with force sequelling his head banging against the concrete wall of the rain shelter, as such, all the accused are to be held to be carrying in their respective mind the common object to hence beget the sequel which ultimately occurred.

22. For the reasons aforesaid this Court is constrained to allow the appeal filed by the State of Himachal Pradesh being Criminal Appeal No.170 of 2014 whereby the benefit of Section 4 of the Probation of Offenders Act, 1958 was extended to all the accused. However, the appeals filed by accused No. 1 and 2 being Criminal Appeal No. 4268 of 2013 and Criminal Appeal No. 172 of 2014 filed by the State are dismissed. The Judgement of the learned trial Court convicting the accused for theirs having committed offences punishable under Section 304 Part-II of the IPC besides for offences punishable under Sections 147, 323 IPC read with Section 149 IPC, is maintained and affirmed. Accused be produced for hearing on quantum of sentence on 28.08.2015.

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

State of Himachal Pradesh .....Appellant.
Versus
Dumnu Ram .....Respondent.

Cr. Appeal No. 186 of 2010.
Reserved on: 31.07.2015.
Date of Decision: 19th August, 2015.

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was raped in a Nalla- she claimed that she was sent by the wife of a priest to bring blanket but the wife of the priest denied this fact- she even denied the presence of the prosecutrix – prosecutrix further deposed that 15-20 boys came and damaged the motorcycle of the accused- however,

motorcycle was not found to be damaged- prosecutrix had apprised 'K' about the incident , however, 'K' was not examined- other witnesses had not supported the prosecutrix regarding the circumstances surrounding the incident- there was delay in lodging of FIR- held, that in these circumstances, accused was rightly acquitted. (Para-17 to 20)

For the Appellant: Mr. M.A. Khan, Additional Advocate General
For the Respondent: Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of H.P. against the judgment of the learned Sessions Judge, Mandi, District Mandi, H.P. rendered in Sessions trial No. 42 of 2008, whereby, the learned trial Court acquitted the accused for his having allegedly committed the offences punishable under Sections 376 and 506 the Indian Penal Code.

2. FIR Ex. PW7/A, lodged qua the occurrence with police station, Sundernagar, records in brief the facts relating to the alleged incident. The facts apposite to decide the appeal, are that on 15.5.2008 at about 6.30-7 p.m., the prosecutrix came to Kali temple at Bobbar to attend a "Jagrata". On the intervening night at about 1.30 a.m. Smt. Chhamma Devi wife of the Pujari of the temple sent the prosecutrix to fetch the blankets from her house. On her way back to the temple with blankets, accused Dumnu Ram alias Ramesh came across her and commented that it was time to take trip. The accused made the prosecutrix forcibly sit on the motor cycle. The accused took the prosecutrix in a Nala situate above the road and tried to commit wrongful act with the prosecutrix. The shrieks, hues and cries of the prosecutrix did not attract any person towards the Nala and the accused made the prosecutrix lie on the ground and opened the string of her salwar and committed sexual intercourse with her. The accused committed the act of sexual intercourse with the prosecutrix twice or thrice and threatened to do away with the life of the prosecutrix if she narrated the incident to any person. The prosecutrix became unconscious. The accused, in the meantime, got a telephonic call and the mobile fell from the hands of the accused, on which the prosecutrix fled from the place to the temple where she disclosed the occurrence to Ms. Daya and Rozy. Smt. Kunta Devi wife of Sh. Sanju told the prosecutrix not to disclose the incident to any person. On account of the threats of the accused, the prosecutrix did not disclose the incident to any person. The prosecutrix, on the night of 16.05.2008 after jagrata stayed at the house of her maternal uncle. Smt. Kunta again met the prosecutrix in the evening of 17.05.2008 and caught the prosecutrix from her arm and tried to prevail upon her to stay at her house on the pretext that the accused was also coming to her house on that day. On finding the prosecutrix with Smt. Kunta Devi, her maternal uncles S/Sh. Guddu and Milkhi Ram, on inquiry were narrated the incident. The prosecutrix had washed her wearing apparels at the house of Ms. Rozy, who had also provided her apparels to the prosecutrix for change. On 18.05.2008, the prosecutrix was brought by her maternal uncles to her home where she narrated the incident to her mother. On finding the commission of offence under Section 376 and 506 IPC, the police commenced the investigation. The prosecutrix was medically examined by Dr. Sarla, who opined that the prosecutrix had been exposed to sexual assault per MLC Ex.PW2/C and samples were preserved. The accused was arrested and was medically examined by Dr. Sanjay Pathak, who opined that the accused was capable of performing sexual act. During the course of the investigation, the police also took into possession birth certificate of the prosecutrix from the concerned panchayat. The motor cycle of the accused along with its documents and its key

was also taken into possession in presence of the witnesses vide separate recovery memo. The case property was handed over to the MHC and samples were sent for analysis to the FSL.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged for his having committed offences under Sections 376 and 506 of the IPC by the learned trial Court. In proof of the prosecution case, the prosecution examined 15 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the Court, in which the accused claimed false implication.

5. The learned trial Court on appreciation of the evidence on record, returned findings of acquittal in favour of the accused.

6. The State of H.P. is aggrieved by the findings of acquittal recorded by the learned trial Court. The learned Additional Advocate General appearing for the appellant/State has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

9. The first witness who stepped into the witness box to support the prosecution case is PW-1 Smt. Chhamma Devi. In her deposition, she has recorded the fact of her husband being a priest of Kali Mata temple at Bobar. She proceeded to testify that on the intervening night of 15/16.05.2008, there was a jagrata in the said temple. 2-3 deities of the area had also congregated in the temple besides, a large gathering had assembled at the temple. Though, she has deposed that she knows the prosecutrix yet she has denied the fact of the prosecutrix having attended the "Jagrata". She has also denied the fact that she had sent the prosecutrix to bring blankets from her house during night time. In sequel, this witness has reneged besides resiled from her previous statement recorded in writing.

10. PW-2 Dr. Sarla in her deposition has proved MLC Ex.PW2/B. Ex.PW2/B underscores the observations recorded by PW-2 Dr. Sarla on hers examining the prosecutrix. She in Ex.PW2/B has on hers examining the prosecutrix enunciated therein the hereinafter extracted details:-

> "The prosecutrix was conscious, co-operative, well oriented in time and place, wearing green coloured floweral suite, which was light coloured. The prosecutrix was normal built, pulse 80 per minute, regular, BP 130/80 mm of HG. Height was 5 feet.
>
> Dental examination: 7/7
> 6/6

Prosecutrix had taken bath and washed her clothes.
Menstrual history:

Menarche started about 5-6 months back.

LMP: 7.5.2008

External examination:

Both breasts were developing.

Axillary hair were developing black in colour.

Labia majora and labia minora were developing.

Pubic hair were black in colour, developed.

Multiple abrasions were present on lower back and on both buttocks. Old and healed scab formed.

Internal examination:

P/S- Hymen torned, foul smell discharge was present.

P/v- One finger was going with painfully."

11. The prosecutrix has stepped into the witness box as PW-7. She has testified on oath that on 15.5.2008, there was a religious function at Maha Kali Temple in Village Bobar. She along with her sister and brother participated in that function. She arrived at the temple at about 5.30 p.m.. Her father served food to the gathering. She deposes that she was sent by the wife of priest to bring blankets from her house at about 1.30 a.m., at night. She acceded to her request and brought the blankets and handed over the same to the aforesaid in the temple. Subsequently, she came to the house of the priest to sleep there during night. She deposes that on the road the accused met her and inquired from her about her identity. The accused has been deposed by her to have lifted her and carried her on his motor cycle uptill a nearby school. At the school adjoining to the temple, the accused has been deposed by the prosecutrix to have committed rape upon her. She has testified that the accused received a call on his mobile from the son of her maternal uncle, who inquired from him about her. To the said query posed by the son of her maternal uncle to the accused, the latter apprized him that he was alone at his residential house. The accused is alleged to have twice or thrice subjected her to forcible sexual intercourse. She deposes that blood oozed from her vagina. She though has deposed of hers having raised an alarm yet the accused then gagged her mouth. Since the mobile held by the accused in his hand fell down, hence, when the accused endeavoured to search it, she noticing an opportunity to flee, fled from the site of occurrence. When she was fleeing from the site of occurrence about 15-20 boys came at the place of incident, who proceeded to damage the motor cycle of the accused. She deposes that on reaching the temple she narrated the incident to Kanta Devi. Besides, she narrated the incident to Rozy, the sister of the priest. She also deposes that she wore the clothes of Rozy. The clothes worn by her at the time of occurrence have been deposed by her to have been washed by her at the residential house of the priest. She deposes that she again went to the temple and Kanta contacted the accused over telephone. She proceeds to depose that she went to the residential house of her maternal uncle after the incident and narrated the incident to her maternal aunt Rama Devi, who in turn narrated the incident to her maternal uncle Milkhi Ram. She deposes that on 17.5.2008, she remained in the residential house of her maternal uncle and on 18.5.2008, she was brought to her house by her maternal uncle and maternal aunt. Her maternal uncle and aunt have been deposed by her to have narrated the incident to her parents. The prosecutrix has deposed that her mother enquired from the accused as to why he has committed the offence yet the accused told her mother that he had done what he liked and asked her mother to take any action she desires. FIR Ex.PW7/A has been proven by the

prosecutrix. During the course of hers recording her deposition, parcel Ex.P-1 was produced and with the permission of the Court it was permitted to be opened. Shirt Ex.P-1, trouser Ex. P-2 (Salwar), scarf Ex.P-3 have been deposed by her to be the same which she was wearing at the time of incident and which were washed by her. She has deposed that the recovery memo prepared by the police qua the recovery of motor cycle is comprised in Ex.PW7/B and it bears her signature. In her cross-examination, she deposes that a report qua the incident with the police was not lodged on 18.05.2008 yet was lodged on 19.8.2008. In her cross-examination, she further deposes that on the night of 17.05.2008, she stayed in the house of her maternal uncle Guddu and Milkhi Ram. However, on the night of 16.5.2008, she deposes hers having stayed in the house of the priest of the temple. The presence of her cousin Sonu as well as of her father in the temple on 16.05.2008 has been admitted by the prosecutrix in her cross-examination. On 16.0.5.2008, she has deposed that during the day time, she narrated the incident to her cousin. Guddu and Milkhi have been deposed by her to be not her real maternal uncles. The house of her maternal grand father has been deposed by her to be by the side of the house of Guddu and Milkhi. The maternal grand father and maternal grand mother have been deposed by her to be available in their house on the relevant day.

12. PW-8, Karam Singh is the father of the prosecutrix. He deposes that on 15.5.2008 he had attended a religious ceremony in Kali Mata temple at Bobar. He proceeds to depose his having performed his duty of serving meals to the devotees, who participated in the religious ceremony. He was accompanied by his two daughters and his son to the temple. He deposes that he remained busy in providing meals to the devotees in the temple upto 4 a.m. of 16.0.5.2008 and thereafter went to sleep. He had directed his son and daughters to reach home in advance. He has pronounced in his deposition that he had reached home on 16.05.2008 at about 6/7 p.m. On his reaching home, he noticed that though his son and one daughter had reached home yet the prosecutrix had not reached home. He proceeded to enquire about the prosecutrix from his in-laws, who apprised him that she was in their area. On 18.05.2008, the prosecutrix along with 12-15 persons including his brother-in-law came to his house whereupon his brother-in-law apprised him about the incident. On inquiry by his wife from the prosecutrix qua the incident, she disclosed to her the fact of hers having been subjected to rape by the accused on the intervening night of 15/16.05.2008. Accordingly, the prosecutrix was brought to the police station where the case was registered. In his cross-examination, he deposes that Sonu did not tell him about the alleged occurrence on 16.05.2008. In cross-examination, he further deposes that a criminal case has been registered in Police Station, Sundernagar against him for beating his mother and daughter. He has feigned ignorance to the suggestion put to him by the defence counsel whether the prosecutrix had complained against him that he wants to put an end to her life besides has feigned ignorance to another suggestion put to him by the defence counsel of his pressurizing her to falsely depose against the accused. Moreover, he has equivocated while purveying an answer to the suggestion put to him during his cross-examination by the learned defence counsel whether the prosecutrix has deposed against the accused under his pressure.

13. PW-9 Smt. Rama Devi, PW-12 Guddu Ram and PW-13 Milkhi Ram, who are the maternal aunt and maternal uncles of the prosecutrix, respectively, have during their respective examinations-in-chief not supported the prosecution version. They were declared hostile and were permitted by the learned trial Court on the request of the learned Ppublic Prosecutor, to be cross-examined. However, during the course of theirs being cross-examined by the learned Public Prosecutor no incriminating material against the accused could be elicited from them.

14. PW-10 Ms. Rozy deposes that the prosecutrix was not known to her. She further deposes that she does not know whether the prosecutrix had attended the religious ceremony or not. Since, she during her examination-in-chief omitted to lend support to the prosecution version, she was declared hostile and was permitted by the learned trial Court on the request of the learned public prosecutor, to be cross-examined. However, during the course of hers being subjected to cross-examination by the learned public prosecutor no incriminating material against the accused could be elicited from her.

15. PW-11 Lal Singh in his deposition has proven recovery memo Ex.PW7/B prepared by the police qua the recovery of motor cycle owned by the accused. In his cross-examination, he has deposed that the motor cycle was in a good condition and was not damaged.

16. PW-14, Inspector Jagdish Chand has deposed that on 18.5.2008 at 7.0.m. prosecutrix along with her parents came to the police station and recorded FIR Ex.PW7/A. Ex.PW7/A has been deposed by him to be recorded by him in his computer as per the version of the prosecutrix and it has been deposed by him to have been signed by the prosecutrix after admitting its contents. The prosecutrix has been deposed by this witness to have been got medically examined from CH, Sundernagar vide application Ex.PW2/A. He further deposes that on the next day, he proceeded to the spot along with the prosecutrix and on her identification, prepared spot map Ex.PW14/A. On the same day, motor cycle of the accused along with RC and key has been deposed by this witness to have been taken into possession in the presence of Lal Singh and the prosecutrix vide recovery memo Ex.PW7/B. He further deposes that on the same day he arrested the accused and sent him for medical examination. He proceeded to depose that during the course of investigation he procured the birth certificate of the prosecutrix, Ex.PW3/A from the Panchayat Secretary concerned. Abstract thereof has been deposed by this witness to be Ex.PW3/B. He further deposes that he recorded the statements of the witnesses as per their versions. In cross-examination, he deposes that a criminal case is also registered against the father of the prosecutrix in police station, Sundernagar for giving beatings to his mother and daughter which is under investigation.

17. This Court can proceed to, on the sole testimony of the prosecutrix record findings of conviction against the accused. However, implicit reliance by this Court upon the testimony of the prosecutrix can be placed only in the event of her testimony inspiring confidence besides, being both credible and trustworthy. For gauging whether the prosecutrix has in her deposition recorded on oath before the learned trial Court unearthed therein the implicit truth qua the occurrence entails an obligation upon this Court to hence read it in a wholesome manner, besides this Court ought to on a keen discernment of the testimonies of the persons to whom revelations qua the incident were made by the prosecutrix, hence, disinter the truth or falsity of the narrations by the prosecutrix in her deposition of hers having apprised the persons enunciated therein, the details of the occurrence.

18. The genesis of the prosecution version stands comprised in the testimony of the prosecutrix wherein she unfolds the factum of hers having been sent by the wife of the priest to bring blankets from the latter's house at about 1.30 a.m, on the ill-fated day. The prosecutrix deposes hers having acceded to the said request and hers having handedover the blankets to the wife of the priest. However, the wife of the priest has stepped into the witness box as PW-1 and has deposed that the prosecutrix did not attend the religious ceremony at Kali Mata temple, Bobar. She has also denied the fact of hers having asked the prosecutrix to bring blankets from her house. With PW-1 having not lent succor to the version of the prosecutrix of hers having been sent by her to her house to fetch blankets

which she did and handedover to the former, rather with PW-1 denying the presence of the prosecutrix in the temple, begets a stain of falsity to the genesis of the prosecution version. Obviously, when the genesis of the prosecution version gets submerged in a taint of falsehood, as a corollary then, this Court would obviously be inclined to not construe the version rendered by the prosecutrix qua the genesis of the occurrence to be either trustworthy or credible. Apart therefrom, the prosecutrix has deposed that when she had fled from the site of occurrence, about 15-20 boys arrived there, who proceeded to damage the motor cycle of the accused. For determining whether the aforesaid deposition of the prosecutrix has any hue of veracity, an advertence to the testimony of PW-11, who is a witness to the recovery memo Ex.PW7/B vide which motor cycle was taken into possession by the police, is imperative. In his cross-examination, he has deposed that the motor cycle of the accused recovered under memo Ex.PW7/B was not damaged. In sequel, hence, the testimony of the prosecutrix comprised in her examination-in-chief of 15-20 boys having damaged the motor cycle of the accused after hers having fled from the site of occurrence, stands grossly falsified. Concomitantly, it gives ground for garnering an inference that the prosecutrix has concocted a version of hers having fled from the site of occurrence after the accused having perpetrated forcible sexual inter course upon her person besides, an inference which is available to be drawn by this Court is that the prosecutrix was never in the company of the accused at the site of occurrence. The prosecutrix on conclusion of the ordeal of hers having come to be subjected to forcible sexual intercourse by the accused, had reached the temple, where she apprised Kanta Devi about the incident. The aforesaid Kanta Devi was not examined by the prosecution. For non examination of Kanta Devi an adverse inference has to be drawn against the prosecution besides, an inevitable inference which is drawable is that it falsifies the version of the prosecutrix of hers, on reaching the temple after conclusion of the ordeal of hers having come to be subjected to forcible sexual intercourse by the accused, having narrated the incident to Kanta Devi. Furthermore as a concomitant it casts an aura of doubt even qua the fact of hers having been subjected to forcible sexual inter course by the accused. Even Rozy, PW-10, the sister of the priest, who has also been deposed by the prosecutrix to have been informed by her about the alleged occurrence, has not supported the prosecutrix. The prosecutrix deposes that she had worn the clothes of Rozy yet the latter does not support the prosecutrix qua the aforesaid fact. The clothes worn by the prosecutrix at the time of occurrence, have been deposed by her to have been washed by her in the house of priest. Nonetheless, the wife of the priest, who stepped into the witness box as PW-1, has not lent an iota of support to the prosecutrix. In sequel, the apt inference which ensues is that neither the prosecutrix after hers having been subjected to alleged forcible sexual intercourse by the accused had narrated the incident to Rozy besides had also not worn the clothes of the latter nor she had washed the clothes which she was wearing at the time of the alleged occurrence, at the house of the priest. The impact of the aforesaid inferences is that it takes a heavy toll upon the version qua the incident propounded by the prosecutrix, inasmuch as it rears an inference of it having come to be engineered by the prosecutrix. The inference of the prosecutrix having deposed under compulsion and duress emanates from a communication in the cross-examination of PW-8 wherein he has admitted the factum of a criminal case having come to be registered against him in police station Sundernagar for beating his mother and daughter. He has also in cross-examination admitted the suggestion put to him by the defence counsel that on the complaint of his daughter (prosecutrix) the police has visited his house. Fortification to the inference of the prosecutrix having been compelled by PW-8 to depose falsely is lent by the factum of PW-8 equivocating while answering during his cross-examination the suggestions put to him by the learned defence counsel whether the prosecutrix had complained against him that he wants to put an end to her life besides his pressurizing her to depose falsely. Moreover, the said inference is lent momentum by his

also equivocating while purveying an answer to the suggestion put to him by the learned defence counsel whether the prosecutrix has deposed under his pressure. Consequently, the apt inference which hence is deducible is that the prosecutrix has rendered a tutored version qua the incident which obviously is uninspiring and untrustworthy. The prosecutrix in her cross-examination has deposed that on the night of 16.05.2008 she stayed at the house of the priest of the temple. However, the aforesaid deposition of the prosecutrix stands not corroborated by PW-1, the wife of the priest. In her cross-examination, she has further deposed that on the night of 17.05.2008, she stayed at the house of her maternal uncles Guddu and Milkhi Ram, wherein she narrated the incident to the wife of Milkhi Ram. None of the aforesaid had stood behind the prosecutrix besides have not lent corroboration to the version of the prosecutrix comprised in her cross-examination of hers on the night of 16.05.2008 having stayed at the house of the priest of the temple and and on the night of 17.05.2008 hers having stayed at the house of Milkhi Ram and Guddu Ram. The effect of the prosecution hence having not been able to adduce tenacious evidence qua the prosecutrix having on the night of 17.05.2008 stayed at the house of Guddu, Milkhi Ram and Rama Devi, constrains an inference that the prosecutrix had resided elsewhere than at the house of Guddu, Milkhi Ram and Rama Devi. Besides, she in her cross-examination has deposed that on 16.05.2008, she stayed at the house of the priest. Even, the wife of the priest had not lent corroboration to the aforesaid factum. Omission on the part of PW-1, the wife of the priest to corroborate the testimony of the prosecutrix qua hers on the night of 16.05.2008 having stayed at her house constrains, an inference that even on the night of 16.05.2008, the prosecutrix had stayed elsewhere than at the house of the priest of the temple. The ensuing deduction is that hence the prosecutrix has contrived besides, reared a false story qua hers on the nights of 16.05.2008 and 17.05.2008 stayed at the house of the wife of the priest and at the house of Guddu Ram, Milkhi Ram and Rama Devi, respectively. Consequently, with falsity having been lent to the fact of hers having stayed on 16.05.2008 and 17.05.2008 at the aforesaid places, naturally then, the version as spelt out by the prosecutrix qua the incident cannot obviously be construed to be either trustworthy or inspiring. In aftermath, no implicit reliance can be placed by this Court on an uninspiring version qua the incident rendered by the prosecutrix.

19. Furthermore, she in her cross-examination deposes that on 16.05.2008 her father was in the temple. However, she omitted to then divulge the incident to her father. She also deposes in her cross-examination that she had on 16.05.2008 disclosed the incident to her cousin Sonu. However, the aforesaid Sonu has not been examined as a prosecution witness. His examination as a prosecution witness would have unfolded the truth qua the fact as deposed by the prosecutrix of hers having disclosed the incident to him on 16.05.2008. It appears that the omission by the prosecution to examine said Sonu as a prosecution witness is deliberate besides intentional as his examination would have rendered the version as propagated by the prosecutrix in her cross-examination of hers having apprised him about the incident on 16.05.2008 to be falsified, with the concomitant effect of imbuing the prosecution version qua the incident with falsity. Even, if assuming that the aforesaid Sonu had been apprised of the occurrence by the prosecutrix on 16.05.2008 yet when the report qua the incident was lodged with the police station concerned on 18.05.2008 and when the attribution of an explanation for the imprompt lodging of the FIR, is couched in the factum of Guddu Ram, Milkhi Ram and Rama Devi having come to the house of PW-8 on 18.05.2008 to apprise the latter about the incident whereupon the incident was promptly reported to the police station concerned, yet with Pws Guddu, Rama Devi and Milkhi Ram not supporting the prosecution case qua the factum of the prosecutrix having stayed at their home on 17.05.2008 and hers having disclosed the incident to them whereupon they purveyed the information to PW-8 construed in entwinement with the non examination of Sonu, renders the explanation for the belated

lodging of the FIR qua the incident anchored upon the factum of it having been revealed to PW-8 by Rama Devi, Milkhi Ram and Guddu Ram only on 18.05.2008 to be in its entirety, ridden with the vice of falsehood. The effect of falsity hence embroiling the explanation for the imprompt lodging of FIR qua the occurrence sequels an inference that the entire prosecution version is an afterthought to which no credence can be paid. Apart therefrom, the occurrence of abrasions on the person of the prosecutrix as pronounced in the MLC are to be concluded to be begotten by beatings delivered by her father upon her person.

20. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

21. In view of the above, we find no merit in this appeal which is accordingly dismissed. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh ...Appellant.
Versus
Mohammad Yaqub and others ...Respondents.

Criminal Appeal No.466 of 2011
Reserved on : 8.7.2015
Date of Decision: August 19, 2015.

Indian Penal Code, 1860- Sections 366, 376, 376(g), 342, 506 read with Section 34 and Section 120B- Prosecutrix was kidnapped by accused 'M' and was taken to a village where she was raped – accused 'I' brought some papers which she was forced to sign as Mehruffa Begum- she was taken to Ner Chowk where she was again subjected to rape- she was taken to village Bagayan and thereafter to village Gazipur- she was raped by accused 'L' and when she made a complaint to accused 'N', she was subjected to indecent act- matter was reported to police- held that testimony of the prosecutrix can be relied upon but where there are reasons not to accept her version on its face value, the court may look for corroboration – Medical Officer had not found any injury on the body of the prosecutrix- prosecutrix is aged more than 18 years- she had reported the matter to police after 11 months- no satisfactory explanation was given for the same- prosecutrix admitted that she resided in open place to which she had free access – she had not narrated the incident to any person- she travelled alone from Ner Chowk to Ropar in a bus but had not made any complaint - in these circumstances, version of the prosecution that accused had raped the prosecutrix cannot be accepted and the trial Court had rightly acquitted the accused. (Para-6 to 29)

Cases referred:
Prandas v. The State, AIR 1954 SC 36
Rajesh Patel Versus State of Jharkhand, (2013) 3 SCC 791
State of Rajasthan Versus Babu Meena, (2013) 4 SCC 206

Tukaram & Anr. v. The State of Maharashtra, (2979) 2 SCC 143
Uday v. State of Karnataka, (2003) 4 SCC 46
Narender Kumar Versus State (NCT of Delhi), (2012) 7 SCC 171
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh Hyderabad (2010) 1 SCC 94

For the Appellant Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General, and Mr. J.S. Guleria, Assistant Advocate General.
For the Respondents Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 29.7.2011 of the learned Additional Sessions Judge, Fast Track, Kullu, Himachal Pradesh, passed in Sessions Trial No.19 of 2010, titled as *State v. Mohammad Yaqub & others,* challenging the acquittal of respondents Mohammad Yaqub, Liyakat Ali, Meer Husain, Ibrahim, Ali Husain and Nazar Bibi (hereinafter referred to as the accused).

2. It is the case of prosecution that on 13.7.2008, prosecutrix, daughter of Liyakat Ali (PW-2), resident of Tharas, Tehsil Kullu, District Kullu, Himachal Pradesh, was kidnapped by accused Mohammad Yaqub and in a vehicle, driven by Ghanshyam (PW-6), taken to village Dudar, where he subjected her to rape and accused Ibrahim brought certain papers, which she was forced to sign as 'Mehruffa Begum'. On 14.7.2008, she was taken to Ner Chowk (District Mandi, Himachal Pradesh) and kept in the house of Gulzar (PW-3), where again she was subjected to rape. For two months, she stayed with accused Mohammad Yaqub in the house of Gulzar. Whereafter, she was taken to village Bagayan and made to stay in the house of Shaffi Mohammad (not examined). On 24.12.2008, she was taken to the house of Ali Husain (not examined) in village Gazipur, District Ropar (Punjab). On 16.3.2009, accused Yaqub Mohammad had to leave Gazipur. Same night as also on 18.3.2009, accused Liyakat Ali sexually assaulted her. When the incident was narrated to accused Nazar Bibi, not only she turned a blind eye, but after removing her clothes, committed an indecent act. Also, her ear rings were taken away by accused Nazar Bibi. On 20.3.2009, prosecutrix came to Mandi with accused Yaqub Mohammad and Liyakat Ali. On 22.3.2009, she freed herself and returned home. Prosecutrix narrated the incident to her mother, but since her father had gone to Punjab, in connection with some work no report could be lodged. Only on his return on 10.6.2009, the incident was reported to the police vide application (Ex.PW-1/A), on the basis of which FIR No.110, dated 15.6.2009 (Ex.PW-12/A), was registered at Police Station Bhuntar, District Kullu, Himachal Pradesh, by SHO Narain Singh (PW-12). Prosecutrix was got medically examined from Dr. Sarita Sharma (PW-5). Investigation was conducted, both by SHO Narain Singh (PW-12) and Krishan Chand (PW-11). Proof with regard to age of the prosecutrix was collected from Than Singh (PW-7). 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 persons were charged as under:

Accused	Offence
Mohammad Yaqub and Liyakat Ali	Sections 366, 376, 376(g), 342, 506 read with Section 34 IPC and Section

	120B IPC.
Ibrahim	Sections 366, 342, 506 read with Section 34 IPC and Section 120B IPC.
Ali Husain, Meer Husain and Nazar Bibi	Sections 342, 506 read with Section 34 IPC and Section 120B IPC.

All the accused pleaded not guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 12 witnesses and statements of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded, in which they pleaded innocence and false implication.

5. Based on the testimonies of the witnesses and the material on record, trial Court acquitted all of the accused persons of all the charged offences. Hence, the present appeal by the State.

6. We have heard Mr. Ashok Chaudhary, Mr. V.S. Chauhan, learned Additional Advocates General, on behalf of the State as also Mr. Anoop Chitkara, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offence.

8. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such

> matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. 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.

10. 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).

11. 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.

12. 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.

13. 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.

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."

14. In the aforesaid backdrop we proceed to discuss the evidence.

15. Medical opinion (Ex.PW-5/A), so proved by Dr. Sarita Sharma, reveals that prosecutrix was habitual to sexual intercourse. No injury was found on the body of the prosecutrix.

16. Age of the prosecutrix, as is evident from the Birth Certificate (Ex.PW-7/A), so proved by Than Singh (PW-7), is more than 18 years. Radiological age, as proved by Dr. Sarita Sharma, also corroborates such fact.

17. When we peruse the testimony of the prosecutrix and her father Liyakat Ali (PW-2), we find certain undisputed facts emerging on record. Prosecutrix was found missing from her home on 13.7.2008. Resultantly, on 14.7.2008, Liyakat Ali lodged a missing report at Police Station, Bhuntar, as also Gram Panchayat Rot. Now, prosecutrix admits that no action was taken by the police on such complaint, for the reason that accused Yaqub Mohammad had produced certificate of having performed his marriage with her. Liyakat Ali admits that his daughter-in-law (wife of his son Arshad) is daughter of brother of accused Meer Husain. He never took up the matter with any of the relatives or searched either for the prosecutrix or the accused after July, 2008. No grievance of whatsoever nature was ever made out with any person. Evidently, in the month of July, 2008 itself, the matter stood closed.

18. In the instant case, the alleged offence took place on 13.7.2008 and the incident was reported to the police only on 10.6.2009, i.e. after a period of about 11 months.

19. It has come in the testimony of the prosecutrix that she freed herself and returned home on 22.3.2009. Even thereafter, matter was not reported to the police. She wants the Court to believe that since her father was away, report could not be lodged with the police. But when we peruse the testimony of her father, we find that he has got three sons and three daughters with the prosecutrix being eldest of the daughters. The sons and the other two daughters could have lodged the report with the police, any time between 22.3.2009 and 10.6.2009. Delay in lodging the complaint raises serious doubt with regard to the correctness of version of the prosecution.

20. Further, perusal of testimony of the prosecutrix, we find it to be not inspiring in confidence. She states that on 13.7.2008, she was taken away in a vehicle and under threat so extended by accused Yaqub Mohammad, signed certain papers in village Dudar, where she was made to reside in the house of Gulzar. She spent some time in the house of Rafi Mohammad in village Bagayan and few months in the house of Ali Husain in village Gazipur (Punjab). Not only accused Yaqub Mohammad subjected her to sexual assault, but even accused Liyakat Ali raped her on 16.3.2009 to 18.3.2009 and when she reported the matter to accused Nazar Bibi, not only she was ridiculed, but subjected to an indecent act . Her clothes were removed. Also, she was robbed of her ear rings. On 20.3.2009, she returned to Mandi with accused Liyakat Ali and Yaqub Mohammad and finding an opportunity, managed to escape on 22.3.2009. Thereafter, she narrated the incident to her mother and on return of her father on 8.6.2009, matter was reported to the police.

21. Now incidentally, she does not ascribe any overt acts of threats, intimidation, coercion or physical assaults against accused Meer Husain, Ibrahim and Ali Husain. That apart, she admits that the places, where she stayed, were open to which she had free access. It is not her case that she was confined to the four corners of a walled room. There were neighbours adjoining to the houses. She moved freely from place to place. Her bald assertion of threats extended to her does not inspire confidence, in view of the fact that wherever she stayed there were family members, including ladies, residing there. She could have conveniently informed any one or managed to escape from there. She admits to have

signed papers, revealing the factum of her marriage with accused Yaqub Mohammad. It is for this reason, police did not pursue the matter, any further, on the complaint filed by her father. She further admits to have stayed in the house of Gulzar Mohammad (PW-3) and Balak Ram (PW-8), both of whom have unrebuttedly deposed that prosecutrix and accused Yaqub Mohammad were living together as husband and wife alongwith their family members. Prosecutrix voluntarily stayed in their houses, without any objection or demure. She was happy living there. Shaffi Mohammad and Ali Husain in whose houses prosecutrix spent long time have not been examined in the Court. They could have unfolded the events which took place in their houses.

22. Ghanshyam (PW-6), Driver of the taxi, in which the prosecutrix voluntarily travelled from Tharas, has unrebuttedly deposed that behaviour of the prosecutrix was normal. Evidently, nothing objectionable was found even by him.

23. Prosecutrix admits to have stayed in a hotel at Pandoh, which fact also stands proved through the testimony of Gurdev (PW-4). Nothing objectionable was found even there. Her conduct was normal. She could have certainly reported the matter to him or escaped from there.

24. Further, prosecutrix admits that her marriage was registered in the village Panchayat. To us, it appears that prosecutrix voluntarily married accused Yaqub Mohammad, travelled freely with him from place to place, lived with him as his wife, without any threat, coercion or intimidation.

25. She admits to have travelled alone from Ner Chowk to Ropar in a bus. At least there she was free to lodge a complaint or escape. She was not under any duress, threat or intimidation. She could have conveniently returned home. It is not that she was not familiar with the plae or terrain, for after all she admits to have taken out `100/- from the shirt of accused Yakub Mohammad at Ropar and then travelled in a bus upto Ner Chowk.

26. As such, we do not find testimony of the prosecutrix to be inspiring in confidence.

27. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused persons have committed the offence they have been charged for.

28. 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 so placed on record by the parties.

29. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged. Appeal stands disposed of, so also pending application(s), if any.

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

The State of H.P. and another .... Petitioners.

Vs.

Rakesh Kumar .... Respondent.

CMP No. 7560 of 2015 in
CWP No. 7122 of 2012
Date of Decision: 19/08/2015

Industrial Disputes Act, 1947 - Section 17(B)- An award was passed by Trial Court ordering the reinstatement in the services- respondents did not comply with the award till 29.7.2015- there was no proof that workman was employed anywhere- hence, respondents are liable to pay compensation to the workman till the date of reinstatement. (Para-2 and 3)

For the petitioners: Mr. Vivek Singh Attri, Dy. A.G.
For the respondent : Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(Oral):*

Under Annexure R-1, which constitutes the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., the respondent herein was ordered to be reinstated in service by the petitioners herein. The respondent therein impugned by filing a CWP on 16th August, 2012 before this Court the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., comprised in Annexure R-1. The factum of the petitioners herein having not complied with the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., comprised in Annexure R-1 till 29th July, 2015 remains uncontested. Hence, since the rendition of the award in favour of the respondent/workman, till 29th July, 2015 the petitioners herein had omitted to comply with the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., inasmuch as they did not proceed in compliance thereto reinstate the workman in service. During the pendency of the writ petition before this Court the respondent/workman has filed an application under Section 17(B) of the Industrial Disputes Act, 1947. The counsel for the respondent canvasses before this Court that the petitioners herein since the inception/institution of the writ petition preferred before this Court uptill 29th July, 2015 omitted to carry out the mandate of the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., inasmuch as they did not reinstate the respondent/workman in service besides when as imminent from the averments in the application supported by an affidavit furnished by the respondent/workman of his having remained unemployed in any other establishment, as such, not drawing wages equivalent to the one last drawn by him, the petitioners herein were liable to pay to him for the interregnum since the rendition of the impugned award till his coming to be reinstated on 29th July, 2015 wages equivalent to the one last drawn by him. In the face of the aforesaid evident fact of the respondent/workman having remained since the institution of the writ petition before this Court by the petitioners on 16th August, 2012 till 29th July, 2015 unemployed in any other establishment besides when the petitioners herein have concomitantly not lent any potent proof in displacement thereof portraying that since the institution of the writ petition before this Court till 29th July, 2015 when they proceeded to reinstate him in service, he drew adequate remuneration equivalent to the one as were

defrayable to him by the petitioners herein in case he had come to be reinstated in service. In sequel, the petitioners herein are liable to pay to the respondent/workman full back wages since the institution of the writ petition before this Court inasmuch as from 16th August, 2012 till 29th July, 2015 on which latter date he came to be reinstated in service by them.

2. The learned Deputy Advocate General contends that since the respondent/workman has belatedly instituted the application before this Court hence the relief as claimed by him in the instant application cannot be purveyed to him. However, the said submission is feeble besides staggers in the face of a peremptory mandate existing in Section 17(B) of the Industrial Disputes Act and its obliging the petitioners to, in the face of the ingredients enshrined therein for reasons aforesaid standing substantiation at the instance of the respondent/workman, purvey to the respondent full back wages last drawn by him computable from the date of institution of the writ petition till the respondent/workman having come to be reinstated in service. The peremptory mandate existing in Section 17(B) of the Industrial Disputes Act entailing upon the employer/petitioners herein to during the pendency of the writ petition preferred by them before this Court impugning the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, comprised in Annexure R-1, render to the workman full back wages last drawn by him from 16th August, 2012 till 29th July, 2015 on which latter date the workman in compliance of the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, stood re-instated in service besides does not either empower or facilitate the learned Deputy Advocate General to make a frivolous submission as he has proceeded to make that the belated institution of the application at the instance of the respondent workman under Section 17(B) of the Industrial Disputes Act estops him to claim the relief as agitated therein. Even though, this Hon'ble Court vide its order rendered on 30th August, 2012 had stayed the operation of the impugned award yet the said factum to the considered mind of this Court would not forestall nor pre-empt either the applicability or invocation at the instance of the respondent-workman of the provisions of Section 17(B) of the Industrial Disputes Act, especially when for the reasons afore-stated the mandate of the above referred provisions of the Industrial Disputes Act cast a preemptory obligation besides make it mandatory upon the petitioners to, during the pendency of the proceedings before this Court when evidence comprised in the averments enunciated in the apposite application of the respondent/workman supported by an affidavit portray the factum of his having remained unemployed in any other establishment during the pendency of the proceedings before this Court, which fact when remaining un-rebutted for want of cogent material in displacement thereof having been adduced by the non applicants/petitioners, defray to the respondent/workman full wages last drawn by him. More so, when the diktat of the apposite provisions of the Industrial Disputes Act have a salutary and holistic object to secure by providing the relief envisaged therein means of livelihood to a workman. For reiteration, the mandate of Section 17(B) when stands established has to be carried forward.

3. Accordingly, petitioners are directed to pay full back wages last drawn by him to the employee/respondent from 16th August, 2012 till he stood reinstated in service i.e. on 29th July, 2015 within three weeks from today. The application stands disposed of accordingly.

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

Yashwant Singh Chauhan. ...Appellant.

Versus

Sneh Lata. ...Respondent.

FAO No. 251/2015
Decided on: 19.8.2015

Hindu Marriage Act, 1955- Section 13- Husband has contracted second marriage with 'Y' and, thus, he had caused mental cruelty to the wife- he cannot be allowed to take advantage of his own wrong to seek divorce- wife had no other option but to leave matrimonial home in view of second marriage and she cannot be held guilty of desertion. (Para-10 to 17)

Cases referred:

Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Lachman Utamchand Kirpalani versus Meena alias Mota, AIR 1964 SC 40
Rohini Kumari versus Narendra Singh, AIR 1972 SC 459
Shobha Rani v. Madhukar Reddi reported in AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh reported in (2007) 4 SCC 511
Ashok Kumar Jain vs. Sumati Jain, AIR 2013 SC 2916

For the Appellant : Mr. Anuj Gupta, Advocate.
For the Respondent : Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

This appeal is directed against the judgment and decree dated 16.5.2015 rendered by the Additional District Judge-Shimla in Case No.12-R/3 of 2010.

2. "Key facts" necessary for the adjudication of this appeal are that the marriage between the parties was solemnized on 5.5.1995 according to Hindu ritual, rites and custom prevalent in the area. Appellant has filed petition under section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage by decree of divorce. According to the appellant, conduct of the respondent always remained arrogant, cruel and quarrelsome. Respondent without any reasonable cause withdrew from the society of the appellant. She has also filed petition for maintenance. There is no possibility of conciliation between the parties. Respondent has subjected him to cruelty.

3. Petition was contested by the respondent. The averments made in the petition were denied. According to the respondent, a sum of Rs. 25,000/-, which was given to her at the time of marriage was also utilized by the appellant. Appellant has contracted second marriage with another lady, namely, Smt. Yashodha. She has given birth to two children. She has filed a petition under section 125 of the Code of Criminal Procedure against the appellant seeking maintenance. It was allowed by the Court. The appellant was Government servant. He was drawing more than Rs. 30,000/- per month. He was having income of Rs. 5 lakhs from the orchard. Respondent has no alternative except to take shelter in the house of her father. The son was about 12 years old at the time of filing of petition.

4. Issues were framed by the learned Additional District Judge-I, Shimla on 16.3.2012. He dismissed the petition on 16.5.2015. Hence, the present appeal.

5. Mr. Anuj Gupta, learned counsel for the appellant has vehemently argued that his client has been subjected to cruelty by the respondent. Respondent has deserted the appellant without any reasonable cause.

6. I have heard the learned counsel for the appellant and have gone through the judgment carefully.

7. Appellant has appeared as PW-1. According to him, he was treated by the respondent with cruelty. She used to abuse him with intention to humiliate him. She used to leave the house without permission. Respondent has left his company without any reason and cause.

8. PW-2 Roshan Singh has shown ignorance to the specific case of respondent that the appellant has contracted second marriage with Yashoda Devi. PW-4 Gulab Singh has also shown ignorance regarding second wife of the appellant having two children. PW-5 Mehar Sain has also shown ignorance regarding contracting second marriage by the appellant. However, fact of the matter is that these witnesses have not denied the case of respondent that appellant has contracted second marriage specifically.

9. Respondent Sneh Lata has appeared as RW-1. According to her, she was living separately from her husband since 1996. It is the appellant who has left her company without any reason. The behaviour of appellant towards her was not good. Appellant has contracted second marriage with Yashodha Devi. She was constrained to file a petition under section 125 of the Code of Criminal Procedure for maintenance.

10. RW-2 Duni Chand has proved documents Ex.RW-2/A to Ex.RW-2/D. RW-3 Kusum Clerk from Sarswati Vidya Mandir School, Samala, Rohru has proved school record Ex.RW-2/D. It is evident from the school record that appellant has contracted second marriage with Yashodha Devi. Date of birth of Bharat Bhushan is 5.12.2002 and date of birth of Jaiwanti is 25.12.2003. Name of the mother of Bharat Bhushan and Jaiwanti in the school register is recorded as Yashodha Devi. The averments made by the appellant in the petition against the respondent were vague and sketchy. It was upon the appellant to prove cruelty against the respondent. It is the appellant, who has caused mental cruelty towards respondent by contracting second marriage with Yashodha though first marriage was subsisting. She was constrained to file petition under section 125 of the Cr.P.C. for maintenance. Appellant cannot be permitted to take advantage of his own wrong. Respondent was forced to live with her parents. She has to maintain a boy, who was 12 years old at the time of filing of petition, i.e. 17.8.2010. Thus, appellant has failed to prove that he has been subjected to cruelty by the respondent or she has deserted him without any sufficient cause.

11. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships have held that desertion is a matter of inference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> "What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn

from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

12. Their Lordships of the Hon'ble Supreme Court in ***Lachman Utamchand Kirpalani*** *versus* ***Meena alias Mota***, AIR 1964 SC 40 have held that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. Their Lordships have further held that the burden of proving desertion - the 'factum' as well as the 'animus deserendi' is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. Their Lordships have held as under:

"The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal for Bombay where the Court

had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act, 1947 whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhavati, 1956 SCR 838; ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.) Vol. 12 was cited with approval :

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the order without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases." The position was thus further explained by this Court. "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently the cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of bring cohabitation permanently to an end (animus deserndi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.. . . . . Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time." Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled Law that the burden of proving desertion -

the "factum" as well as the "animus deserendi" - is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause. As Dunning, L. observed : (Dunn v. Dunn

(1948) 2 All ER 822 at p. 823) :

"The burden he (Counsel for the husband) said was on her to prove just cause (for living apart). The argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a

> failure to distinguish between a legal burden of proof laid down by law and a provisional, burden raised by the state of the evidence . . . . . The legal burden throughout this case is on the husband, as petitioner, to prove that this wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the Court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

13. Their Lordships of the Hon'ble Supreme Court in ***Smt. Rohini Kumari versus Narendra Singh***, AIR 1972 SC 459 have explained the expression 'desertion' to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage.

> "Under Section 10 (1) (a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955 under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn. Page 223 with regard to the elements of desertion According to that statement for the offence of desertion there must be two elements present on the side of the deserting spouse namely, the factum, i.e. physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting

spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him."

14. Their Lordships of the Hon'ble Supreme Court in the case of **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

"4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal

with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

15. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

16. Their Lordships of the Hon'ble Supreme Court in ***Ashok Kumar Jain*** vs. ***Sumati Jain***, AIR 2013 SC 2916 have held that it is always open to the Court to examine

whether the person seeking divorce "is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief." On such examination if it is so found that the person is taking advantage of his or her wrong or disability it is open to the Court to refuse to grant relief.

17. In the instant case also appellant has contracted second marriage though first marriage was subsisting. Thus, the relief sought for by the appellant cannot be granted to him. The appellant has disobeyed the law by contracting second marriage. It is reiterated that he cannot be permitted to take advantage of his own wrong and the respondent has no option but to leave the matrimonial home.

18. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Baldev Singh. ...Appellant

Versus

State of Himachal Pradesh. ...Respondent

Criminal Appeal No. 218 of 2013
Judgment reserved on 13.8.2015
Date of decision: 20.8.2015

Indian Penal Code, 1860- Sections 363, 366, 376 and 342- Prosecutrix was found missing from her home- complainant received a call from the accused threatening her that she would not be spared in case of any harm to the prosecutrix- call was traced and the accused was arrested- prosecutrix earlier refused to undergo medical examination but subsequently, she was medically examined- prosecutrix was proved to be 15 years 2 months of age- Medical Officer proved that she was subjected to coitus which corroborates the version of the prosecutrix- Since prosecutrix was minor, she was not capable of giving consent- however, there was evidence on record to show that prosecutrix had voluntarily accompanied the accused- therefore, conviction upheld but the sentence reduced. (Para-8 to 21)

Cases referred:

State of Himachal Pradesh Vs. Rajesh Kumar and another 2011 (3) Shim. LC 22
Vikas Sharma Vs. State of H.P. 2015 (1) SLC 295
Mohd. Imran Khan Vs. State (Govt. of NCT of Delhi) (2011) 10 SCC 192

For the Appellant: Mr. O.C. Sharma, Advocate.
For the Respondent: Mr.V.K. Verma, Ms.Meenakshi Sharma and Mr.Rupinder Singh, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This appeal is directed against the judgment of conviction and sentence passed by learned Sessions Judge, Mandi on 18.2.2013/20.2.2013, whereby the

appellant/accused has been convicted under Sections 363, 366, 376 and 342 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 7 years and pay a fine of Rs.2,000/- under Section 376 IPC, in default of payment of fine, to further undergo simple imprisonment for a period of two months, under Section 363 IPC to undergo rigorous imprisonment for a period of 3 years and to pay a fine of Rs.1,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month, under Section 366 IPC to undergo rigorous imprisonment for a period of 3 years and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo simple imprisonment for a period of one month and under Section 342 IPC to undergo rigorous imprisonment for a period of two months and pay a fine of Rs.500/- and in default of payment of fine, to undergo simple imprisonment for a period of 15 days.

2. The appellant though was even charged with the offence punishable under Section 3(i) (xii) of the SC & ST (Prevention of Atrocities Act, 1989, but for want of evidence he was acquitted of this charge.

3. The case of the prosecution is that on 9.2.2012, complainant Lal Singh, who was working as Cashier in Quality Inn Hotel at Manali was telephonically informed by his wife that their daughter (herein after referred to as the prosecutrix), who was studying in class 10 in Government Senior Secondary School, Paunta did not return back from the school, which constrained him to lodge missing report at Police Post, Hadi. The police made all out efforts to trace out the prosecutrix, but in vain. On 10.2.2012, wife of the complainant received a call on her mobile, where the caller threatened her that if some harm would be caused to the prosecutrix, then he will not spare them. The said voice was identified to be that of the accused. The complainant expressed his suspicion that his minor daughter has been enticed away by the accused, leading to lodging of FIR under Sections 363, 366 and 120-B IPC.

4. On the basis of call details of the appellant, his whereabouts were traced out from the tower location and the accused was found at Gondpur, Paonta Sahib, District Sirmour. The accused was arrested on 24.3.2012 at 6.00 P.M. and sent to Zonal Hospital, Mandi for medico legally examination. Initially, the prosecutrix was sent to Zonal Hospital, Mandi for medico legally examination, but she refused to get herself examined. However, lateron on 26.3.2012 the prosecutrix again appeared before the police with request to get her medico legally examined, which was conducted by the police at Zonal Hospital, Mandi.

5. After completion of investigation, the police found a case under Section 363, 366, 376, 342 and 506 IPC and Section 3(i)(xii) of the SC and ST (Prevention of Atrocities Act) and accordingly charge sheet was prepared and filed in the Court of learned Judicial Magistrate Ist Class, Sarkaghat, who committed the same to Sessions Court vide his order dated 23.6.2012.

6. The prosecution examined eighteen witnesses and after closure of evidence, the entire incriminating evidence appearing against the accused was put to him in his statement recorded under Section 313 Cr.P.C. The accused denied the entire prosecution story and took the defence that he had been falsely implicated in the case due to inimical relations with the family of the prosecutrix. However, no evidence in defence was led by the accused.

7. The trial Court after evaluating evidence and after hearing the learned counsel for the parties convicted the accused/appellant as aforesaid. Feeling aggrieved with the aforesaid judgment, the present appeal has been filed.

8. Learned counsel for the appellant has tried to convince the Court that he has been falsely implicated, since the prosecutrix was not with the appellant. However, I find that there is overwhelming evidence on record, which goes to show that the prosecutrix had in fact remained with the appellant for a period of about 43 days. This fact is not only supported by the prosecutrix (PW-2), but even her father (PW-3), PW-8 Yamin Ali, who was the landlord of the premises rented out to the accused, where the accused along with prosecutrix had been residing from 12.2.2012 till the time he finally came to be arrested on 23.3.2012 and PW-12 HC Ashok Kumar.

9. The appellant thereafter has tried to claim acquittal on the basis of judgment rendered by learned Division Bench of this Court in ***State of Himachal Pradesh Vs. Rajesh Kumar and another 2011 (3) Shim. LC 22*** and another judgment delivered by learned Single Judge of this Court in ***Vikas Sharma Vs. State of H.P. 2015 (1) SLC 295***. But both these precedents are clearly distinguishable, as in the aforesaid cases it had been duly established that the prosecutrix had voluntarily accompanied the accused therein but she had crossed the age of discretion, while in the present case it is not so.

10. PW-1 Dr. Sonali Mahajan who conducted the medico legally examination of the prosecutrix, has clearly opined that the prosecutrix had been subjected to coitus. PW-2 has stated that the accused committed rape on her on 9.2.2012 and thereafter subjected her to coitus every night during the period she remained in the residential quarter of the accused at Amar Kot.

11. Once the age of the prosecutrix has been established to be 15 years 2 months and she yet not reached the age of discretion, the offences for which the appellant has been charged stand duly established.

12. The learned counsel for the appellant would further argue that in case the Court is not inclined to accept the prayer for acquittal of the appellant, in that case, sentence awarded by the trial Court be reduced. Learned counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in ***Mohd. Imran Khan Vs. State (Govt. of NCT of Delhi) (2011) 10 SCC 192,*** wherein it upheld the reduction of sentence from 7 years to 5 years on the ground that the prosecutrix had willingly accompanied the appellants, who had been accused of gang rape. The age of the prosecutrix was 15 years when she had eloped with the appellants therein, who were young boys.

13. I have given my thoughtful consideration to the rival submissions made by the learned counsel for both sides. In case the testimony of the prosecutrix is seen, it would be clear that she on 9.2.2012 left her house at around 8.30 A.M. She was having a school bag with her. She alleged that she was lifted from Baggi and taken in a vehicle parked on the road side and her mouth was also gagged, so that she could not raise any noise. She also claimed that when she alighted from the vehicle, the accused directed her to change her clothes and after changing clothes they again boarded a bus. She has tried to explain that she could not raise an alarm, as she was threatened by the accused with dire consequences. But then it has come in evidence that the prosecutrix resided with the accused at Amar Kot and did not complain either to the landlord or to anyone in the neighborhood.

14. Not only this, it was not on the basis of the complaint of the prosecutrix that the appellant came to be arrested, rather it was the missing report lodged by the father of the prosecutrix which led to arrest of the accused after his whereabouts were traced on the basis of his location through mobile tower.

15. It has specifically come in the statement of PW-3, Lal Singh, who is none other than father of the prosecutrix, that the prosecutrix had refused to subject herself to

medico legally examination on the first occasion, because the prosecutrix had disclosed to the police that the accused had not committed any act.

16. That apart, it would be seen that even while taking consent of the prosecutrix to undergo the medico legally examination at the first instance, the history recorded is divulged in the following manner.

> *"Alleged H/O sexual assault by Baldev from 9.2.2012 and got married on 10.2.2012.* मैं अपना मेडिकल जांच नहीं करवाना चाहती। मैं पूरे होष में लिख रही हूँ!"

17. In addition to the aforesaid, it would be noticed that Yamin Ali PW-8, who was the landlord has not stated even a single word against the appellant and has rather deposed that during stay of the appellant, two ladies used to visit the appellant and on enquiry, the appellant had disclosed that both these ladies were from his area. In case something unusual would have been noticed by the landlord, it would have definitely come out in his statement.

18. The prosecutrix in her cross-examination has categorically stated that when she boarded the bus along with the accused there were numbers of persons sitting in the bus, but she had not disclosed to anyone that she was being forcibly taken. She has specifically stated that when she was kept in the quarter of the accused, there were number of other persons who were residing in the vicinity and further stated that for all 43 days she remained alone throughout the day in the quarter.

19. On the basis of the evidence available on record, it can safely be gathered that the prosecutrix voluntarily accompanied the accused from Baggi to Ladror and then finally resided with the accused at his residential quarter at Amar Kot for 43 days. Moreover, the occurrence relates to the year 2012 when the prosecutrix was about 15 years 2 months, whereas the appellant was aged about 26 years.

20. As noticed above, there are some special circumstances, which cannot be ignored and have to be considered while sentencing the accused.

21. Therefore, taking into consideration all the cumulative facts and circumstances, the convection of the appellant for the offences for which he has been charged and convicted, is upheld. However, the substantive sentence under Section 376 IPC shall stand reduced to 5 years instead of 7 years, as awarded by the learned trial Court. The remaining sentence and fine under other Sections stands affirmed and upheld. The appeal is partly allowed in the aforesaid terms and disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.681 of 2008 with
FAO No.680 of 2008
Date of decision: 21.08.2015

FAO No.681 of 2008:

Bil Bahadur .....Appellant

Versus

Narender Pal & others .....Respondents

FAO No.680 of 2008:

Sunil Kumar ....Appellant

Versus

Narender Pal & others .....Respondents

Motor Vehicles Act, 1988- Section 169- The matter is covered by the judgment of the full bench in *Jagdish Chand Sharma vs. Bachan Singh and others, 2010 ACJ 1229* and the Tribunal had rightly dismissed the claim petition- petitioner was permitted to withdraw the petition with liberty to seek the appropriate remedy. (Para-3 to 5)

Case referred:
Jagdish Chand Sharma vs. Bachan Singh and others, 2010 ACJ 1229

For the appellant(s):	Mr.B.C. Verma, Advocate.
For the respondents:	Mr.Ajay Sharma, Advocate, for respondent No.1. Nemo for respondent No.2. Mr.B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

The present appeals have been preferred against the awards, dated 20th September, 2008, passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, (for short, the Tribunal), in two separate Claim Petitions, being Claim Petition No.33 of 2006 (subject matter of FAO No.680 of 2008) and Claim Petition No.34 of 2006 (subject matter of FAO No.681 of 2008), whereby both the Claim Petitions came to be dismissed, (for short the impugned awards).

2. I have gone through the impugned awards and the records.

3. The matter is already covered by the judgment passed by the Full Bench of this Court in **Jagdish Chand Sharma vs. Bachan Singh and others, 2010 ACJ 1229.**

4. A perusal of the impugned awards shows that the Tribunal has rightly made the discussion and has rightly dismissed the Claim Petitions. Accordingly, both the appeals are dismissed being without merit.

5. At this stage, the learned counsel for the appellant(s) prays for liberty to the appellant(s) to seek appropriate remedy. Granted. It is made clear that invoking the jurisdiction under Section 166 of the Motor Vehicles Act, 1988 shall not come in the way of the appellant(s) while seeking alternate remedy, if any, in terms of law.

6. Both the appeals stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Kusum Lata and another	.....Appellants.
Versus	
Bhajan Singh and others	.....Respondents

FAO (MVA) No. 29 of 2009.
Date of decision: 21st August, 2015

Motor Vehicles Act, 1988- Section 166- Deceased was aged 47 years at the time of accident- multiplier of '12' was applicable- 1/3rd of amount was to be deducted towards

personal expenses- deceased was drawing salary of Rs.16,291/- per month- rounding it off to Rs.16,500/-- loss of dependency would be Rs.11,000/-- claimants are entitled to Rs. 11000x12x12= Rs.15,84,000/- as compensation. (Para-7 to 9)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120,

For the appellant: Mr. Rajiv Rai, Advocate.
For the respondents: Mr. Anup Rattan, Advocate, for respondents No. 1 and 2.
Mr. B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 2.12.2008, made by the Motor Accident Claims Tribunal-II Una, HP in MAC Petition No. 36 of 2005, titled *Kusum Lata and another versus Bhajan Singh and others,* for short "the Tribunal", whereby compensation to the tune of Rs.7,70,000/- with 9% interest per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Insurer, owner/insured and driver have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is whether the amount awarded is adequate or otherwise?

5. Heard.

6. I have gone through the record. The Tribunal has fallen in an error while recording findings in paras 18 and 19 of the impugned award. Consequently, that error has crept-in in operative part of the impugned award, needs to be corrected, for the following reasons.

7. Admittedly, the deceased was 47 years of age at the time of accident and the multiplier of "12" came to be rightly applied by the Tribunal in view of ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***, read with the 2nd Schedule of the Motor Vehicles Act, for short "the Act". However, 1/3rd was to be deducted towards personal expenses and 2/3rd was to be held loss of dependency to the claimants. The Tribunal has fallen in an error in deducting one half towards the personal expenses, is not in accordance with the law, particularly the law laid down by the apex Court in ***Sarla Verma's*** case supra. Accordingly, it is held that the claimants have lost 2/3rd source of dependency of the income of the deceased.

8. The Tribunal has also fallen in an error in holding that the deceased was drawing Rs.15000/- as gross salary per month. The salary slip Ext. PW3/A is on the record which do disclose that at the time of death of the deceased, he was drawing salary to the

tune of Rs.16291/- per month. The last pay drawn, at the best, could have been rounded off to the tune of Rs.16,500/- per month. Thus, the income of the deceased is taken as Rs.16,500/- per month. Thus, the claimants have lost source of dependency to the tune of Rs.11000/- Accordingly, it is held that the claimants are entitled to Rs.11000x12x12 total Rs.15,84,000/-.

9. The Tribunal has rightly awarded Rs. 10,000/- as funeral expenses, Rs.20,000/- for loss of grievance of married life and Rs.20,000/- for love and affection, needs no interference.

10. Having said so, the appeal is allowed, the impugned award is modified as indicated hereinabove and the amount of compensation is enhanced to **Rs.15,84,000/.** The appellants are entitled to Rs.15,84,000+Rs.10,000/- as funeral expenses, Rs.20,000/- loss of grievance of married life and Rs.20,000/- for love and affection, total to the tune of **Rs.16,34,000/-,** with interest at the rate of 9% per annum from the date of claim petition till its realization. The insurer is directed to deposit the amount in the Registry within six weeks from today.

12. The Registry, on deposit of the amount 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.

13. Send down the record, forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Naresh Kumar .....Appellant
Versus
M/s Associate Bulk Transport Co. and others ..... Respondents

FAO No.105 of 2009
Date of decision: 21.08.2015

Motor Vehicles Act, 1988 –Section 166- Claimant, a motorcyclist, was hit by an approaching vehicle and suffered injuries - claim petition dismissed by the Tribunal holding that the claimant himself was rash and negligent - findings not sustainable - FIR by the claimant against the driver of offending vehicle and presentation of final report by the police sufficient proof of rashness and negligence on the part of the driver of the offending vehicle – witnesses also deposing about the rashness and negligence on the part of driver of offending vehicle - Motor Vehicles Act is not to be seen as an adversial litigation – but its aims and objectives are to be kept in mind while granting compensation – Tribunal committed an error in refusing claim – Rs. 60,000/- awarded as compensation. (Para 5 to 7 & 14)

For the appellant: Mr.J.R. Poswal, Advocate.

For the respondents: Mr.Dinesh Thakur, Advocate, for respondent No.1.
Nemo for respondent No.2.
Mr.Praneet Gupta, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of the instant appeal, the claimant has questioned the award, dated 21st November, 2008, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P., (for short, "the Tribunal") in M.A.C. Petition No.28 of 2006, tilted Naresh Kumar vs. M/s Associate Bulk Transport Company and others, whereby the Claim Petition filed by the claimant came to be dismissed, (for short the "impugned award").

2. Heard learned counsel for the parties and have gone through the record.

3. The Claimant averred in the claim petition that on 26th March, 2006, at about 6.00 p.m. near Veterinary Hospital, National Highway-21, Bilaspur, respondent No.2 (driver), while driving the offending vehicle i.e. Bulkar, bearing No.HP-69-0545, rashly and negligently, hit the motorcycle of the claimant, as a result of which the claimant sustained injuries, was taken to the Zonal Hospital, Bilaspur, where he remained admitted from 26th March, 2006 to 4th April, 2006. The said averment has not been denied by the driver and the owner of the offending vehicle in their reply. However, it was pleaded by them that the accident had occurred due to the rash and negligent driving of the claimant himself, which ground weighed with the Tribunal while dismissing the Claim Petition.

4. In a Claim Petition, the claimant has to prove prima facie that the accident was the outcome of rash and negligent driving of the offending vehicle. Qua the accident, FIR bearing No.109/06, dated 26.3.2006, Ext.PW-1/A, was registered against the driver of the offending vehicle under Sections 279 and 337 of the Indian Penal Code at Police Station, Sadar, Bilaspur, and final report was presented before the competent Court having the jurisdiction. Thus, it was a sufficient proof that the offending vehicle was being driven rashly and negligently in order to grant compensation. However, the Tribunal, after referring to contradictions in the statements of the witnesses, has concluded that the accident had not occurred on account of the rash and negligent driving of the driver of the offending vehicle.

5. It is beaten law of the land that the negligence on the part of the driver of the offending vehicle has to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Furthermore, the claimants claiming compensation in terms of Section 166 of the Motor Vehicles Act is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation.

6. In the instant case, the claimant has examined Constable Shyam Lal, Pratap Singh, Rattan Lal, Naresh Kumar (claimant), Dr.Amarjeet Singh and Sanjay Kumar as PW-1 to PW-6, respectively, whose statements, prima facie, do disclose that the accident was the outcome of rash and negligent driving of the driver of the offending vehicle. Copy of the FIR (Ext.PW-1/A) and other medical record have been proved on record by the Claimant.

7. Having said so, the findings recorded by the Tribunal under issue No.1 are set aside and it is held that the driver of the offending vehicle had driven the offending vehicle rashly and negligently and had caused the accident, in which the claimant had sustained injuries.

8. Before Issue No.2 is dealt with, I deem it proper to deal with issues No.3, 4 and 5.

9. Onus to prove issue No.3 was on the driver of the offending vehicle, which he has failed to discharge. It has not been proved on the record that the claim petition was bad for non-joinder and mis-joinder of necessary parties. Therefore, the said issue is decided in favour of the claimant and against the respondents.

10. To prove issue No.4, the insurer had to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence, has not led any evidence. The driving licence has been proved on the record as Ext.RA, which discloses that the driver of the offending vehicle was having a valid and effective driving licence at the relevant point of time. Accordingly, this issue is also decided in favour of the claimant and against the respondent-insurer.

11. In regard to issue No.5, it was for the insurer to prove that the insured had committed breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 to 149 of the Act, has not led any evidence. There is nothing on the file which can be made the basis for holding that the owner has committed willful breach of the conditions contained in the insurance policy. Accordingly, this issue is also decided in favour of the claimant and against the insurer.

12. Coming to issue No.2, the claimant has proved on record, by way of documents i.e. medical bills (Ext.P-1 to P-14), disability certificate (Ext.PW-5/B/Mark-A), discharge slip (Ext.PW-5/A) that he remained admitted in the hospital for 10 days and was under treatment. Therefore, I deem it proper to exercise guess work while taking into consideration the documents on the file and award Rs.25,000/- under the head 'treatment', Rs.25,000/- for the pain and sufferings undergone and Rs.10,000/- for the disability suffered by the claimant.

13. In view of the findings returned on issues No.3 to 5, the insurer is saddled with the liability.

14. Having said so, the impugned award is set aside, the appeal is allowed and the claimant is held entitled to a sum of Rs.60,000/-, as detailed above, with interest at the rate of 8% per annum from the date of the Claim Petition till realization. The insurer is directed to deposit the entire amount within a period of six weeks from today and on deposit, the Registry is directed to release the same in favour of the claimant forthwith.

15. The appeal stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Co. Ltd. ...Appellant.

Versus

Sh. Madan Lal and others ...Respondents.

FAO No. 60 of 2009
Decided on: 21.08.2015

Motor Vehicles Act, 1988- Section 149- **Insurance Act, 1938-** Section 64-VB- Cheque issued by the insured was dishonoured- however, no evidence was led to show that insured was informed about the dishonor of the cheque or about the cancellation of the insurance policy- held, that Insurance Company cannot be absolved of its liability. (Para-7 to 10)

Cases referred:
New India Assurance Co. Ltd. versus Rula and others, AIR 2000 Supreme Court 1082
Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., 2007 AIR SCW 7948
United India Insurance Co. Ltd. versus Laxmamma & Ors., 2012 AIR SCW 2657

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Ms. Nishi Goel, Advocate, for respondent No. 1.
Mr. Surinder Saklani, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is the judgment and award, dated 20.09.2008, made by the Motor Accident Claims Tribunal, Solan, Camp at Nalagarh, H.P. (for short "the Tribunal") in MAC Petition No. 3-NL/2 of 2005/04, titled as Madan Lal versus Suresh Kumar and others, whereby compensation to the tune of Rs.2,58,400/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and against the owner and the driver and the insurer was directed to satisfy the award (for short "the impugned award").

2. The claimant-injured, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has questioned the impugned award on the ground that the premium cheque was bounced, thus, the insurer was not liable to satisfy the award.

4. Thus, the only question to be determined in this appeal is - whether the Tribunal has rightly saddled the appellant-insurer with liability or otherwise? The answer is in the affirmative for the following reasons:

5. It was for the appellant-insurer to prove that the owner-insured has violated the mandate of Section 64-VB of the Insurance Act, 1938 (hereinafter referred to as "the Insurance Act") read with the mandate of Sections 147 to 149 of the Motor Vehicles Act, 1988 (for short "MV Act"), has not performed its duty and has not informed the owner-insured about the bouncing of the premium cheque or about the cancellation of the insurance policy. Thus, it cannot lie in the mouth of the appellant-insurer that the owner-insured has committed willful breach.

6. It was the duty of the appellant-insurer to prove the said factum by leading positive evidence, which it has failed to do so.

7. My this view is fortified by the judgment rendered by the Apex Court in a case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082.** It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the*

> *Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

8. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down.

9. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made or if the accident occurs till the cancellation is made and conveyed, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

> *"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."*

10. This Court has also laid down the same principle in the cases tilted as **M/s New Prem Bus Service versus Laxman Singh & another**, being **FAO No. 316 of 2008,** decided on 23rd May, 2014 and **FAO No. 35 of 2009,** titled as **National Insurance Company Ltd. versus Smt. Anjana Sharma & others,** being the lead case, decided on 4th July, 2014. It is apt to reproduce paras 15 and 16 of the judgment rendered in **Anjana Sharma's case (supra)** herein:

> *"15. Admittedly, the cover note was issued alongwith the insurance policy. The cover note and the insurance policy are Ext. RW-2/B & Ext. RW-2/A in M.A.C.P. No. 38-G/2004 and Ext. RW-3/B and Ext. RW-3/A in MACP RBT No. 68-G/2010/2004, respectively. While going through the insurance policy and the cover note, one comes to an inescapable conclusion that it was issued on 28th April,*

2003 and was valid up to 27th April, 2004. But, were cancelled on 29th April, 2003, without mentioning any reason. It is nowhere mentioned in the cover note that the premium amount was not received. Further, there is no evidence on the file in support of the fact that the amount was not deposited.

16. Learned counsel for the appellant(s) was asked to show whether there is any evidence on the file to the effect that notice was given to the owner-insured about the cancellation of the insurance policy and the cover on 29th April, 2003, he failed to reply the same."

11. Having said so, the Tribunal has rightly made discussion in para 20 of the impugned award.

12. Viewed thus, the impugned award is legal one, needs no interference.

13. Accordingly, the impugned award is upheld and the appeal is dismissed.

14. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

15. 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.

National Insurance Company Ltd. .....Appellant

Versus

Veena Devi and others .....Respondents

FAO No.104 of 2009
Date of decision: 21.08.2015

Motor Vehicles Act, 1988– Section 166– Tribunal awarded Rs.2 Lacs as compensation in favour of the complainants –insurance company contended in appeal that the driver was not in possession of a valid and effective license and compensation was excessive – the driver of the offending vehicle found to be possessing effective and valid driving license – record revealed that the compensation was on the lower side – appeal dismissed. (Para 5 to 7)

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Nishant Kumar, Advocate.

For the respondents: Mr.Sandeep Sharma, Proxy Counsel, for respondents No.1 and 2.
Mr.Ajay Sharma, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award, dated 17th November, 2008, passed by the Motor Accident Claims Tribunal(I), Kangra at Dharamshala, H.P., (for short,

"the Tribunal") in M.A.C. Petition No.77-D/II/2006, tilted Smt. Veena Devi and another vs. Sh.Naresh Kumar and others, whereby compensation to the tune of Rs.2,00,000/- was awarded in favour of the claimants and the insurer came to be saddled with the liability, (for short the "impugned award").

2. The insured/owner, the driver and the claimants have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Only the insurer has challenged the impugned award on two grounds, namely – i) the Tribunal has fallen in error in saddling the insurer with the liability since the driver of the offending vehicle was not having a valid and effective driving licence; and ii) the amount of compensation awarded by the Tribunal is excessive.

4. I have gone through the impugned award and the record of the case and am of the opinion that both the aforesaid grounds are not tenable in the eyes of law, for the following reasons.

5. Admittedly, the driver of the offending vehicle was having a valid and effective driving licence to drive a light motor vehicle and the offending vehicle was a Light Motor Vehicle as defined under the Motor Vehicles Act, 1988. Therefore, it does not lie in the mouth of the insurer to argue that the driver of the offending vehicle was not competent to drive the offending vehicle at the relevant point of time. The Tribunal has rightly made discussion in paragraph 16 of the impugned award while deciding issue No.6 and the same are liable to be upheld.

6. Coming to the second argument advanced by the learned counsel for the appellant, the Tribunal has awarded Rs.2.00 lacs as compensation. The deceased, a student, was 12 years of age at the time of accident. The amount of compensation awarded by the Tribunal, on the face of it, is too meager. Since the claim ants have not questioned the impugned award on the ground of adequacy of compensation, therefore, the same is reluctantly upheld.

7. Having said so, there is no merit in the appeal filed by the insurer and the same is dismissed. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. .....Appellant

Versus

Vinod Kumar & others ..... Respondents

FAO No.59 of 2009
Date of decision: 21.08.2015

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving licence – however, no evidence was led to prove the same- held, that insurer was rightly held liable by the Tribunal. (Para-4)

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. Ajay Chandel, Advocate, for respondent No.1.

Mr. Neeraj Maniktala, Advocate vice Mr. V.S. Rathore, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 18th September, 2008, passed by the Motor Accident Claims Tribunal(III), Kangra at Dharamshala (for short, "the Tribunal") in MACP No.30-D/2003, titled Sh. Vinod Kumar. vs. Smt. Kaushala Devi & others, whereby a sum of Rs.1,50,000/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimant (for short the "impugned award").

2. The claimant, owner and driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability on the ground that the owner-insured has committed willful breach, which revolves around issues No.3 and 4.

Issue No.3

4. It was for the insurer to plead and prove that the driver of the offending vehicle was not having valid and effective driving licence, has not been able to prove the same. However, I have gone through the FIR (Ext. RW2/A), driving licence (Ext. RW1/A) and the findings recorded by the Tribunal in paragraphs 11 & 16 and am of the considered view that the Tribunal has rightly held that the driver of the offending vehicle was having valid and effective driving licence. The insurer has not led any evidence to discharge the onus. Thus, the Tribunal has rightly recorded the findings in paragraph 16 of the impugned award. Accordingly the findings returned on issue No.3 are upheld.

Issue No.4.

5. I wonder why this issue was framed and how the claim petition can be dismissed on the ground of non-joinder or mis-joinder of necessary parties. It was for the insurer to lead evidence to prove the same, has not led evidence, thus, has failed to do so. Accordingly, the findings on issue No.4 are also upheld.

6. The amount awarded is very meager, cannot be said to be excessive in any way.

7. The impugned award is well reasoned, needs no interference.

8. In the given circumstances, the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

9. The Registry is directed to release the amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award through payees' account cheque, after proper identification.

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 (MVA) No. 51/2009 a/w FAO No. 52/2009.
Date of decision: 21st August, 2015

FAO No. 51/2009.	
The New India Assurance Co.	.....Appellant.
Versus	
Pawan Kumar and another	...Respondents
FAO No. 52/2009.	
The New India Assurance Co.	.....Appellant.
Versus	
Ashok Kumar and another	...Respondents

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that accident was an outcome of contributory negligence- however, no evidence was led by the insurer to prove this fact- it was duly proved that accident was caused by 'A' while driving the offending vehicle- driver had not challenged this finding- held, that plea of Insurance Company was not acceptable. (Para-6)

For the appellant: Mr. B.M. Chauhan, Advocate.

For the respondents: Mr. Vinod Thakur, Advocate, for respondent No. 1
Mr. Bhuvnesh Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

FAO No. 51 of 2009 is directed against the judgment and award dated 1.10.2008, made by the Motor Accident Claims Tribunal, Hamirpur, HP in MAC Petition No. 11 of 2007, titled *Pawan Kumar versus Ajay Kumar and another,* whereby compensation to the tune of Rs.2,35,000/- with 7.5% interest per annum was awarded in favour of the claimant and FAO No. 52 of 2009 is directed against the judgment and award dated 7.8.2008, made by the Motor Accident Claims Tribunal Hamirpur, HP in MAC Petition No. 12 of 2007, titled *Ashok Kumar versus Ajay Kumar and another,* for short "the Tribunal, whereby compensation to the tune of Rs.2,56,865/- with 7.5% interest per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned awards", for short.

2. Both these appeals are outcome of one accident, which was allegedly caused by the driver, namely, Ajay Kumar while driving Maruti Car No. HP-55-5115, rashly and negligently at Chowki about 7.30 P.M. on 28.10.2008, in which both the claimants have suffered injuries. Thus, I deem it proper to determine both these appeals by this common judgment.

3. The claimants had invoked the jurisdiction of the Tribunal for the grant of compensation by the medium of separate claim petitions, as per the break-ups given in the claim petitions, which were determined by the Tribunal by two separate awards, referred to supra.

4. The claimants, owner/insured and driver have not questioned the impugned awards on any ground, thus, have attained finality so far the same relate to them.

5. The insurer has questioned the impugned awards by the medium of these appeals, on the ground that the accident was outcome of contributory negligence. The learned counsel for the appellant also argued that in Ashok Kumar's case, the amount awarded is excessive. Both the arguments are untenable for the following reasons.

6. It was for the insurer to prove that the accident was outcome of contributory negligence, has not led any evidence. The Tribunal has scanned the entire evidence on record, made discussion on issue No. 1 in both the claim petitions and rightly came to the conclusion that the accident was caused by Ajay Kumar, driver while driving the offending Maruti Car rashly and negligently. It is apt to record herein that the driver has not questioned the said findings on issue No. 1. Thus, how can it lie in the mouth of the insurer that the driver has not driven the vehicle rashly and negligently on the date of the accident. Having said so, the findings returned on issue No. 1 in both the appeals are upheld.

7. It appears that a meager amount has been awarded in Pawan Kumar's case. Unfortunately, Pawan Kumar has not questioned the impugned award. Reluctantly, the impugned award is upheld.

8. Now coming to FAO No. 52 of 2009. Admittedly, the injured was admitted in the hospital for four months and undergone pain and suffering throughout. The Tribunal has rightly made the discussion in paras 34 to 40 of the impugned award. Thus, the amount can neither be said to be excessive nor meager in any way. Accordingly, the same is upheld.

9. Viewed thus, both the impugned awards are upheld and the appeals are dismissed.

10. The Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned awards, through payee's cheque account.

11. 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.

The New India Assurance Co. Ltd. ...Appellant.

Versus

Sh. Rakesh Kumar Gautam and others ...Respondents.

FAO No. 395 of 2008
Decided on: 21.08.2015

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that claimant was a friend of owner and the vehicle was registered as a private vehicle, therefore, insurer is not liable to pay compensation to the claimant- insurance policy covered the risk of 4 persons- held, that risk was covered in terms of policy- further, an additional amount of Rs.500/- was paid towards the risk of 3rd party- hence, Insurance Company was rightly held liable.

(Para-7 and 8)

For the appellant: Mr. Ratish Sharma, Advocate.

For the respondents: Mr. Sunil Awasthi, Advocate, for respondent No. 1.
Nemo for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

In terms of the note of the Registry, notices in respect of respondents No. 4 and 5 have been published in 'Dainik Tribune'. Today, there is no representation on their behalf. Hence, respondents No. 4 and 5 are set ex-parte.

2. Challenge in this appeal is to the judgment and award, dated 15.03.2008, made by the Motor Accident Claims Tribunal, Solan, Camp at Nalagarh (for short "the Tribunal") in MAC Petition No. 2-NL/2 of 2006, titled as Shri Rakesh Kumar Gautam versus Sandeep Garg and others, whereby compensation to the tune of Rs.2,14,750/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The claimant-injured, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The only question to be determined in this appeal is - whether the insurer came to be rightly saddled with liability or otherwise?

5. Learned counsel for the appellant argued that the vehicle involved in the accident was a private vehicle and the claimant-injured was a friend of the owner-insured, thus, his risk was not covered.

6. I have gone through the record.

7. The insurance policy, Ext. R-1 and details of policy are given at page 126 of the paper book. While going through Ext. R-1, one comes to an inescapable conclusion that the offending vehicle was a Maruti Car and the seating capacity is '4'. In terms of the details given at page 124 of the paper book, the risk of owner-cum-driver and one employee is covered. It also gives the details of the persons entitled to drive and limits of liability in terms of Sections-II (i) and II(ii) of the terms and conditions of the insurance policy.

8. While going through the terms and conditions of the insurance policy and the record, it can be safely held that the claimant-injured was not travelling in the offending vehicle at the time of the accident as a gratuitous passenger. He was just a friend of the owner of the offending vehicle, as pleaded and proved before the Tribunal and his risk was covered in terms of Annexure R-1 as an additional amount of Rs. 500/- has been paid by the owner-insured towards the risk of third party.

9. Having said so, the Tribunal has rightly made the discussion in the impugned award, needs no interference.

10. Accordingly, the impugned award is upheld and the appeal is dismissed.

11. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

12. Send down the record after placing copy of the judgment on Tribunal's file.

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

Nihal Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 366 of 2014
Reserved on: August 20, 2015.
Decided on: August 21, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.250 k.gs of charas- police party had gone on patrolling duty and were checking the traffic which shows that it was a busy road- however, no independent witness was associated by stopping the vehicles plying on the road- village was at a distance of 1 k.m- no independent person was associated from the village as well- no entry was made in the Malkhana register regarding taking out of the case property for production in the Court and re-deposit of the case property after its production in the Court, which casts doubt that case property produced in the Court is the same which was recovered from the accused- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt - accused acquitted. (Para-13 and 14)

For the appellant: Mr. Ramesh Sharma, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 2.9.2014, rendered by the learned Special Judge-I, Sirmaur at Nahan, H.P, in Sessions Trial No. 67-ST/7 of 2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine, to further undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 30.1.2013, PW-7 SI Ankush Dogra, PW-1 Const. Anil Kumar, HC Jagir Singh and others left the Police Station in an official vehicle driven by Const. Vicky Kumar for patrolling. The police was present at a place 1 km ahead towards Neri Pul at about 5:20 PM. The accused was spotted coming from opposite direction. The accused, on seeing the police party got perplexed and tried to flee away. He was overpowered by the police. The place was secluded one. The accused was holding a *pithu bag*, which was checked in the presence of police officials. On search of the *pithu bag*, pink coloured cloth bag was found containing nine envelopes, in which charas in the shape of sticks, was found. The charas, so recovered from the possession of the accused, was weighed. It weighed 2 kg 250 grams. The charas was re-packed in the same manner and kept in cloth parcel, which was sealed with seal "I". NCB forms in triplicate were prepared and seal impression Ext. PW-2/B was drawn. The seal was handed over to Const. Vicky Kumar. The case property was taken into possession vide seizure memo Ext. PW-2/B. The I.O. prepared "rukka" Ext. PW-1/A and sent the same to the Police Station

through Const. Anil Kumar. FIR Ext. PW-1/B was registered. The spot map Ext. PW-7/C was also prepared. The statements of the witnesses were recorded. The I.O. deposited the case property in the malkhana with PW-3 HC Purshotam Singh. PW-3 HC Purshotam Singh, made entry in the malkhana register at Sr. No. 250 vide Ext. PW-3/B. The case property alongwith the sample of seal and other relevant documents were sent to SFSL, Junga through Const. Anil Kumar PW-6 vide RC Ext. PW-3/C. The report of the FSL is Ext. PW-7/E. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 7 witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated in the case by the police. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Ramesh Sharma, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General for the State has supported the judgment of the learned trial Court dated 2.9.2014.

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

6. PW-1 Const. Anil Kumar, deposed that at about 5:20 PM on 30.1.2013 when they were going from Jagher towards Neripul side, accused was coming on foot from Neripul side at a place 1 km. from Jagher. On seeing the police party, the accused got perplexed. He tried to run away. He was overpowered. The place was secluded one and there was no habitation nearby. The accused was holding a *pithu bag*. It contained charas. It weighed 2 kgs. 250 grams. The S.I. took the photographs. Thereafter, the charas was put into the same polythene envelopes and then put into the same *pithu bag*. The parcel was sealed with seal bearing impression "I". The specimen of seal was obtained and seal was handed over to Const. Vicky Kumar. Seizure memo was prepared which was witnessed by HC Jagir and Const. Vicky Kumar. Rukka Ext. PW-1/A was drawn by SI Ankush Dogra which was entrusted to him. He delivered it to MHC Purshotam in the Police Station. In his cross-examination, he deposed that, on the way from Sanora to Jagher, they stopped at several places for checking the traffic, but no vehicle was challaned. He could not depict the number of any vehicle which was checked on the way. They stated at Jagher for 15-20 minutes. The proceedings were conducted on the spot on the road.

7. PW-2 Const. Vicky Kumar deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. The case property was produced while recording his statement as PW-2. In his cross-examination, he deposed that no record about traffic checking was prepared. The proceedings were conducted inside the vehicle by sitting on the back side of the jeep.

8. PW-3 HC Purshotam Singh deposed that rukka was handed over to him by PW-1 Const. Anil Kumar. FIR Ext. PW-1/B was registered on the basis of the rukka. On the same night at 2:10 AM, SI Ankush Dogra deposited one sealed parcel sealed with seal "I" alongwith the sample seal and NCB forms and articles recovered, regarding which he incorporated the entries in the malkhana register at Sr. No. 250. He proved the extract of the malkhana register vide Ext. PW-3/B. He sent the case property to SFSL Junga, through Const. Anil Kumar vide RC No. 98/12-13.

9. PW-6 Const. Anil Kumar, deposed that MHC Purshotam handed over to him one sealed parcel sealed with seal impression "I" alongwith the sample of seal and NCB form

in triplicate vide RC No. 98/12-13, which he delivered in FSL Junga on the same day under receipt.

10. PW-7 SI Ankush Dogra is the I.O. He deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that the documents were prepared by sitting inside the vehicle. According to him, no person had passed from that place during that period. He did not call any person from Jagher to witness the proceedings on the spot.

11. According to PW-1 Const. Anil Kumar, the proceedings were completed on the spot on the road. PW-2 Const. Vicky Kumar deposed that the proceedings were completed inside the vehicle by sitting on the back side of the jeep. PW-7 SI Ankush Dass also deposed that the proceedings were conducted while sitting inside the jeep.

12. It has come in the statements of PW-1 Const. Anil Kumar, PW-2 Const. Vicky Kumar and PW-7 SI Ankush Dogra that they were on patrolling duty. PW-1 Const. Anil Kumar deposed that on the way from Sanora to Jagher, they stopped at several places for traffic checking. He did not recollect the number of vehicles they checked on the way. PW-2 Constable Vicky Kumar has also deposed that on the way, they stopped at Sanora and conducted traffic checking for 1 ½ -2 hours, but he was not aware that any vehicle was challaned. No record about the traffic checking was prepared. PW-7 SI Ankush Dogra, deposed that no person had passed though that place, but he did not recollect if any vehicle passed through that place during that period. They reached at Jagher at about 5-6 PM and on the way from Sanora to Jagher, no vehicle was challaned. Even at Sanora, they had checked 15-20 vehicles, but he did not recollect if any vehicle was challaned for violation of provisions of M.V.Act. The fact that they had gone on patrolling duty and were checking the traffic pre-supposes that the road from Sanora to Jagher was a busy road and despite that no independent witnesses were associated by stopping the occupants of the vehicle, who were plying on the road from Sanora to Jagher towards Neripul.

13. PW-7 SI Ankush Dogra, has categorically deposed in his cross-examination that he has not called any witness from village Jagher to witness the proceedings on the spot. Jagher was at a distance of only 1 km. from the place where the accused was apprehended. The police has not at all made any sincere efforts to join the independent witnesses at the time of arrest, seizure and sealing proceedings on the spot.

14. The case property was produced while recording the statement of PW-2 Constable Vicky Kumar. The copy of the malkhana register is Ext. PW-3/B. There is entry of the deposit of the contraband on 30.1.2013 and when it was received back from the FSL Junga. There is no entry when the case property was taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register or it was case property of some other case. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing proceedings in the instant case

are doubtful. When the case property was produced in the Court, there is no reference as to who brought the case property to the Court from malkhana and by whom it was taken back.

15. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence punishable under Section 20 of the N.D & P.S., Act.

16. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 2.9.2014, rendered by the learned Special Judge-I, Sirmaur at Nahan, H.P., in Sessions trial No. 67-ST/7 of 2013, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

17. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Shri Parvesh Thakur ...Appellant.
Versus
Shakuntla Devi and others ...Respondents.

FAO No. 199 of 2008
Decided on: 21.08.2015

Motor Vehicles Act, 1988- Section 149- Claimant was travelling in the vehicle as labourer- this fact was not denied by the owner and the driver- insurer pleaded that claimant was travelling as a gratuitous passenger – Tractor was purchased for agricultural purpose- insurance policy also provided that vehicle was insured for being used for agricultural purpose- tractor was being used by Contractor for executing the contract work, which is not an agricultural purpose- held, that Tribunal had rightly granted the right of recovery to the insurer. (Para-5 to 13)

For the appellant: Mr. Sumeet Raj Sharma, Advocate.
For the respondents: Mr. Manoj Thakur, Advocate, for respondent No. 1.
Mr. J.S. Bagga, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award, dated 31.12.2007, made by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (for short "the Tribunal") in M.A.C. Case No. 109 of 2004, titled as Shakuntla Devi versus Shri Parvesh Thakur and others, whereby compensation to the tune of Rs.3,17,000/- with interest @ 6% per annum from the date of filing of the claim petition till its realization came to be awarded

in favour of the claimant-injured and the insurer was directed to satisfy the award at the first instance with a right to recover the same from the owner-insured and the driver (for short "the impugned award").

2. The claimant-injured, the insurer and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-owner-insured, Shri Parvesh Thakur, has questioned the impugned award on the ground that the Tribunal has fallen in an error in granting right of recovery to the insurer.

4. The argument, though attractive, is devoid of any force for the following reasons:

5. The tractor, bearing registration No. HP-22-3934, is the offending vehicle, in which the claimant-injured, namely Smt. Shakuntla Devi, was travelling as a labourer, at the time of accident, as averred in para 24 of the claim petition. It is apt to reproduce relevant portion of para 24 of the claim petition herein:

> *"That on ill-fated day dt. 7.1.2002, the petitioner being the labourer of Contractor Ashok Kumar was asked to load and unload the certain material from Tractor Regn. No. HP 22/3934. The petitioner while was on the tractor with some other labourers at near village Dagsech, Teh. Sadar, Distt. Bilaspur, H.P. the driver of the tractor was driving the said tractor in a very rash and negligent manner and as a result of which the Trolly of the tractor fell across the road due to which the petitioner sustained multiple injuries on her person. Her left leg and limb have been fractured. Soon after the accident, she was shifted to Zonal Hospital, Bilaspur on the very same day in unconscious condition and on 9.1.2002 she was referred to P.G.I. Chandigarh where she remained as Indoor patient uptill 20.1.2002. Thereafter she again remained admitted in Zonal Hospital, Bilaspur, HP upto 27.1.2002. She was got operated in PGI Chandigarh and the petitioner is still under treatment. The petitioner also became permanent disable. The petitioner was earning Rs. 5,000/- per month from the source of labourer and agriculturist and she has five minor children who were totally dependent upon the petitioner, but after the accident she is not in a position to do the manual work in any manner and to maintain herself as well as her minor children. She has spent Rs. 1,00,000/- on her treatment and has also suffered mental pain, harassment and sufferings etc. due to the said accident.*
>
> *That the accident took place due to the rash and negligent driving of the respondent No. 2 who was servant of respondent No. 1, owner of the vehicle involved in accident and the said vehicle was insured with the respondent No. 3 as such all the respondents are liable to pay the*

compensation to the tune of Rs. 5,00,000/- to the petitioner jointly and severally."

6. The averments contained in para 24 (supra) have not specifically been denied by the owner-insured and the driver of the offending vehicle.

7. The insurer has specifically stated in its reply that the claimant-injured was a gratuitous passenger in the offending vehicle at the relevant point of time.

8. Admittedly, the claimant-injured was travelling as a labourer in the offending vehicle, at the relevant point of time, which was engaged by contractor, namely Shri Ashok Kumar for executing the contract work.

9. The registration certificate, Ext. RC, is on the record at pages No. 125 to 128 of the paper book, which does disclose that no token tax was recovered from the appellant-owner-insured for the reason that tractor was being purchased for agricultural purpose only. It is apt to reproduce relevant portion of page 128 herein:

Quarter	*Amount of tax paid or in the case of an exemption the reason therefor*	*District in which payment made*	*Initials of Licensing Officer and remarks*
1st	*Token Tax exempted for agriculture purposes.* *Sd/-* *Registering & Licensing Authority* *HAMIRPUR (H.P.)*		

10. The offending vehicle was insured with the insurer, i.e. United India Insurance Company Ltd., in terms of the insurance policy, Ext. RC, in which it has been recorded that the risk is covered in terms of the insurance policy that relates to the tractor which was to be used only for agricultural purpose.

11. Admittedly, the offending vehicle was not being used, at the time of the accident, for agricultural purpose, but was being used by a contractor for loading and unloading the material, that too, not in connection with agricultural purpose.

12. Learned counsel for the appellant argued that the Apex Court in SLP (C) No. 3265 of 2012, titled as Chairman, Rajasthan State Road Transport Corporation & Ors., versus Smt. Santosh & Ors., decided on May 10, 2013, has held that a tractor cannot only be used for agricultural purposes.

13. The argument may be correct in terms of Section 2 (20) of the Motor Vehicles Act, 1988 (for short "MV Act"), but the offending vehicle was insured only for agricultural purposes and the insurer is liable as per the terms and conditions contained in the insurance policy.

14. Having said so, the Tribunal has not committed any error and the impugned award needs no interference.

15. Viewed thus, the impugned award is upheld and the appeal is dismissed.

16. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

17. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.415 of 2009 with
CWP No.1851 of 2009
Date of decision: 21.08.2015

FAO No.415 of 2009

Rajinder Nath Nehru .... Appellant

Versus

Amit Chadha and others ..... Respondents

CWP No.1851 of 2009

The New India Assurance Co.Ltd. .....Petitioner

Versus

Rajender Nath & others .....Respondents

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted the allowances from the salary of the deceased- held, that Tribunal erred in deducting the allowances- taking the income of the deceased as Rs.17,540/- and after deducting 1/3rd amount towards personal expenses, loss of dependency comes to Rs.11,693/-- applying multiplier of '9'- claimants are entitled to Rs. 11693 x 12 x 9 = Rs.12,62,844/-. (Para-6 to 10)

Cases referred:

Sunil Sharma vs. Bachitar Singh, (2011) 2 CCR(SC) 1170

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

FAO No.415 of 2009:

For the appellant: Mr.Sumeet Raj Sharma, Advocate.

For the respondents: Mr.Praneet Gupta, Advocate for respondent No.4.
Nemo for other respondents.

CWP No.1851 of 2009:

For the petitioner: Mr.Praneet Gupta, Advocate.

For the respondents: Mr.Sumeet Raj Sharma, Advocate, for respondents No.1 and 2.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of the appeal as well as the writ petition is the award, dated 10th March, 2009, passed by the Motor Accident Claims Tribunal, Shimla, (for short, the

Tribunal), in Claim Petition No.70-S/2 of 2006, titled Rajinder Nath Nehru and another vs. Amit Chadha and others, whereby compensation to the tune of Rs.12,10,000/-, with interest at the rate of 9% per annum from the date of filing of the claim petition till deposit, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the impugned award).

2. Feeling aggrieved, the Claimants filed the appeal being FAO No.415 of 2009 for enhancement of compensation, while the insurer laid challenge to the impugned award by way of writ petition (CWP No.1851 of 2009).

3. Facts of the case, in brief, are that on 10.11.2006, the deceased Smt.Vidya Devi (wife of Claimant No.1 and mother of Claimant No.2) boarded the bus bearing No.HP-63-3605 from Himland to Kasumpti, which was being driven by the driver, namely, Susheel Singh rashly and negligently. It was alleged that when the said bus reached at Talland Chowk, the driver of the offending bus tried to overtake two buses in excessive speed as a result of which the deceased was thrown out of the speeding bus, sustained injuries and later on succumbed to the same. The deceased was serving in the H.P. State Forest Corporation as Senior Assistant and was drawing salary to the tune of Rs.17,539/-. Thus, the Claim Petition filed by the Claimants claiming compensation to the tune of Rs.25.00 lacs.

4. The claim petition was resisted by the respondents on various grounds. On the pleadings of the parties the issues were struck and the evidence was led by the parties.

5. I have gone through the impugned award and the record.

6. The Tribunal on the basis of the salary certificate of the deceased Ext.PW-1/C held that the monthly income of the deceased was Rs.17,539/-. However, the Tribunal has deducted a sum of Rs.1250/- from the monthly salary of the deceased, being Conveyance Allowance (Rs.250), Capital Allowance (Rs.100) and House Rent Allowance (Rs.900). Therefore, after deducting the said amount of Rs.1250/- being received by the deceased as Allowances, the Tribunal held that the monthly income of the deceased was Rs.16,300/-, from which amount, the Tribunal deducted 1/3rd amount towards personal expenses of the deceased and thereby worked out the loss of source of dependency to the tune of Rs.1,29,816/- per annum.

7. The learned counsel for the appellants, during the course of hearing, has argued that the Tribunal has fallen in error in deducting the amount of allowances received by the deceased at the time of her death, from her monthly income. In support of his argument, the learned counsel for the appellants relied upon the judgment of the Apex Court in **Sunil Sharma vs. Bachitar Singh, (2011) 2 CCR(SC) 1170.** It is apt to reproduce paragraph 11 of the said decision hereunder:

> *"11. Based on the aforementioned judgments, we are of the view that deductions made by the Tribunal on account of HRA, CCA and medical allowance are done on an incorrect basis and should have been taken into consideration in calculation of the income of the deceased……".*

8. Applying the ratio, the Tribunal has fallen in error while deducting Rs.1,250/-, being received by the deceased as Allowances, from the monthly income of the deceased and the impugned award needs to be modified accordingly. As a result, I hold that the monthly income of the deceased was Rs.17,539/-, which can be said to be Rs.17,540/- after rounding off, and after deducting 1/3rd amount towards her personal expenses, the loss of source of dependency, per month, comes to Rs.11,693/-.

9. Coming to the question of multiplier, admittedly, the age of the deceased, at the time of death, was 53 years. The Tribunal has rightly applied the multiplier of 9 and the same is upheld keeping in view the dictum of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** and the Second Schedule attached to the Motor Vehicles Act, 1988.

10. Having said so, the Claimants are held entitled to compensation to the tune of Rs.11693x 12 x 9 = Rs.12,62,844/-, under the head loss of source of dependency, with interest as awarded by the Tribunal. The compensation awarded under the other heads by the Tribunal needs no interference and the same is upheld.

11. In view of the above discussion, the impugned award is modified, as indicated above, and the appeal filed by the Claimants (FAO No.415 of 2009) is disposed of.

12. The learned counsel for the insurer argued that the insurer has questioned the impugned award on the ground of adequacy of compensation and no other ground was pressed into service. Therefore, the writ petition (CWP No.1851 of 2009), filed by the insurer, deserves to be dismissed in view of my above findings, and the same is dismissed accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Saroj Kumari and others .....Appellants

Versus

Manohar Lal and others ..... Respondents

FAO No.489 of 2008 with
Cross Objections No.186 of 2009
Date of decision: 21.08.2015

Motor Vehicles Act, 1988- Section 149- The offending vehicle was tractor and was insured for agricultural purposes- deceased and other persons were travelling in the tractor as to their home- it is not the case of the claimant that owner had engaged the deceased as labourer or tractor was engaged for agricultural purposes at the time of accident- held, that insurer had committed breach of the terms and conditions of the policy. (Para-8)

Motor Vehicles Act, 1988- Section 171- Tribunal had not awarded any interest on the compensation- interest @ 7.5 % per annum from the date of the filing of the claim petition till deposit awarded. (Para-6)

For the appellants: Mr.Surender Saklani, Advocate.

For the respondents: Mr.Ramakant Sharma, Advocate, for respondents No.1 to 8.
Mr.Praneet Gupta, Advocate, for respondent No.9.
Mr.J.S. Bagga, Advocate, for respondent No.10.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 10th June, 2008, made by the Motor Accident Claims Tribunal(I), Kangra at Dharamshala, H.P. (for short, "the Tribunal") in M.A.C. Petition No.79-G/II/2004, tilted Smt. Saroj Kumari and others vs. Sh.

Manohar Lal and others, whereby compensation to the tune of Rs.1,85,200/-, including compensation under Section 140 of the Motor Vehicles Act, 1988, (for short, the Act), was awarded and the owner came to be saddled with the liability, (for short the "impugned award").

2. The Claimant has challenged the impugned award on the ground of adequacy of compensation, while the owner has filed the Cross Objections laying challenge to the impugned award on the ground that the Tribunal has fallen in error in saddling the owner with the liability.

3. I have gone through the impugned award and have perused the records.

4. The Tribunal, in paragraph 11 of the impugned award, after making reference to the evidence adduced by the claimants, has held that the deceased was an unskilled worker. After making the guess work, the Tribunal held that the deceased would have been earning Rs.1800/- per month at the time of his death. After deducting Rs.400/- towards his personal expenses, it was held that the Claimants lost source of dependency to the tune of Rs.1400/- per month. Since the deceased was 32 years of age at the time death, the Tribunal applied the multiplier of 14 and thus, worked out Rs.2,35,200/- (1400 x 12 x 14) under the head loss of source of dependency. However, the Tribunal deducted Rs.50,000/- from the total amount of compensation on account of the fact that the deceased was also responsible to some extent for his own death. Thus, a sum of Rs.1,85,200/- was awarded in favour of the claimants.

5. Though the amount awarded by the Tribunal appears to be inadequate and the impugned award is liable to be interfered with, however, keeping in view the facts of the case and the fact that the accident had occurred way back in the year 2004 and the claimants are running from pillar to post for compensation, the amount of compensation awarded by the Tribunal is reluctantly upheld.

6. During the course of hearing, it has been pointed out that the Tribunal has not awarded any interest on the award amount. I accordingly deem it proper to award interest at the rate of 7.5% per annum from the date of Claim Petition till deposit. The amount on account of interest be deposited by the owner within a period of six weeks from today.

7. It appears that the Tribunal has not granted interim relief under 'no fault liability', was to be paid by the insurer. Therefore, a sum of Rs.50,000/- is also awarded in favour of the claimants, which be deposited by the insurer, within a period of six weeks from today. It is made clear that the said amount shall not be recoverable from the owner/insured.

8. Coming to the Cross Objections filed by the owner, the same deserve to be dismissed for the following reasons. The vehicle involved in the accident was a Tractor and the insurance policy does disclose that the offending vehicle was insured for agricultural purposes. The deceased and other persons were traveling in the Tractor as passengers and they were going to their homes. It is not the case of the claimants that the owner had engaged the deceased as labourer and the Tractor was engaged for agricultural purposes at the relevant point of time. Viewed thus, the owner/insured has committed breach.

9. Having said so, the impugned award is modified, as indicated above, the appeal stands disposed of and the Cross Objections are dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The Divisional Manager, HRTC .....Appellant
Versus
Sheela Devi and others ..... Respondents

FAO No.113 of 2009
Date of decision: 21.08.2015

Motor Vehicles Act, 1988- Section 166– Tribunal awarded Rs.6,97000/- as compensation – appellant challenged the award on the ground that it was excessive -age of the deceased was 31 years at the time of accident - the Tribunal had rightly applied the multiplier of 14- awarded amount not on the higher side – appeal dismissed. (Para-3 & 4)

For the appellant: Mr.Jagdish Thakur, Advocate.
For the respondents: Mr.Y.Paul and Mr.Dinesh Kumar, Advocates, for respondents No.1 to 3.
Mr.L.N. Sharma, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of instant appeal, the appellant-HRTC has questioned the award, dated 18th October, 2008, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P., (for short, "the Tribunal") in M.A.C. Petition No.50 of 2006, tilted Sheela Devi and others vs. The Divisional Manager, HRTC and others, whereby compensation to the tune of Rs.6,97,000/-, with interest at the rate of 9% per annum, from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the appellant-HRTC was saddled with the liability, (for short the "impugned award").

2. The claimants, the driver and the conductor of the offending bus have not questioned the impugned award on any count, thus the same has attained finality so far as it relates to them. Only the appellant-HRTC, being the owner, has challenged the impugned award on the ground that the amount of compensation awarded by the Tribunal is excessive.

Thus, the only question needs to be determined is – Whether the amount of compensation is excessive?

3. I have gone through the impugned award. The Tribunal, in paragraphs 10 and 11 of the impugned award, has rightly made discussion while deciding issue No.2 and has rightly assessed the income of the deceased after making deductions towards his personal expenses. Keeping in view the age of the deceased, who was 31 years at the relevant point of time, the Tribunal has rightly applied the multiplier of 14. Therefore, by no stretch of imagination, the amount of compensation awarded by the Tribunal can be said to be on the higher side, but appears to be meager. However, the claimants have not assailed the impugned award, therefore, the same is reluctantly upheld.

4. In view of the above discussion, there is no merit in the appeal and the same is dismissed. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 96, 97 & 110 of 2009
Decided on: 21.08.2015

FAO No. 96 of 2009

Udesh Kumar ...Appellant.

Versus

Dhan Prakash and another ...Respondents.

.....

FAO No. 97 of 2009

Sulekha and another ...Appellants.

Versus

Dhan Prakash and another ...Respondents.

.....

FAO No. 110 of 2009

Sulekha ...Appellant.

Versus

Dhan Prakash and another ...Respondents.

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded compensation under the head of 'No Fault Liability' and held that claimants had not proved the rash and negligent driving of the vehicle – FIR was lodged against the driver of the vehicle- driver was convicted by the trial Court but was acquitted by the Appellate Court after giving a benefit of doubt- this fact prima facie shows that driver of the vehicle had driven the vehicle in a rash and negligent manner causing the accident- order passed by the Tribunal set aside and the compensation of Rs.2,50,000/- awarded in addition to the already awarded amount.

(Para-16 to 23)

Cases referred:

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

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

For the appellant(s): Mr. B.S. Chauhan, Senior Advocate, with Mr. Vaibhav Tanwar, Advocate.

For the respondents: Mr. Dinesh Thakur, vice Mr. N.S. Chandel, Advocate, for respondent No. 1.

Mr. Narender Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

All these appeals are outcome of one vehicular accident, thus, I deem it proper to determine all the three appeals by this common judgment.

2. Subject matter of these appeals is the judgment and award, dated 06.09.2008, made by the Motor Accident Claims Tribunal(II), Shimla (for short "the Tribunal") in the respective claim petitions, whereby compensation came to be awarded in favour of the claimants, against the respondents and the insurer was saddled with liability (for short "the impugned awards").

3. The insurer and the driver-cum-owner-insured of the offending vehicle have not questioned any of the impugned awards on any count, thus, have attained finality so far these relate to them.

4. The claimants in all the three claim petitions have questioned the impugned awards on the ground of adequacy of compensation.

5. In order to determine the issue, it is necessary to give flashback of the facts of the case, the womb of which has given birth to the appeals in hand.

6. It is averred in the claim petitions that the driver-cum-owner-insured, namely Shri Dhan Prakash, while driving the offending vehicle, i.e. Balero Camper, bearing registration No. HP-63-0137, rashly and negligently, on 14.11.2004, at about 12.05 P.M., near Charo Bag, caused the accident in which two persons, namely Shri Udesh Kumar and Smt. Sulekha, sustained injuries and asix years' old boy, namely Master Lakshay Kumar, sustained injuries and succumbed to the injuries.

7. The claimants filed separate claim petitions in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") before the Tribunal and sought compensation on the grounds taken in the respective claim petitions.

8. The respondents, i.e. the driver-cum-owner-insured and insurer of the offending vehicle, resisted all the three claim petitions on the grounds taken in the respective memo of objections.

9. Similar set of issues came to be framed in all the three claim petitions except issue No. 1. Thus, I deem it proper to reproduce the issues framed by the Tribunal herein:

"Issue No. 1.	*Whether on 14.11.2004 at about 12.05 PM near Charo Bag the respondent No. 1 was driving Balero Camper No. HP-63-0137 rashly and negligently and as such caused the injuries to the petitioner? OPP*
Issue No. 1. (in Petition No. 37-2 of 05)	*Whether on 14.11.2004 at about 12.05 PM near Charo Bag the respondent No. 1 was driving Balero Camper No. HP-63-0137 rashly and negligently and as such caused death of Master Lakshay Kumar? OPP*
Issue No. 2.	*If issue No. 1 is proved in affirmative, what amount of compensation the petitioner is entitled to and from whom? OPP*
Issue No. 3.	*Whether the driver of the vehicle in question was not having valid and effective driving licence at the time of accident? OPR*
Issue No. 4.	*Whether the vehicle was being plied without registration-cum- fitness certificate, route permit etc.? OPR*
Issue No. 5.	*Whether the accident was caused due to contributory negligence of the drivers of vehicle No. HP-63-0137 and No. HP-01A-329? OPR*
Issue No. 6.	*Relief."*

10. Parties have led evidence.

11. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have not proved the rash and negligent driving of the offending vehicle, but has awarded compensation under the head 'No Fault Liability' in terms of Section 140 of the Motor Vehicles Act, 1988 (for short "MV Act").

12. I have gone through the record.

Issues No. 1 and 5:

13. Both these issues are interdependent, thus, are being decided together.

14. Admittedly, FIR No. 90 of 2004 was lodged against the driver of the offending vehicle, was tried before the Court of competent jurisdiction, was convicted under Sections 279, 337 and 304-A of the Indian Penal Code (for short "IPC"), which was questioned by the medium of appeal before the Court of competent jurisdiction and the driver was acquitted by giving the benefit of doubt.

15. The Tribunal, while discussing the evidence in the impugned award has held that the claimants have failed to prove the rash and negligent driving on the part of the driver of the offending vehicle. The reasoning given by the Tribunal is trash for the following reasons:

16. Admittedly, FIR was lodged against the driver of the offending vehicle, who was convicted by the trial Court and thereafter acquitted by the Appellate Court by giving the benefit of doubt. The copy of FIR is Ext. PW-3/A and the copy of investigation report is Ext. RW-6/A, which do disclose that, *prima facie,* the driver of the offending vehicle had driven the offending vehicle rashly and negligently at the time of the accident. The driver-cum-owner, namely Shri Dhan Prakash, has not questioned lodging of the FIR before the trial Court.

17. In the given circumstances, how it can be said that the claimants have failed to prove the rash and negligent driving of the offending vehicle by the driver-cum-owner, Shri Dhan Prakash. In one breath, the Tribunal has decided issue No. 1 against the claimants and in the second breath, has decided issue No. 5 against the respondents.

18. The insurer-respondent No. 2 in the claim petition has specifically pleaded that the accident was outcome of the contributory negligence. It is apt to reproduce para 5 of the reply filed by the insurer-respondent No. 2 in the claim petition:

> *"22. That there are two vehicles involved in the accident and as such there is contributory negligence on the part of both the drivers. Both the drivers driving the vehicles involved in accident were driving in a rash and negligent manner. Hence the replying respondent is not liable to indemnify the respondent No. 1."*

19. I have examined the record and am of the considered view that the claimants have, *prima facie,* proved by leading evidence that the driver-cum-owner of the offending vehicle had driven the offending vehicle, i.e. Balero Camper, bearing registration No. HP-63-0137, rashly and negligently on 14.11.2004, at about 12.05 P.M. at place Charo Bag and caused the accident, in which Shri Udesh Kumar and Smt. Sulekha sustained injuries and Master Lakshay Kumar sustained injuries and succumbed to the injuries.

20. Having said so, the findings returned by the Tribunal on issues No. 1 and 5 are set aside and are decided in favour of the claimants and against the respondents.

Issues No. 3 and 4:

21. It was for the insurer to prove that the driver-cum-owner of the offending vehicle was not having a valid and effective driving licence and the same was being driven without registration-cum-fitness certificate, route permit, etc., has not led any evidence, thus, has failed to discharge the onus. Accordingly, both these issues are decided in favour of the claimants and against the respondents.

Issue No. 2:

22. Admittedly, the offending vehicle was insured and there was no dispute about the factum of insurance.

23. On the last date of hearing, Mr. Narender Sharma, learned counsel appearing on behalf the insurer, was directed to seek instructions. Today, he stated, on instructions, that the insurer is ready to pay compensation to the tune of Rs.2,50,000/- in lump-sum in addition to the amount already awarded in all the claim petitions, to which the learned senior counsel for the appellant(s) is averse. Thus, I deem it proper to determine the compensation to be awarded in each case separately.

FAO No. 96 of 2009:

24. The Tribunal has awarded a meager amount of Rs.12,500/- under the head 'No Fault Liability' in favour of the claimant-injured, namely Shri Udesh Kumar.

25. Claimant-injured-Udesh Kumar has sustained injuries, was taken to Civil Hospital Kotkhai and thereafter was referred to IGMC, Shimla, where he remained admitted, has spent money on his treatment, which fact is borne out from the record, but, unfortunately, the Tribunal has not discussed the same.

26. The disability certificate of the claimant-injured-Udesh Kumar is Ext. PW-1/A on the file, which does disclose that he has suffered permanent disability to the extent of 5% and has undergone pain and sufferings.

27. Thus, I deem it proper to award compensation to the tune of Rs.50,000/- in lump-sum in favour of the claimant-injured-Udesh Kumar, with interest @ 7.5% per annum from the date of the claim petition till its finalization in addition to the amount already awarded in terms of the impugned award.

FAO No. 110 of 2009:

28. The Tribunal has awarded a meager amount of Rs.12,500/- under the head 'No Fault Liability' in favour of the claimant-injured, namely Smt. Sulekha, despite the fact that she has suffered 45% permanent disability.

29. Claimant-injured-Sulekha has sustained injuries, was taken to Civil Hospital Kotkhai and thereafter was immediately referred to IGMC, Shimla, where she remained admitted in Ortho Department.

30. The disability certificate of the claimant-injured-Sulkeha is Ext. PW-4/A, which does disclose that the claimant-injured-Sulekha has undergone pain and sufferings and has suffered 45% permanent disability. Dr. Ramesh Chauhan (PW-4) has given details as to what is the effect of the said injury, which has not only affected the earning capacity of the claimant-injured-Sulekha, but has also shattered her physical frame. The claimant-injured-Sulekha is not in a position to maintain her matrimonial home due to the injury suffered by her.

31. In the given circumstances, I deem it proper to exercise guess work and award Rs.50,000/- under the head 'pain and sufferings, Rs.50,000/- under the head 'treatment charges' and Rs.1,00,000/- under the head 'loss of income'.

32. Viewed thus, the claimant-injured-Sulekha is held entitled to compensation to the tune of Rs.50,000/- + Rs. 50,000/- + Rs.1,00,000/- = Rs. 2,00,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization in addition to the amount already awarded in terms of the impugned award.

FAO No. 97 of 2009:

33. The Tribunal has awarded a meager amount of Rs.25,000/- under the head 'No Fault Liability' in favour of the claimants on account of death of their son.

34. The unfortunate parents have lost their six years' old son in the accident, who, after attaining the age of eighteen years, would have been earning. He was the source of hope and help to his parents in their old age.

35. By guess work, it can be safely said that the deceased would have been earning not less than Rs.4,500/- per month after attaining the age of majority. Applying the multiplier method in terms of the Second Schedule appended with the MV Act read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** multiplier of '13' is just and appropriate. 50% is to be deducted towards his personal expenses being a bachelor. Thus, it is held that the claimants have suffered loss of dependency to the tune of Rs.2,000/- per month.

36. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.2,000/- x 12 x 13 = Rs.3,12,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization in addition to the amount already awarded in terms of the impugned award.

37. The insurer is directed to deposit the enhanced amount in all the claim petitions before this Registry within eight weeks. On deposition of the same, the Registry to release the same in favour of the claimants after proper identification.

38. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeals are allowed.

39. 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. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Akhil Kumar ...Petitioner.

Versus

Indian Oil Corporation Limited ...Respondent.

CWP No. 2068 of 2015
Reserved on: 11.08.2015
Decided on: 24.08.2015

Constitution of India, 1950- Article 226- Petitioner sought a direction to the respondent to process his case for allotment of the Retail Outlet as per advertisement- petitioner had filed an affidavit that in case of her selection, she will provide assistance to the extent of Rs. 21,54,822/- she filed a letter issued by Block Education Officer that amount lying in the GPF account of the mother of the petitioner can be released at any point of time- respondent informed that amount lying in the GPF account was not taken into consideration as per dealership selection guidelines and the petitioner did not have the document to show that she was in possession of Rs. 25 lacs- held, that it was nowhere provided in the Brochure that amount lying in the GPF of the person or his family members is to be excluded- respondent relied upon the communication addressed by AG Office but this communication was subsequent to the date of rejection- amount lying in the GPF is the property of the employee and the respondent had wrongly excluded amount from consideration.

(Para-12 to 26)

Cases referred:

Ellen Florence Rodriguez versus Edith Mary Hannay and ors, AIR (29) 1942 Rangoon 64 (2).

Union of India versus Jyoti Chit Fund and Finance and others, AIR 1976 Supreme Court 1163

For the petitioner:	Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Amrita Messie, Advocate.
For the respondents:	Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Writ petitioner has invoked the jurisdiction of this Court by the medium of the writ petition in hand and has sought quashment of communication, dated 10.03.2015, (Annexure P-9) made by the respondent, whereby the candidature of the writ petitioner for distributorship of Retail Outlet at location Tatahar SH-19, District Mandi, was rejected, and has also sought writ of mandamus commanding the respondent to process the case of the writ petitioner for allotment of the Retail Outlet at the said location as per the terms and conditions contained in the advertisement notice, dated 30.06.2014 (Annexure P-1), on the grounds taken in the writ petition.

2. The respondent has resisted the writ petition by the medium of the reply.

3. An advertisement notice was issued by the respondent on 30.06.2014 (Annexure P-1) inviting the applications for appointment of Retail Outlet distributor in the State of Himachal Pradesh and one of the location advertised was at Tatahar, District Mandi, SH-19.

4. The writ petitioner applied in terms of the conditions contained in the Brochure for Selection of Dealers for Regular and Rural Retail Outlets (for short "the Brochure") (Annexure P-2). The writ petitioner had given details of his financial ability, mention of which has been given in clause 10 of the application form, (Annexure P-3) wherein it has been disclosed that the writ petitioner alongwith his family members, i.e. mother, was having the financial ability to the tune of Rs.36,26,762.50. The writ petitioner had also filed an affidavit/undertaking, which is at page 30 of the paper book, and has given the details as to how he has complied with the terms and conditions contained in the Brochure and how he is entitled to be selected for the said Retail Outlet distributorship. The

mother of the writ petitioner had also filed an affidavit, which is at page 35 of the paper book, and stated that in case the writ petitioner came to be selected for the Retail Outlet distributorship, she will provide financial assistance to him to the tune of Rs.21,54,822/-.

5. Thereafter, a communication was made by the respondent to the writ petitioner on 22.08.2014 (Annexure P-4) and was asked to show, by or before 12.09.2014, whether the amount lying in GPF Account No. 54473 can meet the requisite fund criterion for development of Retail Outlet.

6. The writ petitioner responded to the said communication vide Annexure P-5 and annexed the certificate issued by the Block Education Officer, Gopalpur-1, District Mandi, stating therein that the amount lying in the GPF Account of the mother of the writ petitioner can be released at any point of time.

7. Thereafter, the respondent decided to inspect the site and vide letter, dated 24.09.2014 (Annexure P-6), requested the writ petitioner to remain present personally on the site on 11.10.2014 alongwith photo identity card issued by any Government Department.

8. After examining all documents and taking into account the spot inspection, it was found that the writ petitioner was eligible and accordingly, was declared to be selected, vide Annexure P-7, dated 20.10.2014.

9. The respondent has remained silent and has not made any communication thereafter to the writ petitioner. The writ petitioner made a communication to the Petroleum Minister, which was forwarded by the Ministry of P&NG to the respondent. Thereafter, the respondent, vide letter, dated 10.03.2015 (Annexure P-9), communicated to the writ petitioner that the amount to the tune of Rs.12,26,963/-, as shown in the GPF Account of his mother, was not admissible as per the dealership selection guidelines of the respondent-Corporation and after excluding the said amount, the balance amount remained to be Rs.23,99,799.50/-, whereas the required amount should not be less than Rs.25 lacs. It was further informed that they were not ready to accept the request of the writ petitioner to accept any fresh documents of finance after cut off date, constraining him to file the writ petition.

10. The respondent has not denied all the said facts but has only pressed into service the ground that the GPF amount cannot be counted while assessing the financial ability/resources of the writ petitioner. It has also been stated that the respondent-Corporation has made a communication with the office of the Accountant General, Himachal Pradesh, in response to which it was informed that the said amount cannot be utilized for the purpose of obtaining the Retail Outlet distributorship.

11. Heard.

12. It appears that the writ petitioner has been dragged from pillar to post and post to pillar for nothing and has been made to suffer because of the bureaucratic approach, that too, technical one.

13. The question, which arises for consideration before this Court, is - whether the amount lying in the GPF of the writ petitioner or his family member is excluded from the financial ability in terms of Clause 4(v) contained in the Brochure?

14. Clause 4 of the Brochure deals with Finance and it nowhere provides that the amount lying in the GPF of a person or his family member is excluded. However, the excluding clause is contained in Clause 4 (v) (c) and (d), which reads as under:

> *"**4. ELIGIBILITY CIRTERIA FOR INDIVIDUAL APPLICANTS - PROPERIETORSHIP/ PARTNERSHIP***
>
> *.....*
>
> ***(v) Finance:***
>
> *.....*
>
> *(c) Cash/Jewelry/Instruments, etc. where the ownership cannot be established will not be considered.*
>
> *(d) Balance in current account will not be considered."*

15. A bare perusal of the said provision does disclose that the amount, as quoted hereinabove, is to be excluded. Thus, GPF amount is not to be excluded from taking into account while determining the financial ability of the applicant/writ petitioner.

16. As discussed hereinabove, a communication was made by the respondent to the writ petitioner on 22.08.2014 (Annexure P-4), to which the writ petitioner responded in terms of Annexure P-5, was considered, site inspection was conducted in terms of Annexure P-6 and the writ petitioner was declared to be selected in terms of Annexure P-7. Then, how can it lie in the mouth of the respondent, after declaring the writ petitioner to be selected candidate vide Annexure P-7, dated 20.10.2014, that he was not eligible.

17. The respondent has not been able to carve out a case that it has considered the case of the writ petitioner afresh and has rejected his candidature. Even, there is nothing on the file indicating that the decision, dated 20.10.2014 was revoked and the candidature of the writ petitioner was rejected.

18. Learned Senior Counsel appearing on behalf of the writ petitioner submitted that the writ petitioner was also having other financial ability at that point of time and had the respondent pointed out and not accepted the explanation given in the application form (Annexure P-3) read with the communication (Annexure P-5), he would have produced the other documents indicating that he has other financial ability at his hand. The writ petitioner has placed on record Annexure P-8, which does disclose that the mother of the writ petitioner was having a sum of Rs.1,17,573/- in her account with the Post Office, Sarkaghat, as on 30.07.2014 and a sum of Rs.66,524/- with the Punjab National Bank. Sarkaghat, as on 31.07.2014. This fact was also brought into the notice of the respondent, but despite that, it has chosen to remain moot spectator and has not conveyed any decision to the writ petitioner till 10.03.2015, when the communication (Annexure P-9) rejecting his candidature was made to him.

19. The respondent has also stated that it has made communication with the office of the Accountant General, Himachal Pradesh, which was made basis for issuing Annexure P-9.

20. It is worthwhile to record herein that the respondent is a big company and is running business throughout the country. If such a company will be allowed to take such a stand, that will be doomsday for that company and unfortunate for the poor persons who hail from a hilly State, that too, far flung areas.

21. The communication, which the respondent has placed on record as Annexure R-1, was addressed to the Accountant General, Himachal Pradesh on 23.04.2015, has been replied by the said office on 27.04.2015.

22. After going through both these communications, one comes to an inescapable conclusion that both the communications have been issued much after

Annexure P-9, dated 10.03.2015, was made. Then, how can it lie in the mouth of the respondent that the decision making process was made on the basis of the said documents, which came into existence after the decision was taken in terms of Annexure P-9, is suggestive of the fact that Annexure R-1 is an afterthought in order to justify its action - Annexure P-9 and also to deprive the petitioner from reaping the fruits of his selection as Retail Outlet distributor, for which he participated in terms of the advertisement notice, was declared eligible and selected.

23. We deem it proper to record herein that the amount lying in the GPF of an employee is the amount which belongs to the employee and is for the benefit of the employee. It is earned money of an employee and it cannot be said that the said amount cannot be released to the employee and the same cannot be made a ground to deprive an employee or the family member of the employee of his legitimate right. It is not the aim and object of the GPF subscription. The aim and object of the GPF subscription is that at the time of the retirement or at the time of dire need, the employee must be in a position to get handsome amount and meet his requirements, that too, strictly in terms of the law applicable.

24. The aim and object of subscription to the Provident Fund has been discussed by the Rangoon High Court in the case titled as **Ellen Florence Rodriguez versus Edith Mary Hannay and others,** reported in **AIR (29) 1942 Rangoon 64 (2).**

25. The Apex Court in the case titled as **Union of India versus Jyoti Chit Fund and Finance and others,** reported in **AIR 1976 Supreme Court 1163,** has held that the provident fund amount is property of the employee, which he can use at the time of retirement or otherwise and the government is a trustee.

26. Having said so, Annexure P-9, dated 10.03.2015, merits to be quashed and is quashed accordingly. The respondent is directed to pass requisite orders in terms of Annexure P-7, dated 20.10.2014, as early as possible, preferably within four weeks.

27. The writ petition is disposed of, as indicated hereinabove, alongwith all pending applications.

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

Gram Panchayat, Nangal Kalan .....Petitioner.

Versus

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

CWP No. 2978 of 2015.
Reserved on: 20.8.2015
Decided on: 24.8.2015.

Constitution of India, 1950- Article 226- State Government issued a notification declaring the areas of Tahliwal as Nagar Panchayat of Tahliwal- petitioner contended that the declaration was contrary to the Constitution of India, H.P. Panchayati Raj Act and Himachal Pradesh Municipal Act, 1994 – respondents contended that notification was issued in the larger public interest and the Gram Panchayat could not authorize the petitioner for institution of the writ petition- held, that right to file the writ petition cannot be curtailed by

the rules framed by the Government- State Government is empowered to issue notification to constitute the municipalities and specify the class to which a municipality shall belong – no violation of mandatory provision of H.P. Municipal Act could be established- Government is not required to consult Panchayat Samiti, the area of which is included in the municipality – the panchayat area had acquired the urban character after the establishment of the industrial units- objections were called and heard - the Government had complied with the requirements of principles of natural justice- petition dismissed. (Para-6 to 41)

Cases referred:

Village Panchayat, Calangute vrs. Additional Director of Panchayat-II and others, (2012) 7 SCC 550

Century Spinning and Manufacturing Co. Ltd. and ors. vrs. District Municipality of Ulhasnagar and ors., AIR 1968 SC 859

Siya Sharan Sinha and ors. vrs. State of Bihar and ors., AIR 1969 Patna 88

Sunil Ranjan De vrs. The State of Assam and others, AIR 1972 Gauhati 50

Baikunth Nath Upadhyaya vrs. The State of Bihar and ors. AIR 1972 Patna 307

Tulsipur Sugar Co. Ltd. vrs. The Notified Area Committee, Tulsipur, (1980) 2 SCC 295

Kamakhya Narain Singh vrs. State of Bihar and ors., AIR 1981 Patna 236

Raghunath Pandey and ors. vrs. The State of Bihar and ors., AIR 1982 Patna 1

Bhaskar Textile Mills Ltd. vrs. Jharsuguda Municipality and others, AIR 1984 SC 583

Baldev Singh and ors. vrs. State of Himachal Pradesh, (1987) 2 SCC 510

Sundarjas Kanyalal Bhathiaja and ors. vrs. The Collector, Thane, Maharashtra and ors., AIR 1990 SC 261

Karnail Singh and another vrs. Darshan Singh and ors., 1995 Supp.(1) SCC 760

Cantonment Board, Secunderabad vrs. G. Venketram Reddy and ors., 1995 Supp. (2) SCC 576

Solapur Midc Industries Association and ors. vrs. State of Maharashtra and ors., (1996) 9 SCC 621

Saij Gram Panchayat vrs. State of Gujarat and ors., (1992) 2 SCC 366

State of Maharashtra and another vrs. Deep Narayan Chavan and others, (2002) 10 SCC 565

Kamal Jora vrs. State of Uttarakhand and anr., AIR 2013 SC 2242

Municipal Board, Hapur and ors. vrs. Jassa Singh and ors., (1996) 10 SCC 377

Nagar Panchayat Kurwai and another vrs. Mahesh Kumar Singhal and ors., (2013) 12 SCC 342

For the petitioner:	Mr. Ajay Sharma, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General with Mr. M.A. Khan and Mr. Anoop Rattan, Addl. Advocate Generals for the respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner has challenged the notification dated 27.04.2015, whereby the areas of Tahliwal, specified in the schedule, have been declared as Nagar Panchayat Tahliwal. The Director (Urban Development), has sent the communication to the Deputy Commissioner, Una on 16.03.2013 giving reference to the representations received from the

public representatives for the constitution of Nagar Panchayat Tahliwal. The Deputy Commissioner, Una, was requested to do the needful and send the complete proposal, as per Section 3 of the H.P. Municipal Act, 1994 (hereinafter referred to as the Act for brevity sake). The Deputy Commissioner, Una was also called upon to send the resolution (NOC) of the concerned Gram Panchayat. The Director, (UD), sent the reminder to the Deputy Commissioner, Una on 11.06.2014. The SDO (C) Haroli, sent the communication to Deputy Commissioner, Una dated 17.07.2014, mentioning therein that in Tahliwal area, big industrial units have been setup, including Cremica and Nestle and thus the Revenue Department has no objection for the constitution of Tahliwal area into Nagar Panchayat. The Additional District Magistrate, Una sent the communication to the Director (UD), dated 18.07.2014, stating therein that a complete case has been received from the SDO (C) Haroli and as per the report the Gram Panchayat Nangal Kalan, vide its resolution No. 11 dated 20.07.2013 has submitted NOC for the constitution of Nagar Panchayat Tahliwal. There is also reference to the big industrial units like Cremica and Nestle located at Tahliwal in the communication dated 18.07.2014. The proposal was sent vide this communication to the Director (UD).

2. In sequel to the proposal sent by the Additional District Magistrate, Una Annexure R/5-4, the objections were called from the inhabitants of the area to submit their objections/suggestions, if any, to the proposed declaration of Nagar Panchayat Tahliwal. These objections/suggestions were required to be submitted to the Secretary (UD), to the Government of Himachal Pradesh in writing through Deputy Commissioner, Una within a period of six weeks from the date of the publication of the notification in the Rajpatra dated 7.7.2015, Himachal Pradesh. The objections were filed vide Annexure P4 and P5 by the residents of the area. The State Government issued notification dated 27.04.2015 under section 4 of the Himachal Pradesh Municipal Act, 1994, declaring the areas of Tahliwal, as specified in the schedule, as Nagar Panchayat, Tahliwal (Annexure P-11). Thereafter, the State Government has also issued notification dated 1.06.2015, whereby the objections were called from the Gram Sabha Nangal Kalan, within a period of 30 days.

3. Mr. Ajay Sharma, Advocate appearing for the petitioner has vehemently argued that declaration of areas of Tahliwal as Nagar Panchayat Tahliwal is contrary to Article 243-E of the Constitution of India, sub-section (2) of section 3 of H.P. Panchayati Raj Act, 1994 and also in breach of mandatory provisions of sections 3 and 4 of the Himachal Pradesh Municipal Act, 1994. On the other hand, Mr. Shrawan Dogra, learned Advocate General has vehemently argued that the writ petition on behalf of the petitioner is not maintainable. The Gram Panchayat Nangal Kalan, could not authorize the petitioner for institution of the present writ petition. He then contended that the provisions of Sections 3 and 4 of the Himachal Pradesh Municipal Act, 1994, as well as the mandatory provisions of the H.P. Panchayati Raj Act, have been followed in letter and spirit. He lastly contended that the constitution of Nagar Panchayat was in the larger public interest to provide better civic amenities to the area, taking into consideration big industrial units located in Tahliwal area.

4. We have heard the learned counsel for both the sides and have also gone through the pleadings carefully.

5. The petitioner has been authorized to file the writ petition as per Annexure P-1 dated 21.04.2015. There is a detailed procedure provided under section 119 of the Himachal Pradesh Panchayati Raj Act, 1994 read with rule 111 of the Himachal Pradesh Panchayati Raj (General) Rules, 1997. Sub-rule (5) of Rule 111 of the Himachal Pradesh Panchayati Raj (General) Rules, 1997 provides that no suit on behalf of the Panchayat shall be instituted without the previous sanction of the District Panchayat Officer. It is further

stipulated therein that while according the sanction, the District Panchayat Officer shall study the *pros and cons* of the suit in question and examine the facts enumerated therein to be submitted by the concerned Panchayat.

6. We are of the considered view that the petitioner has necessary *locus standi* to assail the notification(s) constituting Gram Panchayat Tahliwal, for the simple reason that judicial review is a fundamental right. The Gram Panchayat has rightly authorized the petitioner to institute the present petition. Moreover, there is a difference between a suit and a writ petition. The right to file a writ petition cannot be curtailed on the basis of Rule 111 (5) of the Himachal Pradesh Panchayati Raj (General) Rules, 1997. In the case of ***Village Panchayat, Calangute vrs. Additional Director of Panchayat-II and others,*** reported in ***(2012) 7 SCC 550,*** their lordships of the Hon'ble Supreme Court have held that Gram Panchayat had the locus to file writ petition under Articles 226 and 227 of the Constitution of India against the decision of the Appellate Authority, who has exercised the powers illegally. It has been held as follows:

> "30. It is thus evident that while the appellant and the Sarpanch had exercised their respective powers in public interest, respondent No.1 nullified that exercise because he felt that the resolution/action was contrary to law and was unjustified. While exercising the power under the Act, the Panchayat was not acting as a subordinate to respondent No.1 but as a body representing the will of the people and also a body corporate in terms of Section 8 of the Act. Therefore, it had the locus to challenge the orders passed by respondent No.1 and the High Court was clearly in error in holding that the writ petition was not maintainable.
>
> 35. By applying the ratio of the aforesaid judgments to the facts of these cases, we hold that the writ petitions filed by the appellant were maintainable and the learned Single Judge of the High Court committed grave error by summarily dismissing the same. We also declare that the contrary view expressed by the High Court in other judgments does not represent the correct legal position.
>
> 36. In the result, the appeals are allowed, the impugned order is set aside and the writ petitions filed by appellant are restored to their original numbers. The High Court shall now issue notice to the respondents and decide the writ petitions on merits.
>
> 37. It will be open to the appellant to apply for interim relief. If any such application is filed, then the High Court shall decide the same on its own merits."

7. The constitution of Municipalities is provided under Article 243Q of the Constitution of India. It reads as under:-

> **"243Q. Constitution of Municipalities.-** (1) There shall be constituted in every State,-
>
> (a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area
>
> (b) a Municipal Council for a smaller urban area; and
>
> (c) a Municipal Corporation for a larger urban area,
>
> in accordance with the provisions of this Part:
>
> Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having

regard to the size of tile area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township

(2) In this article, a transitional area, a smaller urban area or a larger urban area means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part."

8. The Legislative Assembly, Himachal Pradesh has enacted the Act called the Himachal Pradesh Municipal Act, 1994. Section 3 of the Act provides that the State shall constitute three classes of municipalities in accordance with provisions of this Section i.e. "Nagar Panchayat", "Municipal Council" and Municipal Corporation. The Nagar Panchayat is provided for a transitional area with population exceeding 2000 and generating annual revenue exceeding Rs. 5 lacs for the local administration. According to the proviso, the municipality under this Section, may not be constituted in such urban areas or part thereof, as the State Government may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as it may deem fit, by notification, specify to be an industrial township. According to the explanation, the "transitional area", "a smaller urban area", or "a larger urban area", has been defined as such area as the State Government may, having regard to the population of the area, the density of the population therein, the revenue generated for the local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors, as the State Government may deem fit, specify in notification for the purpose of this section.

9. The State Government under sub-section (2) of Section 3 has been empowered to issue notification to constitute the municipalities and specify the class to which a municipality shall belong in accordance with the provisions after observing the procedure as laid down in Section 4. The detailed procedure for declaring municipalities has been enumerated under Section 4 of the Act. According to sub-section (1) of Section 4, the State Government may, by notification, propose any local area to be municipal area under the Act and sub-section (2) of Section 4 provides that every such notification under sub-section (1) shall define the limits of the local area to which it relates. Sub-section (3) of Section 4 of the Act provides that the copy of every notification under this section, with a translation thereof, in such language as the State Government may direct shall be affixed at some conspicuous place in the office of Deputy Commissioner, within whose jurisdiction the local area to which the notification relates lies, and at one or more conspicuous places in that local area. Sub-section (4) of Section 4 provides that the Deputy Commissioner shall certify to the State Government the date of which the copy and translation work so affixed and the date so certified shall be deemed to be the date of publication of the notification. Sub-section (5) of Section 4 stipulates that if any inhabitants desires to object to a notification issued under sub-section (1), he may within six weeks from the date of the publication, submit his objections in writing through the Deputy Commissioner to the State Government and the State Government shall take his objections into consideration. Sub-section (6) of Section 4 provides that when six weeks from the date of publication have expired, and the State Government has considered and passed orders on such objections, as may have been submitted to it, the State Government may, by notification, declare the local area for the purposes of this Act, to be a municipal area.

10. The constitution of the municipalities, as discussed hereinabove, is provided under Article 243Q of the Constitution of India. The Nagar Panchayat for transitional area with population exceeding 2000 and generating annual revenue exceeding Rs. 5 lacs for the local administration is visualized. The total population of the area is 3565 and as per the record produced before us, the Tehsildar of the area concerned, has certified that the total revenue generated from the area is more than Rs. six lacs. The Gram Panchayat, Nagar Kalan, has issued No Objection Certificate (NOC). The Deputy Commissioner, Una has sent the proposal to the State Government for constitution of the Tahliwal Nagar Panchayat on 18.07.2014. The objections were called on 30.08.2014, strictly in conformity with sub-section (5) of Section 4 of the Act. These objections were considered and the notification has been issued on 27.04.2015 constituting Tahliwal area as Nagar Panchayat, Tahliwal.

11. Mr. Ajay Sharma, Advocate for the petitioner has failed to point out the violation of the mandatory provision of Sections 3 or 4 of the Himachal Pradesh Municipal Act, 1994. Mr. Ajay Sharma, Advocate has also argued that before the proposal was initiated for constituting the local area into Nagar Panchayat Tahliwal, sub-section (2) of Section 3 of the Act was to be followed and the tenure of the Gram Panchayat Nangal Kalan could not be reduced as per Article 243Q of the Constitution of India. This submission of the learned counsel merits rejection, being not tenable.

12. Under sub-Section (1) of Section 3 of the Himachal Pradesh Panchayati Raj Act, 1994, the Government, by notification, can declare any village or group of contiguous villages with a population of not less than one thousand and not more than five thousand to constitute one or more Sabha areas for the purposes of this Act and also specify its headquarters under Section 3 of the Act. Sub-section (2) of Section 3 provides that the State Government at the request of the Gram Sabha concerned or otherwise, and after previous publication of the proposal by notification at any time, increase any Sabha by including within such Sabha area any village or group of villages or diminish any Sabha area by excluding from such Sabha area any village or group of villages, or alter the headquarter or name of any Sabha area or declare that any area shall cease to be a Sabha area. It is clear from the plain language employed in sub-section 2 of Section 3 of the Himachal Pradesh Panchayati Raj Act, 1994 that the State Government is empowered to do the needful either at the request of Gram Sabha concerned or otherwise.

13. Their lordships of the Hon'ble Supreme Court in the case of ***Century Spinning and Manufacturing Co. Ltd. and ors. vrs. District Municipality of Ulhasnagar and ors.,*** reported in ***AIR 1968 SC 859,*** have held that there was nothing either in Section 4 or Section 7 of the Bombay District Municipal Act, to limit the power of the Government in constituting a municipal district to include therein the whole of the village or suburb. It has been held as follows:

> "4. As regards the first contention, the argument was that sees. 4,7 and 8 do not permit the Government to constitute a local area by including in it not villages but only portions thereof and that when it is proposed to amalgamate different units such as villages or suburbs situate adjacent to each other to form one municipal district it can do so by bringing them into such a district as whole, units and not breaking them up and having a part or parts of such unit and not the rest. The contention was rounded on the fact that the notification dated October 30, 1959 stated that the Government proposed to constitute the local area comprising of parts of Shahad, Ambernath,. and other villages into a permanent municipal district, the limits of which were specified in the Schedule thereto. The said Schedule set out the boundaries of the proposed municipal district by showing Ulhas river

as its boundary in the north and certain survey numbers of the. said villages as boundaries in the east, south and west. After considering the objections as required by the Act the Government by a further notification dated September 20, 1960 declared the said local area of which the same boundaries were set. cut in the Schedule thereto to be a permanent municipal district. It is true that in constituting the municipal district of Ulhasnagar the Government included parts of villages enumerated in the said Schedule. But the question is, was the Government competent to do so or not. Section 4 provides that subject to secs. 6, 7 and 8 the Government may declare by a notification any local urea to be a municipal district and may, by a like notification, extend, contract or otherwise after the limits of any municipal district, that every such notification constituting a new municipal district or altering the limits. of an existing municipal district shall clearly set forth the local limits of the area to be included in or excluded from such municipal district as the case may be and when so done it is the duty of the municipality already existing or of every municipality newly constituted or whose limits are altered to set up as required by the Collector boundary marks defining its limits or the altered limits of the municipal district subject to its authority. Section 7 provides that any local area which comprises of (a) a city, town, or station or two or more neighbouring cities, towns or stations with or without any village, suburb or land adjoining thereto or (b) a village or suburb or two or more neighbouring villages or suburbs, may be declared a permanent municipal district. It will be seen that while the Government can declare a municipal district comprising of two or more neighbouring cities, towns or stations or a village or suburb or two or more neighbouring villages or suburbs, sec. 7 expressly provides that such a local area may comprise not only of two. neighbouring villages or suburbs but also land adjoining to a village or suburb. Therefore while constituting a municipal district the Government, when it is expedient so to do, can join to an existing village or suburb the land adjoining thereto. Similarly sec. 4 empowers the Government to extend, contract or otherwise alter from time to time the existing limits of a municipal district or declare any local area to be a municipal district. There is nothing either in sec. 4 or sec. 7 to limit the power of the Government in constituting a municipal district to include therein the whole of the village or suburb as contended. The Act, on the other hand, permits the Government to include "land adjoining there to" which shows that a part of the land adjoining to an existing village or a suburb can also be added if it is thought expedient so to do. Likewise, while altering the limits of an existing municipal district it can exclude from or include in it part of the land where it becomes necessary or expedient to do. That being so, it is impossible to say that by taking parts of the villages set out in the Schedules to the two notifications the Government formed a municipal district contrary to the provisions of secs. 4 or 7 or that the constitution by it of the municipal district of Ulhasnagar was in any way contrary to or ultra vires the two sections."

14. In the case of ***Siya Sharan Sinha and ors. vrs. State of Bihar and ors.,*** reported in ***AIR 1969 Patna 88,*** the Division Bench of the Patna High Court has held that the State Government must be satisfied that all the three conditions, which are conditions precedent to constitute a town a Municipality in accordance with Cl. (a) of sub-section (1) of S. 4 of the Act have been fulfilled and that the declaration of its intention to constitute the town a municipality must be published in the official gazette and in such other manner as

the State Government may direct as required by sub-section (2) to S. 4. It has been held as follows:

> "6. Section 390A(1) of the Act reads as follows :--
>
> > "Conversion of a Notified Area into a Municipality :--
> >
> > (1) Notwithstanding anything contained in Sections 388, 389 and 390 and subject to the provisions of Section 4, the State Government may, by notification, declare that with effect from the date to be specified in the notification and subject to such provisions as the State Government may make for the period of transition, a notified area constituted under Section 388 shall be converted into a Municipality, and with effect from that date all the provisions of this Act shall apply to such Municipality unless the State Government in the notification, or by a fresh notification, specifically bar the application of any provision in that area."
>
> Clauses (b) to (d) of Sub-section (1) of Section 4 of the Act are not necessary to be read for the purpose of the present case. It is, however, necessary to quote Clause (a) of Sub-section (1) and Sub-section (2) of Section 4, which run as follows :--
>
> > "(1)(a) When the State Government is satisfied that three-fourths of the adult male population of any town are engaged on pursuits other than agricultural and that such town contains not less than five thousand inhabitants, and an average number of not less than one thousand inhabitants to the square mile of the area of such town, the State Government may declare its intention to constitute such town, together with or exclusive of any railway station, village, land or building in the vicinity of such town, municipality, and to extend to it all or any of the provisions of this Act (2) Every declaration under this section shall be published in the Official Gazette and in such other manner as the State Government may direct."
>
> It is manifest, therefore, that the conversion of a Notified area into a Municipality under Section 390A has been subjected to the provisions of Section 4 of the Act. In other words, the State Government must be satisfied that all the three conditions, which are conditions precedent to constitute a town a Municipality in accordance with Clause (a) of Sub-section (1) of Section 4 of the Act, have been fulfilled and that the declaration of its intention to constitute the town a municipality must be published in the official gazette and in such other manner as the State Government may direct as required by Sub-section (2).
>
> 7. The wordings of Sub-section (2), extracted above, clearly indicate that the publication of the declaration of the intention to constitute a town a Municipality is mandatory both in regard to its publication in the official gazette as also in such other manner as the State Government may direct The publication of the declaration of the intention in the official gazette only is not sufficient nor is it sufficient to give a notice of the said declaration to the Notified Area Committee, because the publication of the declaration of the intention must be in such other manner as the State Government may determine. Giving of notice to the Notified Area Committee is not the publication of the declaration within the meaning of Sub-section (2) of Section 4 of the Act."

15. In the instant case, the provisions of Section 4 of the Himachal Pradesh Municipal Act, 1994 have been followed scrupulously.

16. In the case of ***Sunil Ranjan De vrs. The State of Assam and others,*** reported in ***AIR 1972 Gauhati 50,*** the Division Bench of the Gauhati High Court has held that once a Town Committee is lawfully constituted, even including an erstwhile portion of the Anchalik Panchayat, that area gets automatically excluded from the Anchalik Panchayat, in view of the provisions of Section 1(2) of the Assam Panchayat Act, 1959. It has been held as follows:

> ".....It presupposes that there may be already some Anchalik Panchayats which are constituted and it takes note of the possibility of some portion of such area being included later in a Town Committee. Once a Town Committee is constituted in accordance with law even including an erstwhile portion of the Anchalik Panchayat, that area gets automatically excluded from the Anchalik Panchayat in view of the provisions of Section 1(2) of the Act. There is no necessity for another notification excluding the area from the Anchalik Panchayat. The absence of a second notification excluding a particular area from the Panchayat is therefore not fatal to the constitution of the Town Committee in this case. The submission of the learned counsel is therefore of no avail."

17. In the case of ***Baikunth Nath Upadhyaya vrs. The State of Bihar and ors.*** reported in ***AIR 1972 Patna 307,*** the Division Bench has held that where an area is constituted as a 'Notified Area' or a 'Municipal Committee', the Government is not required to consult Panchayat Samiti, the area of which is included in such Notified Committee or Municipality. It has been held as follows:

> "1. The petitioner is the Pramukh of Namkun (Khijri) Pan-chayat Samiti is the district of Ranchi. He has filed this writ application for quashing Notification No. 8220 L. S. G., dated the 27th of November, 1970, purported to have been issued by the Government of Bihar under Clause (c) ofSection 6 of the Bihar and Orissa Municipal Act, 1922. A copy of the said notification has been made Annesure '1' to the writ application. By the impugned notification a number of villages either in whole or in part have been included within the Doranda Notified Area.
>
> 3. I will first deal with the main ground on which the validity of the notification has been challenged. Chapter II of Bihar Act 6 of 1962 provides for constitution, incorporation, composition etc. of the Fanchayat Samitis. Under Section 3 (1) of that Act the State Government has been empowered (a) to declare any area within a particular district to be a Block and name the Block, (b) to include any area within the same district in a Block so declared, (c) to exclude any area from any such Block, or (d) to transfer any area from one Block to another within the same district. By Bihar Act 4 of 1964 a proviso has been added to Section 3 (1) which reads as under:
>
> > "Provided that before issuing any notification under' Clause (b), (c) or (d), the State Government shall consult the concerned Panchayat Samiti and Zila Parishad, if any, and where no Panchayat Samiti for any Block or Zila Parishad for the district has been constituted, the concerned Block Development Committee and the District Development Committee, if any, constituted under the orders of the State Government."

Mr. Thakur Prasad submitted that before excluding any area from a Block it is incumbent on the State Government to consult the Panchayat Samiti of the Block concerned. As in the instant case the State Government did not consult the Namkum Panchayat Samiti before excluding various villages either in whole or in part from the Block and including them in the Doranda Notified Area, there has been a contravention of the mandatory provisions as contained in the proviso to Section 3(1) of Bihar Act 6 of 1962. There does not appear to be any substance in the contention raised.

A plain reading of Section 3 (1) of Bihar Act 6 of 1962 would show that the State Government has to consult the concerned Panchayat Samiti before excluding any area from a Block for the purposes of the Act. In the instant case there has been no notification by the Government excluding any area from the Namkum Block for the purposes of Bihar Act 6 of 1962 and as such the State Government was under no obligation to consult the Namkum Panchayat Samiti. The provisions of Bihar Act 6 of 1962 are not attracted when an area has been constituted a Municipality or a Notified Area under the provisions of the Bihar and Orissa Municipal Act, 1922. This is clear from the proviso to sub-section (2) of Section 1 of Bihar Act 6 of 1962, which reads as under:

> "Provided that save as otherwise expressly obtained in this Act nothing therein shall apply to any local area to which the provisions of the Fatna Municipal Corporation Act, 1951 (Bihar Act 13 of 1952), apply or any area which has been or may hereafter be constituted a Municipality or a Notified Area under the nrovisions of the Bihar and Orissa Municipal Act, 1922 (B. & O. 7 of 1922), or a Cantonment under the provisions of the Cantonment Act, 1924 (Act 2 of 1924)."

The notification, therefore, cannot be held to be invalid on the ground that the State Government did not consult the Namkum Panchayat Samiti before issuing the same.

4. The second ground on which the validity of the notification has been impugned is equally without substance. Section 3 (3) of Bihar Act 7 of 1948 reads as under:

> "Provided that before making any alteration in the local limits of the jurisdiction of any Gram Panchayat, the Government shall, in the prescribed manner, ascertain the views of the people of the area affected by such alteration."

In the instant case the Government has not issued any notification under Section 3 (3) of Bihar Act7 of 1948 excluding any village or part of a village from any Gram Panchayat, thereby making an alteration in the local limits of the jurisdiction of that Gram Panchayat. It was, therefore, not necessary for the Government to ascertain the views of the people of the area affected by such alteration. As provided under sub-section (2) of Section 1 of Bihar Act 7 of 1948, the provisions of that Act are not applicable to an area which has been or may be constitued a municipality or a notified area under the provisions of the Bihar and Orissa Municipal Act, 1922, hereinafter to be called "the Act", The State Government was, therefore, under no obligation to consult the views of the people of the area as required by the proviso to Section 3 (3) of Bihar Act 7 of 19-18 before issuing the notification under the provisions of the Act. For the foregoing reasons I am of the view that there is no substance even in the second contention."

18. Their lordships of the Hon'ble Supreme Court in the case of ***Tulsipur Sugar Co. Ltd. vrs. The Notified Area Committee, Tulsipur,*** reported in ***(1980) 2 SCC 295,*** have held that Section 3 of the U.P. Town Areas Act, 1914 was in the nature of conditional legislation. The power of the State Government to make a declaration under that section is legislative in character because the application of the rest of the provisions of the Act to the geographical area which is declared as a town area is dependent upon such declaration. It has been held as follows:

> "7. We are concerned in the present case with the power of the State Government to make a declaration constituting a geographical area into a town area under section 3 of the Act which does not require the State Government to make such declaration after giving notice of its intention so to do to the members of the public and inviting their representations regarding such action. The power of the State Government to make a declaration under section 3 of the Act is legislative in character because the application of the rest of the provisions of the Act to the geographical area which is declared as a town area is dependent upon such declaration. Section 3 of the Act is in the nature of a conditional legislation. Dealing with the nature of functions of a non-judicial authority, Prof. S. A. De Smith in Judicial Review of Administrative Action (Third Edition) observes at page 163:-
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> > "However, the analytical classification of a function may be a conclusive factor in excluding the operation of the audi alteram partem rule. It is generally assumed that in English law the making of a subordinate legislative instrument need not be preceded by notice or hearing unless the parent Act so provides".
>
> 8. In Bates v. Lord Hailsham of St. Marylebone & Ors. the facts were these: In 1964, the British Legal Association was formed. Out of about 26,000 practising solicitors some 2,900 were members of the association. The Lord Chancellor announced on May, 1, 1972, that the scale of fees under Schedule I to the Solicitors' Remuneration Order, 1883 were proposed to be abolished and that for all conveyancing transactions the system of quantum meruit was to be applied. On June 6, pursuant to section 56 (3) of the Solicitors Act 1957, the Law Society was sent by the committee set up under section 56 (1) a draft of the order proposed to be made under section 56 (2). The draft order was published in The Law Society's Gazette on June 21. The association set out two circulars about the proposed order, the first at the end of May, to all solicitors, and the second on July 17, making a series of accusations against the Lord Chancellor and the Law Society. On July 11, the association sent printed submissions to the statutory committee, requesting that the order should not be approved at this juncture and that the Lord Chancellor should seek further consultations with the profession and professional organisations. On July 14, the association wrote to each member of the committee asking for further time and a deferment of the decision for two months. The Lord Chancellor's reply dated July 18, was that he saw no reason for postponing the meeting or for refraining from making the order in such terms as the committee approved. On July 18, the plaintiff as a member of the national executive committee of the association, took out a writ against all members of the statutory committee, seeking a declaration and an injunction, and on July 19, at 2 P.M. having previously notified the Treasury Solicitor of the intention, he moved the court ex parte, seeking to restrain the committee from holding the meeting which

was to be held at 4.30 P.M. on that day. The motion was dismissed by Megarry, J. and we feel rightly with the following observations:

> "In the present case, the committee in question has an entirely different function: It is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and effected very substantially, are never consulted in the process of enacting that legislation, and yet they have no remedy. Of course the informal consultation of representative bodies by the legislative authority is a commonplace, but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see for example, the Factories Act1961, Schedule 4), I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attact, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative".

9. We are, therefore, of the view that the maxim 'audi alteram partem' does not become applicable to the case by necessary implication.

10. The second limb of the argument in support of the above contention is that the declaration made under section 3 of the Act being in the nature of subordinate legislation, it was the duty of the State Government to follow the same procedure which was applicable to the promulgation of rules under section 39 of the Act. Our attention was drawn in this connection to sub-section (3) of section 39 of the Act which provided that the power to make rules under the said section was subject to the condition of the rules being made after previous publication. We are of the view that it is not possible to equate a declaration to be made under section 3 of the Act with rules made under section 39. Sub-section (3) of section 39 of the Act does not in terms apply to a declaration to be made under section 3 of the Act. The contention that the declaration to be made under section 3 of the Act is in the nature of a subordinate legislation is also not tenable. We may refer at this stage to the decision of the Judicial Committee of the Privy Council in The Queen v. Burah. Section 9 of Act No. XXII of 1869 of the Indian Legislature which camp up for consideration in that case conferred upon the Lieutenant Governor of Bengal the power to determine whether that Act or any part of it should be applied to a certain area within his jurisdiction. It read as under:-

> "9. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extend mutatis mutandis all or

any of the provisions contained in the other sections of this Act to the Jaintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India. Every such notification shall specify the boundaries of the territories to which it applies."

17. We are, therefore, of the view that a notification issued under section 3 of the Act which has the effect of making the Act applicable to a geographical area is in the nature of a conditional legislation and that it cannot be characterised as a piece of subordinate legislation. In view of the foregoing, we hold that the contention of the plaintiff that the declaration made by the State Government under section 3 of the Act declaring the area in which the sugar factory of the plaintiff is situated as a part of the Tulsipur town area is invalid is not tenable."

19. In the case of ***Kamakhya Narain Singh vrs. State of Bihar and ors.,*** reported in ***AIR 1981 Patna 236,*** the Division Bench of the Patna High Court has held that the State Government is competent to create a Corporation by combining two municipalities or by including an area which was not a municipality. It has been held as follows:

"4. Mr. B. C. Ghose, learned counsel appearing for the petitioner, has raised a number of contention which I propose to discuss in detail along with the submissions of the learned Additional Advocate General, appearing on behalf of the State, and Sri Prabha Shanker Mishra, appearing on behalf of respondent No. 2. Firstly, it has been contended by Mr. Ghose that by theCorporation Act 1978 (Act 12 of 1978) the Legislature intended to create a Corporation of such municipal area having a population of two lacs but this could not have been done by combining two municipalities and such amalgamation was not permissible except by express resolution of the two municipalities as provided for under Section 4 (1) (d) of the Municipal Act. He has urged that inclusion of Jagannathpur which was not a municipality, is also illegal. Learned Addl. Advocate General, on the other hand, has submitted that Section 1 of Corporation Act does not limit the power of the State Government to constitute corporation in the area where there is a municipality existing from before nor it envisages that the area sought to be covered must be a part of the municipal town. Thus, according to him, any urban population having an area of two lacs can be converted into corporation and this is the only requirement and the three areas combined together fully satisfy that condition. Here it will be relevant to refer to the relevant provisions of the Act and Sections 1 and 2 of the Act are as follows :

"1. Short Title: extent and commencement :

(1) This Ordinance may be called the Bihar Municipal Corporation Ordinance, 1978.

(2) It shall extend to the whole of the State of Bihar.

(3) It shall come into force in any city having a population of two lacs or more on such date as the State Government may appoint by notification and different dates may be appointed for different cities.

2. Constitution of Corporation and specification of the area thereof:

(1) The State Government may, by notification in the Official Gazette, declare any area including the area of any municipality or notified area constituted under the Bihar and Orissa Municipal Act, 1922 (B. & O. Act 7 of 1922) with such other areas as may be specified therein to be a Municipal Corporation, which shall be known by the name assigned to it by the State Government.

(2) The State Government may from time to time by notification in the Official Gazette alter the limits of such Municipal Corporation so as to include therein on exclude therefrom such area or areas as may be specified in the notification." The word "City" as mentioned in Section 1 (3) has not been defined under the Act. City, according to Chambers' Dictionary, means a large town, a town with a Corporation or a Cathedral, the business centre or original area of a large town. "Town" according to Strouds' 4th Edition, Vol. 5, Item No. 3 is as follows :

> " 'Town' is not restricted by its legal meaning but is expanded popularly and means the space which, for the time being, is covered by, or occupied as accessory to, houses collected together in a mass, and in sufficient number to be ordinarily designated as a Town; and includes unbuilt of lands that may lie within the ambit of such collected mass of houses but no lands outside such ambit though within a borough,"

Learned Additional Advocate General has drawn our attention to a Bench decision of the Calcutta High Court in the case of Balait Sheikh v. State of Bengal (AIR 1952 Cal 753) where the word 'Town' was interpreted by their Lordships in absence of any definition in the Bengal Municipal Act and held as follows (at p. 755):

> "The word 'Town', in absence of any definition in the Act has to be understood in the sense in which ordinary people having the main attributes of the existence of houses in clear proximity, concentration of a large number of people in a comparatively small area and engagement of the bulk of the population in non-agricultural pursuits."

The word 'Town' has, however, a fairly defined connotation to the ordinary man--the main attributes of a Town being the existence of house in clear proximity concentration of a large number of people in a comparatively small area, engagement of the bulk of population in non-agricultural pursuits. This decision gives us some light OQ the subject. Mr. Ghose has, however, relied on the definition of Section 4 (gg) of the Patna Municipal Corporation Act which reads as follows:

> " 'Town' means the local areas comprised within the limits of Patna City Municipality and within Patna is defined in Section 2 of the Patna Administration Act, 1915, immediately before the commencement of this Act and includes any other area specified in a notification under Section 514."

Reading the provisions of Act 12 of 1978 and after going through the relevant provisions it is difficult to accept the submission of Mr. Ghose that only those towns which have a population of two lacs can only be converted into Corporation. Section 2 of the Act clearly says that any area including the area of any Municipality or Notified Area constituted under the Municipal Ac) with such other areas (underlined by me) as may be specified therein to be a Municipal Corporation. The submission of Mr. Ghose is, therefore, contrary to the provisions of the Act which have to be read together and not in isolation in order to give harmonious construction. The provisions of Patna Municipal Corporation (Act) are not at all relevant for consideration and it confines to Patna and its adjoining area only. In my opinion, therefore, Legislature has given power to the State Government to include any area in

order to constitute a Corporation; may be Municipality, Notified Area Committee joining the area with such area as the State Government may think fit and proper. The only basic requirement is that it must have an urban population of two lacs or more. From the affidavit filed on behalf of the State, as I have stated earlier, it is clear that objections were invited from those living in area, sought to be included, and after the expiry of the period notification was issued and no objection was filed Therefore, the first contention of Mr. Ghosej fails."

20. In the case of ***Raghunath Pandey and ors. vrs. The State of Bihar and ors.,*** reported in ***AIR 1982 Patna 1,*** the Division Bench of the Patna High Court has held that inclusion of suburbs bearing urban character does not mean that agriculture of the area is likely to be ruined. It has been also held that it is not necessary to ascertain the opinion of the Panchayat under Section 3(3) of the Bihar Panchayati Raj Act, 1948 and inclusion of Panchayat in Municipal Corporation does not amount to stultifying progress of Panchayat. It has been further held that constitution of Municipal Corporation on dissolution of existing Municipality or Gram Panchayats does not amount to depriving the rights of the seating Municipal Councilors and Members to continue as such for the full term and the principles of natural justice won't be violated. It has been held as follows:

"15. It has further been argued that the inclusion of the Gram Panchayat is in violation of P. R. Act.Section 3 of that Act deals with the establishment and constitution of the Gram Panchayat. The first two Sub-sections deal with initial constitution of the Gram Panchayat and the next two Sub-sections deal with inclusion and exclusion of any portion from that area. For better appreciation I would quote the first four Sub-sections of Section 3 of the P. R. Act. They are as follows:--

"Establishment and constitution of a Gram Panchayat:--

(1) For every village or part of different villages, the Government may, by notification, establish a Gram Panchayat:--

Provided that the Government may, if it thinks fit, establish one Gram Panchayat for a group of contiguous villages or more than one Gram Panchayat in a big village consisting of several Tolas.

(2) The Government shall specify the name and the local limits of the jurisdiction of Gram Panchayat in the notification mentioned in Sub-section (1).

(3) The . Government may, by notification in the official Gazette, alter the local limits of the jurisdiction of any Gram Panchayat by including therein, or excluding therefrom, any village or part of a village and also alter the name of such Gram Panchayat:

Provided that before making any alteration in the local limits of the jurisdiction of any Gram Panchayat, the Government shall, in the prescribed manner, ascertain the views of the people of the area affected by such alteration, (4) Upon the issue of a notification under Sub-section (3), the Gram Panchayat shall be deemed to have been established under Sub-section (1) with its local limits so altered."

It would appear from Sub-sections (1) and (2) that the Government may straightway issue a notification constituting a Gram Panchayat for a group of contiguous villages or may constitute more than one Gram Panchayat in any

big village consisting of several tolas. The name and local limit of jurisdiction will have to be given in the notification. Thus there is no provision for eliciting the opinion of the public regarding the constitution of the Panchayat. But if after constitution any area is sought to be included or excluded the Government have to ascertain the views of the people of the area affected by such alteration as required by Sub-section (3) quoted above. Mr. Mridul has contended that bringing the Panchayat within the fold of the corporation amounts to altering the areas and so it was incumbent on the State Government to ascertain the views of the people of that area. The Advocate General on the other hand has argued that this provision is applicable only where an area is desired to be taken out from one panchayat and put in another panchayat and not in a situation where the entire panchayat is included within a corporation. He has relied upon certain cases where actually some areas from one panchayat were put in another panchayat but instead of issuing one notification of exclusion and inclusion two notifications were made defining the limits of the two panchayats. It was held that in such situation it was not necessary to obtain the views of the people. It all depends upon the notification that is issued. The cases referred to are reported in 1965 B. L. J.R. 227 (Ramautar Mahton v. Sub-divisional Officer, Begusarai 1965 B. L. J. R., 397 (Daroga Singh v. State of Bihar) and 1966 B. L. J. R. 779 (Braalal Prasad v. State of Bihar). The first two are single Judge cases but the third one is a Division Bench. Brijlal Prasad's case was dismissed on the . ground of delay but the earlier two single Bench decisions have also been noticed. Mr. Mridul has challenged these decisions on the ground that there is violation of natural justice by taking recourse to such a method, and merely issuing two notifications in a different garb instead of one, gives the colour of contrivance which is unconstitutional. The learned Advocate General has submitted that if the notification can be supported by the P. R. Act it can never be said that they are unconstitutional until and unless the provision itself held to be ultra vires. The argument of the Advocate General is supported by the decision of this very Court and as such it cannot be said that issuing of notification would be unconstitutional. It would thus follow that the opinion of the Panchayats as or in the manner laid down in Sub-section (3) of Section 3 of the P. R. Act, was not required to be elicited before including those panchayats within the limits of the corporation, and the notification (Annexure 1) is not in violation of any provision of the P. R. Act. Attention was also invited to Article 40 of the Constitution which says that "the State shall take steps to organise village panchayat and endow them with such powers and authority as may be necessary to enable them to function as unit of self-Government". It has been argued that the directive principles require the State to develop panchayat as unit of the self-Government, and hence it would be against the directive principles to obliterate the Gram Panchayat by bringing them within the fold of corporation. The argument is not appealing because it could never be the intention of the constitution, while laying down directive principles, to rule the whole country through panchayats and panchayats alone. If the intention in any act of the State Government be to stultify the progress of the gram panchayat, then of course Article 40 might be attracted but where better privileges are given to particular area, better administration and all round improvement is envisaged in any act, I do not think Article 40 is any

way offended. If of course the constitution of the corporation is held to be unconstitutional the question would be otherwise.

20. Coming to the second point (at pags 9 of the judgment) with the creation of the corporation, the municipality and some gram panchayats have no doubt ceased to function. The Chairman and Members of the Committee as also the Mukhiyas had a right to continue for the period they were elected. They were endowed with certain rights and burdened with certain responsibilities, all of a nature commanding respectful regard from the public. Therefore the consequences they may personally suffer may be civil consequences. The question however is as to whose civil consequences will be taken into account -- those of a few persons who may choose to come to Court of law, or of the mass which is going to be affected or benefited in other words it should be for examination if the general public will be benefited by the corporation or they will suffer on account of it. Whenever any act, even beneficial is done, it is hardly possible to find that somebody has not suffered. If a pitch' road is constructed the builockcart-walas who had a right to carry their own profession suffer. When buses are allowed to ply on the road the ricksha-walas do suffer. When tram-lines are laid, the bus-owners suffer. When circuit Bench of High Court is created at any place the counsel of the parent Court suffer and raise their voice against it When a new school or college is opened, the older institutions suffer, as the students who would have usually gone there, go to new institutions. When a new district is carved out some residents of parent district do suffer. Similar is the case when a new judgship is carved out from an old one. But in all these cases it is the advantage to the general public which is kept in view. If there is a gain to the mass the loss to a few individuals is insignificant. The civil consequences of a few individual should not be considered in isolation, where any act is for benefit to the general public. It was argued that the villagers of the area included within the corporation have their own right of cultivating their lands, which they might loose by bringing the area within the corporation. This argument does not cut any ice, because whether it is a corporation or a municipality or a village, if the land is agricultural no body can be stopped from cultivating it: rather by bringing it under corporation, better facilities of cultivation may be made available to them. In cases like this, therefore, a pragmatic view of the whole thing should be taken. The inspection hole should not be narrow. The Chairman and the Commissioner may also have better chances and better prospects with the corporation coming in. There will be so many electoral posts for which they may contest and those who succeed will certainly have higher status than the present one, What would have happened if the population of Muzaffarpur would have been 2 lakhs? The Corporation Act would have applied straightway, the Chairman and Commissioners would not have been heard at all. even though they would have suffered the same consequence, which they are suffering now. How can the same consequence be civil in one case only to enable them to raise the plea? In my opinion whether it is a case of civil consequence or not should be determined on facts of individual cases and the answer to this question must be given after considering not only the rights of a few but the rights of the general public going to be affected, and for the simple gains of a few the advantage to the mass must not be sacrificed. Taking a pragmatic view of the situation, I am of opinion that the consequences which the petitioners may suffer will be such a small drop in

the ocean, that in the larger interest it should be held that the petitioners also do not suffer from any civil consequence.

22. Thus the impugned notification (Annexure 1) does not offend against the principle of natural justice, on the ground that the petitioners would suffer civil consequences.

24. It is thus clear that in the instant case (a) petitioners do not suffer from any civil consequence, (b) even if they suffer, the law of natural justice will not be attracted, and (c) it is not a case of delegated legislation at all : rather it is a piece of conditional legislation, where law of natural justice does not operate."

21. In the instant case, the Panchayat area has acquired the urban character after the establishment of the industrial units, including Cremica and Nestle and 78 other industrial units. The civic amenities are required to be provided to the area in larger proportion which the Gram Panchayat cannot cater for, taking into consideration its meager resources.

22. Their lordships of the Hon'ble Supreme Court in the case of ***Bhaskar Textile Mills Ltd. vrs. Jharsuguda Municipality and others,*** reported in ***AIR 1984 SC 583,*** have held that while including a village in a municipality, proviso to Section 4(1) of the Orissa Municipal Act, 1950, has no application and it cannot be a ground to challenge the notification. It has been further held that when the objections have been examined by the District Magistrate and Revenue Divisional Commissioner and the Department has agreed and final notification was issued, it could not be said that objections had not been considered by the State Government. It has been held as follows:

" 15. The argument proceeds on the assumption that the proviso to s.4(1) applies. But a bare perusal of the proviso clearly indicates that the requirement is that two-thirds of the adult male population of the town to which it refers should be engaged in non-agricultural ' pursuits. The provision, to our mind, applies not to all the classes of sub-s.(l) of s.4 but it applies only to cl.(a) of sub-s.(l) of s.4, because it is cl.(a) of s.4(1) which talks of town. Therefore, the proviso, in . . Our opinion, has no application to the present case and that cannot be taken to be a ground for challenging the notification for inclusion of village Ektali in the Jharsuguda Municipality. This takes us to the third ground.

16. The appellant had filed an objection under sub-s.(2) of s.4. The said objection was examined by the District Magistrate, Sambalpur and the Revenue Divisional Commissioner (Northern Division), Sambalpur: They overruled the objection treating it to be of general nature. Thereafter, the Community Development and the Panchati Raj (Grama Panchayat) Department were consulted to agree with this proposal, to which they agreed, and it was thereafter that the Urban Development Department issued a final notification dated 12th August, 1975 to include the above village into the municipal limits of Jharsuguda Municipality. The contention of the appellant that the objection had not been considered by the State Government cannot be accepted in as much as the objection is required to be made through the Magistrate of the district. Naturally, the District Magistrate while forwarding the objection to the State Government made his comment. The Revenue Divisional Commissioner intervenes in the channel of communication between the District Magistrate and the State Government and he, therefore, had an occasion to. process the matter. The-State Government while dealing with the matter consulted the. Panchayati Raj

Department and ultimately notified in terms of notification dated 12th August, 1975. In the circumstances it cannot be accepted that the objection filed by the appellant had not been considered by the State Government."

23. Now, as far as proviso to Section 3(1)(iii) of the H.P. Municipal Act, 1994 is concerned, it is for the State Government to take a conscious decision under the proviso after taking into consideration the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as it may deem fit. Thus, there is no merit in the contention of Mr. Ajay Sharma, Advocate, appearing for the petitioner that proviso to Section 3(1) (iii) of the Himachal Pradesh Municipal Act, 1994, has not been taken into consideration.

24. Their lordships of the Hon'ble Supreme Court in the case of ***Baldev Singh and ors. vrs. State of Himachal Pradesh,*** reported in ***(1987) 2 SCC 510,*** have held that affording of hearing to the affected persons is essential prerequisite for constituting notified area. However, it has been further held that hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way. It has been held as follows:

"4. Appellants counsel has raised a more serious issue namely denial of an opportunity of being heard before the notified areas has been constituted Since Section 256 of the Act requires certain aspects to be satisfied before a notified area can be constituted, factual determination had to be made as to whether those statutory conditions were satisfied Ours is a democratic polity. At every level, from the villages up to the national level; democratic institution have been introduced The villages are under Gram Panchayats, urban areas under Municipalities and Corporations, districts are under Parishads for the State the is a Legislature and for the entire country, we have the Parliament People residing within Gram Panchayats have their electoral rights to exercise and in exercise of such rights, they have elected their representatives. Citizens of India have a right to decide, what should be the nature of their society in which they live-agrarian, semi-urban or urban Admittedly, the way of life varies, depending upon where one lives Inclusion of an area covered by a Gram Panchayat within a notified area would certainly involve civil consequences. In such circumstances it is necessary that people who will be affected by the change should be given an opportunity of being heard, otherwise they would be visited with serious consequences like loss of office in Gram Panchayats. an imposition of a way of life, higher incidences of tax and the like.

5. Reliance was placed on two decisions of this Court in support of the appellants' stand that natural justice required an opportunity of being heard to be extended to the people of the area before the administrative decision to constitute the notified area was taken The first is the case of S.L. Kanpoor V Jagmohan and Ors. 1. (1980) 4 SCC 379. That was a case where the committee constituted under the Municipal Act was superseded. This Court held that where the administrative action entails civil consequences, observance of natural justice would be warranted and unless the law excludes the application of natural justice it should be taken as implanted into the scheme. The other is the case of Slate of Orissa v Sridhar Kumar Mallik and Ors.. 2. (1985) 3 SCC 697. where the validity of the action taken under Section 417-A of the Orissa Municipal Act in constituting a notified area was being examined. The Court, referring to the statutory scheme, found :

> The extension of the Orissa Municipality Act to an area other than a municipality is a matter of serious moment to the residents of the area. It results in the provision of amenities and conveniences necessary to civil life and their regulation by a local body. But the Act also provides for the imposition of taxes of different kinds on the residents. The tax structure does not embody an integrated unified impost expressed in a single tax measure. Different kinds of taxes are contemplated by the Act. The scheme set forth in Chapter XXX-A of the Act intends that before the Government extends the operation of the Act to an area under a municipality it must afford an opportunity to the local residents to object to the proposed action. The objections are submitted to the District Magistrate, who forwards them along with his views to the State Government. The State Government must take into consideration all the material before it and decide thereafter what should be the precise area to which the Act should be extended, and indeed whether all the provisions of the Act or only certain specified provisions should be so extended. The possibility of some only of the provisions of the Act being applied to the notified area is evident from the terms in which the grant of power has been conferred on the State Government. Sub-section (1) of Section 417-A specifically envisages that when issuing the notification contemplated therein the State Government must decide whether administrative provision needs to be made "for all or any of the purposes" of the Act in the area proposed to be notified. Unless the proposal formulated in the proclamation made under Sub-section (1-a) of Section 417-A is precise and clear, and indicates with sufficient accuracy the area intended to be notified, and further indicates whether the administrative provision is proposed for all the purposes of the Act or only some of them, and if only some of them then which of them, it will not be possible for the residents to properly avail of the right conferred on them by the statute to make their objections to the proposal of the State Government. We do not see how it can be otherwise.

It is a fact that the Orissa Act provides in clear terms a right of hearing whereas Section 256 of the Himachal Act makes no such provision but the settled position in law is that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, the rules of natural justice would aply. We accept the submission on behalf of the appellants that before the notified area was constituted in terms of Section 256 of the Act, the people of the locality should have been afforded an opportunity of being heard and the administrative decision by the State Government should have been taken after considering the views of the residents. Denial of such opportunity is not in consonance with the scheme of the Rule of law governing our society. We must clarify that the hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way.

7. The appeal is allowed and the impugned notification of 31st March, 1982 constituting the particular notified area is quashed. We make it clear that it is open to the State Government to make a fresh notification after complying with the law and this judgement of ours would not stand in the way of the State Government to do so. Parties are directed to bear their own costs."

25. In the instant case, the objections were called for from the residents of the area. These were also notified in the official gazette on 7.7.2015 and thereafter, the objections were heard in just, fair and reasonable manner. Thus, it cannot be held that there was violation of principles of natural justice.

26. Their lordships of the Hon'ble Supreme Court in the case of ***Sundarjas Kanyalal Bhathiaja and ors. vrs. The Collector, Thane, Maharashtra and ors.,*** reported in ***AIR 1990 SC 261,*** have held that function of the Government while establishing a Corporation is neither executive nor administrative. It is legislative process. The rules of natural justice are not applicable to legislative action plenary or subordinate. It has been held as follows:

> "23. Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the Government in establishing a Corporation under the Act is neither executive nor administrative. Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with,, then, the Court could say no more. In the present case the Government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The Court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for theirs.""

27. Their lordships of the Hon'ble Supreme Court in the case of ***Karnail Singh and another vrs. Darshan Singh and ors.,*** reported in ***1995 Supp.(1) SCC 760,*** have held that amalgamation of two gram sabhas into one is an administrative decision in public interest and if there is some material, the Court would not interfere unless it is vitiated by malafides. It has been held as follows:

> "[6] But the second contention of Shri Manoj merits acceptance. It is seen that the government not only had taken into consideration that there exist a high school, a mini bank and veterinary hospital but also with a view to avoid friction among the people of their respective locations, the government thought it expedient to amalgamate the two gram sabhas into one. It would also be clear that Atma Ram appears to have misused his office and obtained Fictitious and collusive decrees in the names of his supporters and had appropriated valuable 86 acres 2 kanals of the panchayat land for his personal benefit. The government appears to have thought that such a misuse or abuse of the power should be prevented by amalgamating two panchayats. Other corrective measures though may be evolved, the action of the government cannot be said to be unwarranted or illegal or invalid. Atma Ram represents Harigarh and Bhorakh Gram Panchayat is represented by another Sarpanch. It would appear that if a person, having sufficient influence over the people in the one area, when he had managed to secure the valuable gram panchayat property in his name for personal benefit, the government thought it expedient that such misuse or abuse of office could be curbed and such insidious effects could be prevented by amalgamation. The decision taken, thereby, cannot be said to be irrelevant, arbitrary and unwarranted, on the facts of the case. It is seen that the public interest

would be better served for taking appropriate decision by the government either for constituting one or more than one gram sabha areas or amalgamating into an existing one. It is a public policy and an administrative decision taken by the government. It is an administrative action. But the government should have material and should consider the material before it takes the decision. In the absence of any material, it can be said that it is an arbitrary decision taken by the government. But when there is some material before the authority or the government and the same was considered though two views may be possible to be taken on the same material, it must be left to the government to take a decision which unless it is vitiated by mala fides, the court cannot substitute its view to that of the government in constituting two " separate gram sabhas or equally amalgamating the two existing gram panchayats situated in the revenue estate or two contiguous villages with a population of not less than 500.

[7] Mr M. K. Dua, learned counsel appearing for the respondent has stated that the two gram sabhas, created on 30/6/1988, have been properly functioning and that, therefore, the government was not justified in amalgamating the two panchayats into one. We have already stated that it is only an executive policydecision taken by the government to create separate panchayats or to amalgamate the existing gram sabhas. It would not be for the courts to evaluate and decide whether the existence of the two gram sabhas should be continued or further bifurcated or amalgamated. It is also stated in the additional affidavit that Atma Ram had not misused his office nor has taken the properties into his possession and in support thereof relied on the entries from the revenue records. It is further stated that it was done in the year 1966. We cannot appreciate that evidence. The report given by the Director of Panchayats shows that the Sarpanch had misused the office and obtained fictitious decrees. Necessarily the entries in the revenue records would be in the names of spurious persons but that does not conclude that Atma Ram had not misused the office and the circumstance taken by the government cannot be said to be irrelevant or arbitrary."

28. Neither specific malafides have been alleged against a particular person nor that person has been arrayed as a party.

29. Their lordships of the Hon'ble Supreme Court in the case of ***Cantonment Board, Secunderabad vrs. G. Venketram Reddy and ors.,*** reported in ***1995 Supp. (2) SCC 576,*** have held that the word "municipality" has a wide connotation. The Constitution also understands it in a broad sense. Articles 243 P and 243 Q indicate that a Corporation or a Municipal Council or Nagar Panchayat is constituted on the strength of population and the area or place where it is constituted, namely, rural or urban. But, all these three are deemed to be municipality. It has been held as follows:

"3. Section 60 of the Act reads as under:-

"S.60 - General power of taxation:- (1) The Board may impose with the previous sanction of the Central Government in any Cantonment any tax which under any enactment for the time being in force may be imposed in any Municipality in the State wherein such cantonment is situate".

A very perusal of it would indicate that this is a general power of taxation which is enjoyed by the Board which can be exercised with the previous sanction of the Central Government. There was no dispute that the octroi " was levied by the Cantonment Board after obtaining sanction of the Central

Government. But what has been found is that the ambit of the power being restricted to only those taxes which for the time being in force could be imposed by any Municipality in the State wherein such cantonment was situated, the appellant was precluded from imposing octroi as no such octroi was being levied by any Municipality in the State. How the expression, 'Municipality in the State' should be understood? The word 'Municipality' has been defined is Webster's New Dictionary as, 'a town, city or borough which has local self government'. In Black's Law Dictionary it is extended to 'legally incorporated or duly authorised association of inhabitants of limited area for local governmental or other public purposes. A body politic created by the incorporation of the People of a prescribed locality invested with the subordinate powers of legislation to assist in the civil government of the State and to regulate and administer local and internal affairs of the community'. This word thus has a wide connotation. The Constitution also understands it in broad sense. Chapter (IX-A) deals with the Municipality. Clause (e) of Article 243-F defines Municipality to mean, 'an institution of self- government constituted under Article 243-Q' Article 243-Q reads as under:

> "243-Q, Constitution of Municipalities :-
>
> (1) There shall be constituted in every State, -
>
> (a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;
>
> (b) a Municipal Council for a smaller urban area; and
>
> (c) a Municipal Corporation for a larger urban area, b accordance with the provisions of this Part:
>
> Provided....."

This definition indicates that a Corporation or a Municipal Council or Nagar Panchayat is constituted on strength of population and the area or place where it is constituted namely rural or urban. But all the three are deemed to be municipality. A Municipal Corporation with a larger area is as much a municipality as a council with smaller area. The expression, 'Municipality in the State' thus has to be read in broad and larger sense. The Hyderabad Corporation which came into existence in 1956 is as much municipality as any other municipality in the State, Since Corporation is imposing octroi the Board could in exercise of power under Section 60 levy octroi."

30. Their lordships of the Hon'ble Supreme Court in the case of ***Solapur Midc Industries Association and ors. vrs. State of Maharashtra and ors.,*** reported in ***(1996) 9 SCC 621,*** have held that notification enlarging limits of territorial jurisdiction of Municipal Corporation can bring within the municipal limits industrial estate/area even though the same has not yet withdrawn from the purview of Industrial Development Corporation under S. 56 of Maharashtra Industrial Development Act, 1961. It has been further held that the two Acts i.e. Bombay Provincial Municipal Corporation Act, 1949 and Industrial Development Corporation under S. 56 of Maharashtra Industrial Development Act, 1961, operate in different fields and there is no *inter se* conflict between them. It has been held as follows:

> "3. It is not disputed that since the State Government has not yet withdrawn the industrial estate/industrial area concerned from the hold of the Corporation, the provisions of the 1961 Act continue to apply. The

> Preamble thereof is suggestive of its objects sought to be achieved namely the orderly establishment in industrial areas and industrial estates of industries, and to assist generally in the organisation thereof, and for that purpose to establish the Industrial Development Corporation and for purposes connected with the matters therewith. The purpose of the 1949 Act on the other hand, as is suggestive from its Preamble, is to provide for the establishment of Municipal Corporations with a view to ensure a better municipal government of the cities in which municipal corporations are set up. These being the basic differences as to the ambit of the two statutes, the High Court, in our view, rightly arrived at the conclusion that there was inter se no conflict between the two. There may be certain areas such as provision for civil amenities in which there is identity of purpose but these are ancillary and incidental to the main purpose of the respective two statutes. The suggestion drawn from the Assembly debates, to which our attention has been drawn, while passing the 1961 Act, suggestive of the fact that the industrial estates or industrial areas on ripening were meant to be kept under the purview of the 1961 Act until some civic administration in the form of a Panchayat or Municipality could take over is not supported by any statutory provision available in the respective two Acts. As said before the topics of legislation being different, there was no question of their rubbing against each other because being enacted under two different legislative fields."

31. In this case also, the H.P. Panchayati Raj Act, 1994 and H.P. Municipal Act, 1994, operate in entirely different fields.

32. Their lordships of the Hon'ble Supreme Court in the case of ***Saij Gram Panchayat vrs. State of Gujarat and ors.,*** reported in ***(1992) 2 SCC 366,*** have held that while constituting the industrial township out of the rural area, there is no violation of the Constitutional provision regarding local self government for rural areas contained in Part IX of the Constitution where notified industrial areas are converted by notification into industrial townships and also removed from the ambit of Gram Panchayats. There was no violation of Constitutional Scheme of local self-government and the purpose of notification under S. 16 was to avoid dual control and administration. It has been held as follows:

> "16. The contention is based on a misconception about the relationship of the provisions of Parts IX and IXA of the Constitution with any legislation pertaining to industrial development. The Gujarat Industrial Development Act operates in a totally different sphere from Parts IX and IXA of the Constitution as well as the Gujarat Panchayats Act, 1961 and the Gujarat Municipalities Act, 1962 - the latter being provisions dealing with local self Government while the former being an Act for industrial development, and orderly establishment and organisation of industries in a State. The industrial areas which have been notified under Section 16 of the Gujarat Industrial Development Act on 7.9.1993 were notified as industrial areas under the Gujarat Industrial Development Act long back in the year 1972. These industrial areas have been developed by the Gujarat Industrial Development Corporation and they can hardly be looked upon as rural areas covered by Part IX of the Constitution. It is only such industrial areas which can be notified under Section 16 of the Gujarat Industrial Development Act, 1963. If by a notification issued under Section 16, these industrial areas are deemed to be notified areas under the Gujarat Municipalities Act and are equated with industrial townships under the proviso to Clause (1) of Article

> 243Q, the constitutional scheme is not violated. In fact, under Chapter 3 of the Gujarat Industrial Development Act, 1962, the Gujarat Industrial Development Corporation, has been given power, inter alia, to develop land for the purpose of facilitating the location of industries and commercial centres. It has also been given the power to provide amenities and common facilities in such areas including provision of roads, lighting, water supply, drainage facilities and so on. It may do this either jointly with Government or local authorities or on an agency basis in furtherance of the purposes for which the corporation is established. The industrial area thus has separate provision for municipal services being provided by the Industrial Development Corporation. Once such an area is a deemed notified area under the Gujarat Municipalities Act, 1964, it is equated with an industrial township under Part IXA of the Constitution, where municipal services may be provided by industries. We do not see any violation of a constitutional provision in this scheme."

33. The area has become industrial hub. It is necessary for the State Government to provide basic amenities and other facilities to the residents of the area by constituting Nagar Panchayat.

34. Their lordships of the Hon'ble Supreme Court in the case of ***State of Maharashtra and another vrs. Deep Narayan Chavan and others,*** reported in ***(2002) 10 SCC 565,*** have held that the moment the Corporation is constituted lawfully, the elected Municipal Council would cease to function and the Councillors, though elected would have to vacate the office. The apprehension that even in such an event the Municipal Council would continue to function for the balance of its duration of five years under Article 243-U was repelled. It has been held as follows:

> "2. Mr. Lalit, learned counsel appearing for the State of Maharashtra, contends that once a Municipal Council is constituted, then its duration should be five years in accordance with the constitutional provisions contained in Article 243U and, therefore, in the event the writ application is dismissed and the State Government constitutes a Corporation, the Municipal Council will continue to function. This apprehension, in our considered opinion, is misconceived, inasmuch as under Section 341 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 when the whole of the local area comprising a municipal area ceases to be a municipal area, with effect from the date on which such local area ceases to be a municipal area, the Council constituted for such municipal area shall cease to exist or function and the Councillors of the Council shall vacate office. Article 243U of the Constitution unequivocally indicates that every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. The expression "unless sooner dissolved under any law for the time being" would bring within its sweep the provisions of Section 341 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 and therefore the moment the Corporation is constituted in ...3 (3) accordance with law, the elected Municipal Council would cease to function and so also the Councillors though elected will have to vacate the office. In this view of the matter, we are not inclined to interfere with the interim order passed by the Bombay High Court directing holding of election to the Municipal Council."

35. Section 120 of the Himachal Pradesh Panchayati Raj Act, 1994 provides that every Panchayat shall continue for five years from the date appointed for its first meeting and no longer unless sooner dissolved under the Act. Now, as far as Section 140 of the same Act, referred to by Mr. Ajay Sharma, Advocate, for the petitioner is concerned, if at any time, it appears to the State Government or the prescribed authority that a Panchayat is persistently making default or abuse of power etc., it is for the State Government to provide reasonable opportunity to the Panchayat for furnishing its explanation. In the present case, the Gram Panchayat area is being converted into Nagar Panchayat and objections were called from all the members likely to be affected by the impugned notification. Their lordships of the Hon'ble Supreme Court in the case of ***Kamal Jora vrs. State of Uttarakhand and anr.,*** reported in ***AIR 2013 SC 2242,*** have held that when the objections were called from all the persons likely to be affected and the objections were filed and considered, it would be in conformity with the principles of natural justice. Their lordships have held as follows:

> "12. Hence, the first question that we have to decide is whether an opportunity of hearing was granted to the Municipal Council, Haridwar before the two notifications dated 21.7.2011 were issued dissolving the Haridwar Municipality and appointing an administrator under Section 8-AA of the Act. The public notice which was issued on 29.06.2011 soon after the judgment dated 23.06.2011 of the Division Bench of the High Court in Special Appeal No.104 of 2011 is extracted hereinbelow:
>
> > "Under Section 3 sub-section (2) of Uttar Pradesh Municipal Corporation Act, 1959 (U.P. Act No.2 of 1959) (as applicable in the State of Uttarakhand) read with Article 243 U of Part 2, it is the considered opinion of the State Government that smaller Urban Area Nagar Palika Parishad, Haridwar be converted into a larger Urban Area and consequently into a Municipal Corporation, Haridwar.
> >
> > In view of the above, the Chairman of Nagar Palika Parishad, Haridwar, the councilors of Nagar Palika Parishad, Haridwar and the entire public who ordinarily reside in the said area are invited to give their objections and suggestions. The written objections and suggestions should reach the office of Director, Department of Urban Development, Uttarakhand 43/6, Mata Mandir Marg Dharmpur, Dehradun by 11th July 2011. Any suggestion and objection received after the said notified date will not be accepted. On the receipt of the written objections and suggestions, a hearing would be done on 13th July 2011 by Principal Secretary, Urban Development Department, Government of Uttarakhand in the office of Director, Department of Urban Development, Uttarakhand 43/6, Mata Mandir Marg, Dharmpur, Dehradun. The time would be 1.30 P.M. to 4.00 P.M. During the hearing the persons would also be given an opportunity of personal hearing. After receiving such objections and suggestions and after considering the same, the final decision to convert the place into a larger Urban Area will be taken."
>
> It will be clear from the aforesaid public notice dated 29.06.2011 issued by the Government of Uttarakhand that the Chairman of the Haridwar Municipality, the Councilors of Haridwar Municipality and the entire public who ordinarily reside in the area were invited to give their objections and suggestions. It will also be clear from the public notice dated 29.06.2011 extracted above that on receipt of the written objections and

> suggestions, a hearing was to be conducted on 13th July 2011 by Principal Secretary, Urban Development Department, Government of Uttarakhand between 1.30 p.m. to 4.00 p.m. and during the hearing the persons were to be given an opportunity of personal hearing on the objections. By a subsequent corrigendum the date of hearing was altered to 16.07.2011. We further find from paragraph 4 of the order dated 19.07.2011 annexed to the counter affidavit filed on behalf of respondent Nos. 1 and 2 as Annexure C-I that the Principal Secretary Urban Development Department, Government of Uttarakhand has provided an opportunity of hearing to the objectors on their respective objections on 16.07.2011 from 11.00 a.m. to 3.00 p.m. at Kumbh Fair Controlling House, Haridwar and amongst the objectors there were several Municipal Councilors of Haridwar Municipality, namely Dinesh Joshi, Rakesh Prajapati, Yashoda Devi, Leela Devi, Ashok Sharma, Jagdhir Singh, Nikhil Mehta, Idris Ansari, Satya Narayan, Karuna Sharma, Sanjay Sharma, Radhey Krishna, Prabha Ghai and Ram Ahuja. Hence, the appellant, who was the Chairman of the Municipal Council, Haridwar could have also participated in the hearing in support of his objections. We cannot, therefore, find any infirmity in the impugned judgment of the Division Bench of the High Court that an opportunity of hearing was actually given to all persons likely to be affected by the two notifications dated 21.07.2011."

36. The moment the Nagar Panchayat, Tahliwal is constituted, the Gram Panchayat would cease to function and the office bearers of the Gram Panchayat would have to vacate the office.

37. Under Section 268 of the Himachal Pradesh Municipal Act, 1994, it has been stipulated that when a municipal area is constituted under the Act, the State Government may appoint a person to exercise the powers, discharge the duties and perform the functions of the municipality, for a period not exceeding six months or until the municipality is established, whichever is earlier, and he shall for the purpose be deemed to be the municipality. The person, so appointed under sub-section (1) shall comply with such directions as may be given to him by the State Government from time to time for carrying the said purposes.

38. Their lordships of the Hon'ble Supreme Court in the case of ***Municipal Board, Hapur and ors. vrs. Jassa Singh and ors.,*** reported in ***(1996) 10 SCC 377,*** have held that the Legislature of the State may, by law, endow the municipalities powers and authority as may be necessary to enable them to function as institutions of self-government. It has been held as follows:

> "6. Clause (b) thereof provides for the regulation or prohibition of any description of traffic in the streets where such regulation or prohibition appears to the Board to be necessary. It would, thus, be seen that the Board has been empowered statutorily to prescribe the fee for use of the public property vesting in or belonging to the municipality. Even under the recent amendment brought by the Constitution [73rd Amendment] Act, 1992 which came into force w.e.f. April 20, 1993, it imposes the statutory responsibilities on the municipalities. Article 243 - p(d) defines "municipal area" to mean the territorial area of a Municipality as is notified by the Governor. Article 243(a)(i)envisages that subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the municipalities powers and authority as may be necessary to enable them to function as institutions of self- government and such law may contain provisions for the devolution of

> powers and responsibilities upon municipalities, subject to such conditions, as may specified therein, with respect to the preparation of plans for economic development and social justice. Entry 17 of the 12th Schedule provides for public amenities including street lighting, parking lots, bus stops and public conveniences. Thus, the Constitution enjoins the appropriate Legislature to provide for preparation of the plans for economic development and social justice including power to provide public amenities including street lighting, parking lots, bus stops and public conveniences. On such public amenities including bus stops having been provided by the municipalities, as a is statutory duty, it is the duty of the user thereof to pay fee for service rendered by the municipality. The municipality had prescribed the minimum fee to the user at the rate of Re. 0.75 per day or part thereof, for use of any transport vehicle, as mentioned hereinbefore. The High Court is clearly in error in striking down the demand of fee power holding that it is ultra vires their power."

39. Their lordships of the Hon'ble Supreme Court in the case of ***Nagar Panchayat Kurwai and another vrs. Mahesh Kumar Singhal and ors.,*** reported in ***(2013) 12 SCC 342,*** have held that Nagar Panchayat, is a unit of self-government, which is a sovereign body having both constitutional and statutory status and considerable powers are conferred on it to carry out various schemes for economic development and social justice at the local level. It has been held as follows:

> "6. Nagar Panchayat is, therefore, a unit of self-government, which is a sovereign body having both constitutional and statutory status. Article 243Q and 243W(a)(i) and (ii) read with Entry 17, confer considerable powers on the Nagar Panchayat to carry out various schemes for economic development and social justice. Municipalities need funds for carrying out the various welfare activities and for the said purpose, it can always utilize its assets in a profitable manner to its advantage so that various welfare activities entrusted to it under law could be properly addressed and implemented. Bus stand has been provided by the Nagar Panchayat for the benefit of all vehicle owners and the passengers, spending public money. Nagar Panchayat has to get a reasonable return for its upkeep and maintenance."

40. Thus, it shall now be open for the State Government to immediately, after the constitution of the Nagar Panchayat Tahliwal, appoint a person to exercise the powers discharging the duties and perform the functions of the municipality, for a period not exceeding six months in the interregnum.

41. Accordingly, in view of the observations and discussion made hereinabove, there is no merit in this petition and the same is dismissed. The respondent-State is directed to constitute Nagar Panchayat, Tahliwal, within a period of eight weeks from today. The elected members of the Gram Panchayat, Nangal Kalan, shall cease to function immediately after the constitution of the Nagar Panchayat, Tahliwal and the respondent-State is directed to appoint a person to exercise the powers to discharge the duties and to perform the functions of the Municipality for a period not exceeding six months under Section 268 of the Himachal Pradesh Municipal Act, 1994. 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.

Maharishi Markendeshwar University .....Petitioner.

Versus

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

CWP No. 2617 of 2015.
Judgment reserved on: 10.08.2015.
Date of decision: August 24, 2015.

Constitution of India, 1950- Article 226- Government issued a notification providing that admission shall be made on the basis of National Common Entrance Test- petitioner prayed that it may be permitted to admit students on the basis of merit obtained in a written test to be conducted by it - State Government had issued an Essentiality Certificate in which it was provided that institution will have to abide by the guidelines/terms issued by Medical Council of India and State Government and the admission, fee structure and related issues shall be governed as per H.P. Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006- therefore, petitioner/University cannot rely upon the statute to claim a right of admission against the Essentiality Certificate- it is governed by Medical Council of India and is bound to follow the instructions issued by it- petition dismissed. (Para-4 to 15)

Case referred:
Dheeraj versus Maharishi Markandeshwar University and another, ILR 2015 HP (XLV)-II, 561(D.B.)

For the Petitioner : Mr.Bhupender Gupta, Senior Advocate with Ms.Charu Gupta, Advocate.

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

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner is a private University established in the State of Himachal Pradesh as per Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010 (in short 'Act of 2010') enacted by the State of Himachal Pradesh and received the assent of the Governor on 15.09.2010. The establishment of the petitioner has been approved by the Medical Council of India ('MCI') and it is averred that it is the only private University which is offering MBBS course for the academic year 2015-2016 and it, therefore, be permitted to admit students on the basis of the written test to be conducted by it on the basis of merit as provided under the Act of 2010.

2. The petitioner has taken exception to the notification dated 26.9.2014, whereby the respondents have notified that admission criteria in technical/non-technical/professional/non-professional courses for the academic session 2015-16 in various private Universities shall be on the basis of National Common Entrance Test. It is averred that this violates its right to administer its educational institution and thus is

violative of Article 19(1)(g) of the Constitution of India, more especifically when it is a totally unaided educational institution. It is further averred that there is no specific provision under the Indian Medical Council Act, 1956 which may authorize it to direct that the admissions shall be made on the basis of Common National Eligibility-cum-Entrance Test and even if such condition exists, the same would not apply to the petitioner, as this would amount to imposing unreasonable restrictions on the right of the petitioner to administer its educational institution.

3. In response to the petition, the respondents in their reply have stated that Section 31 of the Act of 2010 only provides for admission to the University for Non-Medical Course and does not deal with admissions to the medical institutions of the Universities which in turn are governed by the H.P. Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 (in short 'Act of 2006'). The Government had conveyed its approval on 29.08.2012 to issue 'No Objection Certificate' and 'Essentiality Certificate' to the petitioner subject to the condition that the institution would abide by the guidelines/terms issued by the Medical Council of India and State Government and the admission, fee structure and related issues shall be governed by the Act of 2006. It was further provided that the eligibility criteria for admission shall be such as may be determined and notified by the State Government from time to time and, therefore, once it was decided that the admission shall be made on the basis of the Common Entrance Test in accordance with the merit, then no deviation in the said procedure is permissible and the petitioner will have to abide by such condition.

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

4. At the outset it may be observed that identical issue came up for consideration before this Court in ***H.P. Private Universities Management Association vs. State of H.P. and others, decided on 23rd July, 2014, CWP No. 7688 of 2013,*** wherein 16 private Universities had questioned the competence of the State Government to regulate admissions in professional colleges and this Court upheld the stand of the State Government and held that the State had the authority to regulate the conduct of admissions as this would ensure that the admissions are based on merits. It was further held that no doubt the notification issued by the State directing the filling up of seats on the basis of the Common Entrance Test may have some effect on the autonomy of the private unaided institutions, but that would not mean that their freedom under Article 19(1) (g) of the Constitution has in any manner been violated. It was also held that the freedom contemplated under Article 19(1)(g) does not imply or even suggest that the State cannot regulate educational intuitions in the larger public interest. This Court further held that the autonomy granted to the private unaided institutions cannot restrict the State's authority and duty to regulate academic standards.

5. Notably, this judgment has attained finality, as the SLP preferred against the same was dismissed by the Hon'ble Supreme Court vide its order dated 21.11.2014.

6. The learned Senior Counsel for the petitioner would vehemently argue that in view of Section 31 Maharishi Markandeshwar University (Establishment & Regulation) Act, 2010, it is free to make admissions by conducting its own exams, though strictly in accordance with order of merit.

7. This issue too is no longer *res integra* in view of the judgment rendered by this Bench in ***CWP No. 6664 of 2014 decided on 01.04.2015, titled Dheeraj versus Maharishi Markandeshwar University and another,*** which case in fact related to the

petitioner University. The petitioner therein had sought admission to the University on the basis that instructions of the State Government as issued vide letter dated 5.9.2014 should be quashed, as it had no power to issue such directions in view of Section 31 of the Maharishi Markandeshwar University (Establishment & Regulation) Act, 2010, under which it had been established.

8. This Court reiterated its earlier view taken in *H.P. Private Universities Management* case (supra) and recognized the competence of the State Government to issue instructions and regulate admissions in the petitioner University and it was held:-

> *"7. Admittedly, the respondent No.1-University is a private University established under H.P. Government Act No. 22 of 2010 and approved under Section 22 of the UGC Act, 1956. Under Section 31 of the Maharishi Markandeshwar University (Establishment & Regulation) Act, 2010, it has been provided as under:*
>
> > *"31. (1). Admissions in the University shall be made strictly on the basis of merit.*
> >
> > *(2) Merit for admission in the University may be determined either on the basis of marks or grade obtained in the qualifying examination for admission and achievements in co-curricular and extra-curricular activities or on the basis of marks or grade obtained in the entrance test conducted at State level either by an association of the Universities conducting similar course or by any agency of the State.*
> >
> > ***Provided that admission in professional and technical courses shall be made only through entrance test.***
> >
> > *(3) Seats for admission in the University for the students belonging to SC,ST and OBC and handicapped students, shall be reserved as per the policy of the State Government.*
> >
> > *(4) At least 25% seats for admission to each course shall be reserved for students who are bonafide Himachalis."*
>
> *8. Once a mode of making admissions has been prescribed under Section 31 of the Act ibid, then no provision of the rules, byelaws, regulations or even the prospectus which provide anything contrary to the provisions of Section 31 can prevail. It is settled law that an Act will prevail over the rules, byelaws, regulations and even the prospectus.*
>
> *12. The State Government has clearly observed in its letter dated 6.9.2014 (Annexure R-4) that the provisions of the prospectus wherein it was stipulated that if the requisite number of AIPMT qualified candidates are not available, the resultant vacant seats will be filled up from the candidates on the basis of qualifying examination was contrary not only to the provisions of Section 31 of the Act but also to the MCI guidelines.*
>
> *13. Now insofar as the question regarding competence of the State Government to issue instructions and regulate admissions in private University is concerned, this issue is no longer res integra in view of the judgment passed by this Bench in* ***H.P. Private Universities Management Association vs. State of H.P. and others, decided on 23rd July, 2014, CWP No. 7688 of 2013,*** *wherein as many as 16 private Universities had questioned the competence of the State Government to regulate admissions in professional colleges and this Court held as follows:*

> ***"20.*** *In view of the various pronouncements of the Hon'ble Supreme Court, it can safely be concluded that in a right to establish an institution, inherent is the right to administer the same which is protected as part of the freedom of occupation under Article 19 (1) (g). Equally, at the same time, it has to be remembered that this right is not a business or a trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be "permissible". Even the petitioners concede that they have established the institutions to ensure good quality education and would not permit the standard of excellence to fall below the standard as may be prescribed by the State Government. The petitioners also conceded that the State makes it mandatory for them to maintain the standard of excellence in professional institutions. Thus, ensuring that admissions policies are based on merit, it is crucial for the State to act as a regulator. No doubt, this may have some effect on the autonomy of the private unaided institution but that would not mean that their freedom under Article 19 (1) (g) has in any manner been violated. The freedom contemplated under Article 19 (1) (g) does not imply or even suggest that the State cannot regulate educational institutions in the larger public interest nor it be suggested that under Article 19 (1) (g), only insignificant and trivial matters can be regulated by the State. Therefore, what clearly emerges is that the autonomy granted to private unaided institutions cannot restrict the State's authority and duty to regulate academic standards. On the other hand, it must be taken to be equally settled that the State's authority cannot obliterate or unduly compromise these institutions' autonomy. In fact it is in matters of ensuring academic standards that the balance necessarily tilts in favour of the State taking into consideration the public interest and the responsibility of the State to ensure the maintenance of higher standards of education.*
>
> ***23.*** *The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in* ***Visveswaraiah Technological University*** *(supra) and reiterated in* ***Mahatma Gandhi University*** *(supra)."*
>
> *The judgment passed by this Court has attained finality inasmuch as the SLP preferred against this judgment has been dismissed by the Hon'ble Supreme Court on 21.11.2014."*

9. At this stage, we may also notice that the State Government vide letter dated 29.8.2012 had issued the 'Essentiality and Feasibility Certificate/No Objection Certificate', but subject to certain terms and conditions, which include:-

"1. The Institution concerned will have to abide by the guidelines/terms issued by the Medical Council of India and State Government;

2. The admission, fee structure and related issues shall be governed as per "The H.P. Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006".

10. Undoubtedly, the petitioner is an University established under a statute, but it cannot fall back on a self serving provision of its statute to claim a right of admission, which is in violation of the H.P. Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 and against the "Essentiality and Feasibility Certificate/No Objection Certificate" issued vide letter dated 29.8.2012.

11. Moreover, even if the provisions of Section 31 of the Act are taken into consideration, then the proviso appended thereto makes it absolutely clear that the same has no application to admissions in professional and technical courses which can be made only through entrance test and the same reads thus:

"***Provided that admission in professional and technical courses shall be made only through entrance test."***

12. Indisputably, the petitioner institution has been established and is governed by the instructions issued by the Medical Council of India and the relevant provision as contained in clause 5 thereof reads thus:-

"5. Selection of students: the selection of students to Medical College shall be based solely on merit of the candidate and for determination of the merit, the following criteria be adopted uniformally throughout the country;

(1) In States having only one Medical College and one University/Board/Examining body conducting the qualifying examination, the marks obtained in such qualifying examination may be taken into consideration;

(2) In States having more than one University/Board/Examining Body conducting the qualifying examination (or where there is more than one Medical College under the administrative control of one authority) a competitive Entrance Examination should be held so as to achieve a uniform evaluation as there may be variation of standards at qualifying examinations conducted by different agencies;

(3) Where there are more than one College in a State and only one University/Board conducting the qualifying examination, then a joint selection Board be constituted for all the colleges;

(4) A competitive entrance examination is absolutely necessary in the case of institution of all India character."

13. The aforesaid clause makes its abundantly clear that an entrance exam is absolutely necessary in case the institution is of all India character and therefore, no exception to the same can be taken, because there can be no better system of adjudging merit than an exam conducted by the Centralized Agency, that too on all India basis, wherein a common level playing field is available to all the candidates and the admission is further based on an uniform process.

14. The learned Senior Counsel for the petitioner would then argue that the instructions and guidelines issued by the respondents could at the best be imposed and

applied to the seats falling under the State quota and it had no authority to impose any restriction on the seats falling to the share of the Management.

15. We are afraid that even this contention of the petitioner cannot be acceded to as there cannot be two different modes of admissions for the same course or else the same would *per se* be discriminatory.

16. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J

Painchu Ram & Ors. .....Appellants/defendants.

VERSUS

Hoshiar Singh & Anr. .....Plaintiffs/Respondents.

RSA No.24 of 2004.
Reserved on: 18.08.2015.
Decided on: 24/08/2015.

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit seeking to restrain the defendants from raising construction or changing its nature till it is legally partitioned- it was pleaded that suit land is valuable and is located adjacent to PWD road- partition proceedings are pending and defendants have no right to raise construction or change its nature- defendants pleaded that suit land was in possession of 'H' who inducted father of the defendants as occupancy tenant- he became owner on the commencement of Punjab Occupancy Tenant Vesting of Proprietary Right Act, 1952 – record showed that proceedings for partition are pending before Learned A.C. Ist Grade- merely because co-owner is in exclusive possession will not give him right to use the land in a manner inconsistent with the rights of other co-owners- they cannot raise construction inconsistent with the rights of other co-owners- appeal dismissed. (Para-10 to 13)

For the Appellants: Mr.Sanjeev Kuthiala, Advocate.
For the Respondents: Mr.N.K.Thakur, Sr.Advocate with Mr.Jagdish Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal has arisen out of the judgment and decree rendered by the learned first appellate Court on 08.10.2003 in Civil Appeal No.40 of 2000 whereby the learned first appellate Court affirmed the judgment and decree rendered by the learned trial Court on 26.2.2000 in Case No.227/94 and consequently dismissed the appeal preferred by the defendants/appellants.

2. The plaintiffs had instituted a suit for permanent injunction against the defendants for restraining the latter from raising any construction and changing the nature of land measuring 553-88 square meters comprised in Khewat No.111 Min Khatauni No.335 Min bearing Khasra No.5101 situated in village Daulatpur Chowk, Tehsil Amb, District Una,

H.P. till partition of the suit land held by the parties at lis takes place. The learned trial Court decreed the suit of the plaintiffs. The defendants standing aggrieved by the rendition of the trial Court instituted an appeal before the learned District Judge, Una assailing the findings recorded by the trial Court. The District Judge Una on an appraisal of the material on record concurred with the findings and conclusions recorded by the trial Court. Consequently, he affirmed the judgment and dcree rendered by the learned trial Court. The defendants are aggrieved by the renditions of both the Courts below, hence, have instituted the instant appeal before this Court for reversing the concurrently arrived findings and conclusions of both the Courts below.

3. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs filed a civil suit before the learned trial Court for permanent injunction restraining the defendants from raising any construction and changing the nature of the land measuring 553-88 square meters comprised in Khewat No.111 min, Khatauni No.335 min, Khasra No.5101 as entered in the Khatauni Bandobast for the year 1992-93 situate in village Daulatpur Chowk, Tehsil Amb, District Una, H.P. till partition. The plaintiffs have contended that the suit land is jointly owned and possessed by the parties along with other co-sharers and the same is located adjacent to the PWD road. The suit land is very valuable and partition proceedings with regard to the suit land are pending before Assistant Collector 1st Grade, Amb and the same is at the final stage. The plaintiffs have also been allotted the land out of the suit land during partition by the field staff. It is averred that the defendants have no right to change the nature of the suit land till partition. The defendants are threatening to raise construction so as to nullify the separate Kuras prepared by the settlement field staff for the purpose of partition. Hence, the suit was filed for seeking the relief(s), mentioned above.

4. The suit of the plaintiffs was resisted by the defendants by filing written statement taking preliminary objections regarding lack of maintainability, estoppel and the suit being bad for non-joinder of necessary parties. On merits, it has been contended that the suit land was never in possession of the plaintiffs or their predecessor. In fact, the suit land was in possession of Harnam Singh alias Harnama who inducted Banna father of the defendants as occupancy tenant over the suit land vide registered deed of 16.6.1909. Banna was put in possession and thereafter father of the plaintiffs Lal Singh used to receive rent of the suit land. Banna was occupancy tenant over the suit land and has become owner under the provisions of Punjab Occupancy Tenant Act, 1952. Now the plaintiffs are neither owners nor in possession of the suit land. The answering defendants have their abadi near the suit land which is part of old Khasra Nos.1357 and 2306. The plaintiffs had filed partition proceedings without ascertaining the true facts. The defendants have denied the averments made in other paras of the plaint.

5. The plaintiffs filed replication to the written statement of the defendants, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments made in the plaint.

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

1. Whether the plaintiffs are entitled to the relief of injunction, as prayed for? OPP
2. Whether the defendants were earlier in possession of the suit land as occupancy tenants and they have become owners of it, as alleged? OPD
3. Whether the suit is not maintainable? OPD

4. Whether the plaintiffs are estopped by their acts and conduct to file this suit? OPD
5. Whether the suit is bad for non-joinder of necessary parties? OPD
6. Relief.

7. On an appraisal of the evidence, adduced before the learned trial Court, it decreed the suit of the plaintiffs. In appeal, preferred by the appellants/defendants before the learned first Appellate Court, against the judgment and decree of the learned trial Court, the learned first Appellate Court affirmed the findings, recorded by the learned trial Court and consequently, dismissed the appeal preferred by the defendants/appellants.

8. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by both the Courts below. When the appeal came up for admission on 29.04.2005, this Court, admitted the appeal instituted by the defendants/appellants against the judgments and decrees rendered by the Courts below, on, the hereinafter extracted substantial questions of law:-

1. Whether the learned Courts below have misread and mis-appreciated oral and documentary evidence on record, especially the statements of PW-1, DW-1, Ext.P-1, Ext.D-1 to Ext.D-39, Ext.D-41, Ext.D-42 and Ext.D-2 to Ext.D-37?
2. Whether the occupancy tenant inducted by a co-owner on the basis of an agreement and for construction of rent, on the enactment of the Punjab Occupancy Tenant, Vesting of Proprietary Right, 1952 would become owner of the land?
3. Whether a suit for injunction can be brought by a person not in possession on the averments that the said person is a co-owner despite the revenue entries to the contrary as also the pleadings of ouster and complete possession by the other side?

Substantial Questions of Law No.1 to 3:

9. Since all the aforesaid extracted substantial questions of law are entwined, hence, they being interlinked, necessitate a conjoint/cumulative decision.

10. The suit land is comprised in Khasra No.5101. For rendering a determination qua whether extantly the suit land to which Khasra No.5101 is ascribed in Ext.P-1 Jamabandi for the year 1992-93 stands un-partitioned or hence it is an undivided holding, an allusion to Ext.P-1 unravelling the factum of the plaintiffs Hoshiar Singh and Sukh Dev along with real brothers Rajinder Singh and Rachhpal Singh therein holding 9 shares out of 18 shares whereas the remaining 9 shares being held as owners by Lekh Raj, Kashmir Singh and Waryam Singh etc. as Bayan i.e. vendors under whom the defendants herein stand recorded as *Mustrian* constrains an apt inference that extantly the suit land is held jointly by the parties at lis. Uncontrovertedly, proceedings for partition of the suit land are pending before the Assistant Collector 1st Grade, Amb. Given the pendency of proceedings for partition of the suit land before the Assistant Collector 1st Grade, Amb obviously no conclusion can be formed at this stage that they have hence attained consummation or that the hitherto undivided status of the suit land has begotten severance of its jointness by its being partitioned by metes and bounds. In sequel, with the jointness of the undivided holding comprised in Khasra No.5101 having remained undismembered by its partition, the plaintiffs/respondents along with other recorded co-owners hold it jointly. Any undivided holding entails application to it of the rule of joint tenancy whereby each of

the co-owner in the undivided holding has unity of title and community of possession with the other co-owners. The learned counsel for the defendants/appellants vehemently endeavours to repel the right of the plaintiffs/respondents to seek a decree of permanent injunction restraining the former from carrying out construction on the suit land thereby changing its nature on the score of the defendants/appellants having held exclusive possession of the suit land continuously yet since 1907-08 as apparent from a perusal of the Jamabandi apposite to the years aforesaid. The evolution of exclusive possession of the defendants/appellants of the suit land is embedded upon Ext.D-1 with a candid communication therein of the original co-owner therein one Harnam Singh @ Harnama having created tenancy rights qua his share in the undivided holding in favour of Banna, the predecessor-in-interest of the defendants. The entry of Banna, the predecessor-in-interest of the defendants/appellants, as a tenant qua the share of original co-owner Harnam Singh @ Harnama in the undivided holding as occurring in Jamabandi for the year 1907-08 stands constantly besides consistently reflected in the subsequent Jamabandis for the years 1916-17 Ext.D-40, for the year 1956-57 Ext.D-41 and for the year 1977-78 Ext.D-42. However, in Ext.D-43 Jamabandi for the year 1990-91, the successors-in-interest of Banna who are the defendants/appellants stand reflected therein as Mustrian qua the suit land. The factum of the predecessor-in-interest of defendants/appellants one Banna holding the share of Harnam Singh @ Harnama in the undivided holding as a tenant gains succor from Ext.D-39 which is the Misal Haquiat for the year 1913-14. The documentary evidence as alluded to herein-above amplifyingly pronounces the fact that since 1907-08 in pursuance to Ext.D-1, the predecessor-in-interest of the defendants/appellants Banna had continuously thereafter held the share of Harnam Singh @ Harnama in the undivided holding as a tenant besides the documentary evidence conveys the exclusivity of possession of the suit land by Banna during his life time and such exclusivity of possession of the suit land on his demise continuing with the defendants/appellants. On the strength of the aforesaid manner of exclusivity of possession of the appellants/defendants of the suit land comprised in Khasra No.5101, the learned counsel for the defendants/appellants foists an argument that hence the suit for permanent injunction for whose attaining success proven possession of the suit land by the plaintiffs/respondents was both imperative as well as a *sine qua non,* whereas when the plaintiffs/respondents continuously since 1907-08 through their predecessor-in-interest never held its possession or on the latters demise do not either hold or enjoy its possession contrarily when the defendants/appellants rather held in the manner aforesaid besides now hold its exclusive possession while constituting non emanation of proof of the aforesaid indispensable tenets, was dismissable. In aftermath, the learned counsel for the defendants/appellants concerts before this Court that the according of a decree of permanent injunction in favour of the plaintiffs/respondents is interferable by this Court. Even though the documentary evidence on record bears out the submission addressed before this Court by the learned counsel for the appellants/defendants especially when no cogent evidence of probative worth has been adduced by the plaintiffs/respondents to dislodge the presumption of truth carried by the revenue entries constituted in the afore-referred exhibits displaying the exclusivity of possession of the suit land of the predecessor-in-interest of the defendants/appellants and on his demise of the defendants/appellants thereon, nonetheless the mere exclusivity of possession of the predecessor-in-interest of the defendants/appellants of the suit land and on his demise of the defendants/appellants thereon, cannot tantamount to sequelling an inference from this Court that the rule of joint tenancy embodying the canon of unity of title and community of possession inhering in each of the co-owners in the joint land/undivided holding, stands usurpation**.** Apparently also the documentary evidence alluded to herein-above portrays that only the share of one of the co-sharers in the undivided holding inasmuch as of Harnam Singh @ Harnama, was encumbered with the tenancy of the predecessor-in-interest of the defendants/appellants,

which encumbrance of the share of Harnam Singh @ Harnama in the undivided holding with the tenancy of the predecessor-in-interest of the defendants/appellants stands now continued in favour of the defendants/appellants. Concomitantly, the share of the predecessor-in-interest of the plaintiffs/respondents and on his demise their share in the undivided holding cannot be foisted with the encumbrance of tenancy of Banna, the predecessor-in-interest of the defendants/appellants besides such encumbrance on his demise subsisting in the defendants/appellants, especially when (a) Ext.D-1 does not portray the factum of the predecessor-in-interest of the plaintiffs/respondents having permitted his share in the undivided holding with Harnam Singh @ Harnama to be subjected to creation of tenancy rights therein in favour of the predecessor-in-interest of the defendants/appellants (b) the imminent reflection in the documentary evidence alluded to herein-above of the plaintiffs/respondents holding the suit land jointly along with other recorded co-owners under whom the defendants/appellants hold the suit land as Mustrian which reflections therein while enjoying a presumption of truth attain finality and conclusiveness especially when the presumption aforesaid imputed to them stand undisplaced for want of adduction of cogent evidence by the defendants/appellants. As a corollary begetting an inference that the plaintiffs/respondents hold the suit land jointly along with other recorded co-owners under whom the defendants/appellants hold the suit land as Mustrian. In aftermath, with conclusiveness being imputed even qua the reflections in the apposite record qua the suit land, of the plaintiffs/respondents holding the undivided suit land jointly along with other recorded co-owners under whom the defendants/appellants hold it as Mustrian, naturally then, the application of the rule of joint tenancy with its fullest vigour to the undivided holding is the ensuing effect thereof. Hence the exclusivity of possession of the suit land by the defendants/appellants through their predecessor-in-interest Banna since 1907-08 and on his demise such exclusivity of its possession subsisting in them has to give way to the application besides invocation of the rule of joint tenancy qua an undivided holding as the suit land is, besides the concomitant underlying tenet thereof of each of the co-owners in the undivided holding enjoying unity of title and community of possession with the other co-owners warrants its too holding sway even if a part of the undivided holding is held in exclusive possession by one or more of the recorded co-owners or by the Mushtrian under them as the defendants/appellants are. Even though the said rule of joint tenancy applicable to an undivided holding may appear to fade and stand eclipsed by the factum of the predecessor-in-interest of the defendants/appellants holding uninterrupted exclusivity of possession of the suit land and on his demise the latter extantly holding it, yet permitting such waning or eclipsing of the rule of joint tenancy applicable to an undivided holding as the suit land is, would have the effect of extinguishing the rights of the plaintiffs/respondents as co-owners in the undivided holding, besides would give latitude to co-owners/Mushtrian as the defendants/appellants are while theirs holding exclusive possession of any part of the undivided holding to use it in a manner inconsistent with the compatible rights of other co-owners therein. In holding that when the rule of joint tenancy stands applicable to an undivided holding as is the suit land and with its embodying the salient canon of unity of title and community of possession inhering in the recorded co-owners qua the suit land, as a corollary the holding of exclusive possession of the suit land by the defendants/appellants in the manner aforesaid is to be construed to be constructive possession for all recorded owners. Concomitantly negating the assertion by the defendants/appellants to appropriate any part of the joint holding to their exclusive user when its jointness yet remains unsevered. Ensuingly, when the defendants/appellants proceed to, even when the jointness of the undivided holding remains undismembered by its having been partitioned by metes and bounds whereupon the suit land comprised in Khasra No.5101 stands allotted to those co-owners under whom the defendants/appellants are Mushtrian, in the garb of mere exclusivity of its possession by

them especially when such possession for reasons aforesaid is possession held by them constructively for the plaintiffs/respondents along with other recorded co-owners, use without the consent of the plaintiffs/respondents, a valuable and coveted portion thereof for raising construction in derogation of besides in inconsistence with the compatible rights of the plaintiffs/respondents therein. Any countenancing by this Court of the above concert of the defendants/appellants obviously would cause a jolt to the principle of joint tenancy applicable to an undivided holding. Moreover, the aforesaid manner of exclusivity of possession of the suit land by the appellants/defendants cannot per se connote evidence of complete ouster of the plaintiffs/respondents from the suit land, moreso, when no evidence of vigour and potency has been adduced that in the defendants/appellants holding exclusive possession of the suit land in the manner aforesaid had intended to while carrying an *animus possidendi* usurp the right of the plaintiffs/respondents in the suit land by hence completely ousting them.

11. Even though the defendants/appellants on the score of their predecessor-in-interest having purportedly held the suit land as an occupancy tenant since 1907-08, as such, with the Punjab Occupancy Tenant, Vesting of Proprietary Right, 1952 contemplating conferment of proprietary rights on an occupancy tenant, in sequel with the aforesaid having then acquired by statutory operation proprietary rights qua the suit land is contended to estop the plaintiffs-respondents to claim any rights as co-owners qua the suit land. However, the said submission does not carry much force in the face of DW-1 having in his testimony disclosed that their predecessor-in-interest has purchased the suit land from Harnama. Consequently, when oral evidence on record constituted in the testimony of DW-1 is in conflict, with the propagation of the defendants besides with the espousal of the defendants/appellants of their predecessor in interest while his being an occupancy tenant qua the suit land his having under the Punjab Occupancy Tenant Vesting of Proprietary Right, 1952 contemplating statutory vestment of proprietary rights in an occupancy tenant acquired title thereon, hence renders the said submission to capsize nor renders dispensable the enjoined necessity of the undivided holding being dismembered of its jointness by its partition.

12. The view as taken by both the Courts below is reasonable and based on a proper appreciation of material on record and does not suffer from any perversity or absurdity nor also warrants any interference by this Court. Substantial questions of law accordingly answered.

13. The result of the above discussion is that the appeal, preferred by the defendants/appellants, is dismissed and the judgments and decrees, rendered by the learned Courts below, are affirmed and maintained. However, the parties are left to bear their own costs. All pending application(s) shall also stand dismissed. Records be sent back forthwith.

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

Ram Dittu (Now deceased) through LRs. ..Appellants.

Versus

Ram Dass (Now deceased) through LRs. ..Respondents.

RSA No.534 of 2003
Reserved on: 17.08.2015
Date of decision: 24th August, 2015.

Specific Relief Act, 1963- Sections 34 and 28- Plaintiff pleaded that deceased had executed a Will in his favour – defendant No. 3 got himself recorded to be the owner in possession, on the basis of gift deed- defendants pleaded that Will set up by the plaintiff was a forged Will- the validity of the Will was upheld by the trial Court but this judgment was reversed in the appeal- it was duly proved that Will was revoked by execution of a validly executed and registered revocation deed- appeal dismissed. (Para-8 to 11)

For the appellants: Mr.K.D.Sood, Sr. Advocate, with Mr.Mukul Sood, Advocate.
For the respondents: Mr.Rajiv Jiwan, Advocate, for respondents No.1(a) to 1(g) and 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant appeal has been preferred before this Court by the plaintiffs, who stand aggrieved by the rendition of the learned District Judge, Bilaspur, whereby the appeal instituted before him by the defendants/respondents herein against the judgement and decree of the learned Sub Judge, 1st Class, Bilaspur, whereby the learned Sub Judge, 1st Class, Bilaspur, decreed the suit of the plaintiff for declaration as well as for permanent injunction qua the suit land, stood accepted. Besides, the learned District Judge, Bilaspur, while accepting the appeal preferred before him by the defendants/respondents had also reversed the decree of possession qua possession accorded in favour of the plaintiff/appellant by the learned Sub Judge 1st Class, Bilaspur qua possession of Khasra No.115 measuring 0-1 biswas.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff Ram Dittu on 18.11.1992 had instituted a civil suit for declaration with consequential relief of permanent injunction against the defendants No.1 to 4 in the Court below on the allegations that one Shri Lachhman son of Shri Hiru had been owner in possession of land described in Khewat/Khatoni No.69/84, Khasra No.118, 119, 136, 141, 152, 454, 115, 139, measuring 3-5 bighas situated in revenue estate Dhabeta, Pargana Fatehpur, Tehsil Shree Naina Devi Ji, District Bilaspur. Shri Lachhman on 3.5.1985 in sound disposing state of mind and body had executed his last and final Will Ext.PA of his estate in favour of the plaintiff. Shri Lachhman had died on 10.8.1992. After the death of Shri Lachhman, the plaintiff had been owner in possession of the suit land. The defendant No.3 Ram Murti, in collusion with officials of the revenue department, had got himself recorded in possession of Khasra No.115, measuring 0-1 biswa. In the books of Collector, it had been recorded that Shri Lachhman had gifted Khasra No.115 in favour of defendant No.3. The gift is contended to be illegal and without jurisdiction as the value of Khasra No.115 was Rs.50,000/-. In collusion with defendants No.1, 2 and 4, the defendant No.3 wanted to grab the suit land. The defendant No.3 had started representing that defendants No.1 and 2 were legal heirs of Shri Lachhman. The defendant No.3 was stated to be carrying much influence. The plaintiff was a poor person. The Tehsildar had refused to sanction the mutation of the suit land in favour of the plaintiff on the strength of registered Will Ext.PA. The defendants No.1 to 4 had started interfering with the ownership and possession of the plaintiff in the suit land. The plaintiff had sought declaration of his ownership and possession of the suit land. The defendants No.1 to 4 were sought to be restrained from interfering with the ownership and possession of the plaintiff of the suit land by issuance of a decree of perpetual injunction. Alternatively, the plaintiff had sought relief of possession.

3. The suit of the plaintiff was resisted by defendants No.1 and 2 on the grounds of maintainability, improper valuation of the suit for the purpose of court fees and

jurisdiction, want of jurisdiction, in preliminary objections. In reply to paras on merit, the defendants No.1 and 2 had admitted the ownership and possession of Shri Lachhman son of Shri Hiru of the suit land. It had been averred that the alleged Will set up by the plaintiff had been revoked by Shri Lachhman vide registered revocation deed Ext.DW-4/A on 25.6.1992. As such, after the death of Lachhman, the plaintiff could not be treated legal heir of Shri Lachhman. The plaintiff had not been owner in possession of the suit land. The defendants No.1, 2 were legal heirs of Shri Lachhman. After his death, the defendants No.1 and 2 had been owners in possession of the suit land. As such, the question of interference of defendants No.1 and 2 with the possession of the plaintiff of the suit land could not arise for consideration. The plaintiff was stated to have started interference with the ownership and possession of defendants No.1 and 2 of the suit land. The defendants No.1 and 2 had instituted counter claim for restraining the plaintiff from interfering with their ownership and possession of the suit land. The plaintiff was not entitled to any relief muchless to the discretionary relief of permanent injunction. The defendants Nos.3 and 4 had also resisted the suit. The defendant No.3 had denied having manipulated the transfer of khasra No.115, measuring 0-1 biswas from Sh.Lachhman in his favour by illegal means. The defendant No.3 had denied having connived with the officials of the revenue department in any way. It had been contended that the defendant No.3 was an attesting witness of revocation deed Ext.DW4/A of 25.6.1992. The plaintiff had instituted false and frivolous suit against defendant No.3. The plaintiff was not entitled to any relief against defendants No.3 and 4.

4. The plaintiff had filed written statement to the counter claim of defendants No.1 and 2. The plaintiff had also filed replication to the written statement of the defendants Nos.1 to 4 and had reiterated his ownership and possession of the suit land on the strength of registered Will of 3.5.1985 Ext.PA. Sh.Lachhman had not revocated the Will.

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

1. Whether the suit in the present form is not maintainable, as alleged? ….OPD.
2. Whether the suit is properly valued for the purposes of Court fees and jurisdiction? ….OPP.
3. Whether deceased Lachhman executed a valid Will in favour of the plaintiff in respect of the suit land?…OPP.
4. Whether the Will dated 3.5.1985 executed by Lachhman deceased in favour of the plaintiff stands revoked by testator on 25.6.1992, as alleged and if so, its effect? …OPD.
5. Whether this Court has no jurisdiction to hear and decide the suit as alleged? …OPD.
6. Whether the plaintiff is entitled to the permanent injunction as prayed for? …OPP.
7. Whether defendants Nos.1 and 2 have been coming in possession of the suit land after the death of Lachhman by way of natural succession, as alleged in Counter claim? …OPD.
8. Whether the defendants No.1 and 2 are entitled for the permanent injunction, as prayed for? …OPD.
9. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff whereas the learned District Judge, Bilaspur, had allowed the appeal preferred before him by the defendants/respondents.

7. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court, in, its impugned judgment and decree. When the appeal came up for admission on 24.12.2003, this Court, admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether the impugned judgement and decree of the learned first Appellate Court is based on misreading of oral and documentary evidence, particularly revocation deed Ext.DW-4/A?
2. Whether the learned first Appellate Court misread and misconstrued the evidence to conclude that Smt.Jhalli was the sister of deceased Lachhman and such finding is based on surmises and conjectures and inadmissible evidence?

Substantial questions of law No. 1 & 2:

8. The predecessor-in-interest of the plaintiffs/appellants herein one Ram Dittu was the son of the brother of father of deceased testator Lachhman, whose estate on his demise opened for succession. The aforesaid Ram Dittu on the demise of deceased Lachhman stakes title to the suit property on the strength of Will Ext.PA purportedly executed in his favour by deceased Lachhman. The learned Sub Judge 1st Class, Bilaspur, had imputed legitimacy besides concluded that the Will propounded by Ram Dittu, predecessor-in-interest of the appellants herein comprised in Ext.PA was validly and duly executed qua his estate by deceased testator Lachhman. The conclusion qua validity and due execution of Will Ext.PA in favour of Ram Dittu predecessor in interest of the plaintiff was founded upon the factum of the defendants-respondents in their written statement having admitted the factum of its valid and due execution qua his estate by deceased testator Lachhman. The learned District Judge, Bilaspur, while testing the fervor and tenacity of the aforesaid conclusion formed by the Sub Judge 1st Class qua Ext.PA acquiring probative force constituted in the fact of its valid and due execution having been admitted by the defendants in their written statement had on a discerning and piercing besides an in depth analysis of the pleadings of the parties detected an inherent fallacy in the conclusion aforesaid formed by the Sub Judge 1st Class, Bilaspur. The learned District Judge, Bilaspur, in the endeavour to test the sinew of the aforesaid reasoning attributed by the learned Sub Judge 1st Class, Bilaspur, in imputing legitimacy besides validity to Ext.PA had adverted to the contents of paragraph 2 of the plaint where the plaintiff had averred that on 3.5.1985 deceased testator Lachhman had executed a Will qua his estate in his favour. Besides he proceeded to allude to the corresponding para of the written statement instituted by the defendants to the aforesaid averments, a perusal whereof unraveled the factum of the defendants having denied the factum aforesaid averred therein by the plaintiffs, besides when the defendants 1 and 2 contended that the deceased testator Lachhman had revoked Ext.PA, the latter contention when construed in entwinement with the defendants in their written statement denying paragraph 2 of the plaint proclaiming the factum of Ext.PA having been validly executed qua his estate by deceased testator Lachhman in favour of the plaintiff, was concluded by the learned District Judge, Bilaspur to be not fostering any conclusion as erroneously formed by the learned Sub Judge 1st Class, Bilaspur that the defendants while theirs having in their response to the apposite averment in the pleadings of the plaintiff constituted in paragraph No.2 of the plaint admitted the valid and due

execution of Ext.PA, hence, the factum of valid and due execution of Ext.PA stood substantiated as well as established. The said reasoning as adopted by the learned District Judge, Bilaspur in discarding besides benumbing the reasoning afforded by the learned Sub Judge 1st Class in imputing probative credence to Ext.PA, does not suffer from any infirmity. Moreover, the mere fact of the defendants in their written statement having espoused the factum of, revocation deed constituted in Ext.DW-4/A to be ousting the probative worth or legal efficacy of Ext.PA also cannot per se be construable to be connoting their acquiescence qua the factum of Ext.PA, having been validly and duly executed qua his estate by deceased testator Lachhman in favour of the plaintiff, especially when an apposite issue qua Ex. PA having been validly and duly executed existing at Sr. No. 3 stood cast on the pleadings of the parties. The onus of proving whereof was cast upon the plaintiff hence entailed upon him to, dehors the aforesaid effect, if any, of the revocation of Ext.PA and it may be constituting acquiescence by the defendants qua the valid and due execution of Ext.PA by deceased Lachhman qua his estate in favour of the plaintiff Ram Dittu, adduce affirmative and cogent proof in discharge of its onus. Moreover, for reiteration the existence of the aforesaid apposite issue qua proof being adducible at his instance qua valid and due execution of Ex.PA besides, Peremptorily entailed upon the plaintiff Ram Dittu to hence discharge the onus of proving Ext.PA in the manner ordained by law inasmuch as his leading into the witness box attesting witnesses to it, besides its scribe in proof of its valid and due execution. The factum of casting of an apposite issue though encumbering the plaintiff to adduce proof qua the factum of valid and due execution of Ext.PA in his favour by deceased Lachhman qua the latter's estate as a concomitant enjoined upon the plaintiff to discharge the said onus by adduction of apposite and legally ordained evidence by plaintiff Ram Dittu yet the plaintiff Ram Dittu omitted to discharge the onus. Obviously then for want of on the part of plaintiff Ram Dittu to discharge the onus cast upon him by the apposite issue relating to the valid and due execution of Ext.PA in his favour by Lachhman qua the latter's estate, the learned Sub Judge 1st Class, Bilaspur could not erroneously conclude merely on the basis of advertence to purported acquiescences of the defendants existing in their written statement qua valid and due execution of Ext. PA which acquiescences, if any, for reasons aforesaid are ingrained with an inherent fallacy or construe that Ext.PA was duly and validly executed nor the learned Sub Judge 1st Class, Bilaspur, could have concluded that hence the onus cast upon plaintiff Ram Dittu to prove by adducing legally efficacious evidence besides evidence of probative worth qua the factum of valid due execution of Ext.PA by deceased in favour of Ram Dittu stood discharged or was dispensable. The learned Sub Judge 1st Class, Bilaspur having relieved the plaintiff Ram Dittu from discharging the onus cast upon him qua apposite issue No. 3 devolving upon the factum of valid and due execution of Ext.PA by deceased Lachhman qua his estate in his favour has, thereupon proceeded to, on grossly untenable grounds render an unwarrantable conclusion qua Ext.PA having been proved to be validly and duly executed by deceased testator Lachhman qua his estate in favour of plaintiff Ram Dittu.

9. The learned District Judge, Bilaspur had pronounced upon the factum of revocation deed Ext.DW-4/A in extinguishment of Ext.PA having been proved to be validly and duly executed. The learned District Judge, Bilaspur while proceeding to impute validity to Ext.DW-4/A had usurp the conclusions and findings qua its invalidity recorded by the learned Sub Judge 1st Class, Bilaspur anvilled upon the factum of contentious Khasra No. 115 standing in the possession of DW-5 rendering hence oustable on the score of interestedness, the testimony of DW-5 one of the attesting witness to Ex.DW4/A. The reasons which prevailed upon the learned District Judge, Bilaspur to impute credence to the testimony of DW-5 in proof of valid and due execution of Ext.DW-4/A are tenably comprised in the factum of deceased Lachhman having during his life time alienated by way of gift Khasra No. 115 in favour of Ram Swaroop father of DW-5 several years back hence when the

alienation of Khasra No. 115 in favour of DW-5 in the manner aforesaid occurred much prior to the execution of Ext.DW-4/A besides when it remained unimpeached during the life time of Lachhman hence the testimony of DW-5 while his being an attesting witness qua the valid execution of Ex.DW4/A could not either belittle his testimony nor render it oustable merely on the score of his interestedness arising from the factum aforesaid which occurred much prior to the execution of Ext.DW4/A. Moreover, the factum of DW-4 Jagan Nath, the scribe of Ext.DW-4/A, who proved the factum of Ext.DW-4/A having been drafted by him at the instance of and at the behest of deceased testator Lachhman, on completion of whose drafting by him, it having been read over and explained by him, to deceased Lachhman whereafter the latter thumb marked it, whereupon DW-5 and one Jagdish affixed their marks thereon as witnesses in the presence of deceased Lachhman, constitutes sinewed evidence qua Ex.DW4/A having been validly executed by deceased Lachhman qua his estate, especially when an incisive reading of the cross-examination of DW-4 omits to portray that the deceased Lachhman was beset with any exertion upon him of any coercion or any undue influence by DW-5 or by other defendants. Omission of a communication in the cross-examination of DW-4 qua preparation of Ext.DW-4/A arising from exercising of the deceased Lachhman any exertion, undue influence or any coercion by the defendants or DW-5 constrains a conclusion from this Court that Ext.DW-4/A was for reiteration voluntarily executed by deceased Lachhman qua his estate besides when the factum of its valid and due execution in terms of Section 63 of the Indian Succession Act has been proved by the recording of the deposition of one of attesting witnesses to it who has deposed as DW-5, whose testimony when underscores the factum of deceased Lachhman having thumb marked Ext.DW-4/A in the presence of the attesting witnesses to it, whereafter both, he and Jagdish in the presence of the deceased Lachhman put their respective marks thereon begets an apt inference of Ext.DW-4/A having been proved to be validly besides voluntarily executed by the deceased Lachhman. A perusal of Ex.DW4/A unearths the fact that the Sub Registrar concerned before whom it was presented for registration had prior to his proceeding to register it as manifested from an endorsement existing thereon readover and explained its contents to the deceased testator who on admitting its contents to be true thumb marked it, in his presence. Besides, the registration of Ex.DW4/A by the Sub Registrar concerned was preceded by DW-5 identifying the deceased Lachhman before the Sub Registrar concerned. The probative value of the endorsement of the Sub Registrar existing on Ex.DW4/A and its pronouncing the fact that on the deceased Lachhman having been explained the contents of Ex.DW4/A by the Sub Registrar concerned and on the former comprehending its contents, his having thumb marked it, in the presence of the Sub Registrar, construed in conjunction with the factum of DW-5 having identified the deceased Lachhman before the Sub Registrar concerned whereupon the latter proceeded to register it, constitutes reinforced evidence of formidable vigour along with the testimony of DW-5 qua the factum of valid and due execution of Ex.DW4/A, more so, when DW5 remained uncross-examined qua the factum of the deceased Lachhman having not appeared before the Sub Registrar nor is there evidence of probative worth that the thumb marks existing on Ex.DW4/A and attributed to deceased Lachhman do not belong to him. In aftermath an invincible conclusion is to be formed that with Ex.DW-4/A having been proved to be duly and validly executed, the rights, if any, which the Ram Dittu acquired in the suit property under Ex.-PA stood denuded, dwindled as well as extinguished. Moreover, the endorsement of Sub Registrar existing on Ext.DW-4/A belittles besides renders legally unworthwhile the effect, if any, of the interestedness of DW-5 and its impinging upon the factum of Ext.DW-4/A having been or not validly and duly executed by deceased Lachhman.

10. The learned Sub Judge 1st Class, Bilaspur had concluded that defendant Ram Murti was without any right, title or interest holding possession of Khasra No.115. However, Ext.P-1, which is the Missal Haquiat, qua khasra number aforesaid for the year

1986-87 depicts the factum of it being in possession of deceased Lachhman yet in the settlement which was conducted in the mohal concerned in the year 1986-87 the defendant Ram Murti stands recorded therein to be holding possession of Khasra No. 115 as Gair Marusi. Even though an entry exists in the apposite Jamabandi qua khasra No. 115 of defendant Ram Murti being Gair Marusi therein, whose occurrence therein overwhelmed the Sub Judge 1st Class, Bilaspur to conclude that with DW-5 having not deposed qua his being non-occupancy tenant under deceased Lachhman qua Khasra No. 115 constituted the said entry to be in conflict with his oral testimony wherein he asserted title to it, on the strength of its being gifted to his deceased father rendering him hence disabled to stake any right, title or interest qua khasra No.115. However, the Sub Judge 1st Class, Bilaspur, while concluding that the entry in the apposite record qua khasra No. 115 of DW-5 holding it as gair marusi while its being in conflict with his staking title to it on its having been gifted to his predecessor in interest, disabled DW-5 to claim title to the suit land, is an inherently fallacious conclusion, inasmuch as it emanates besides ensues on the entry aforesaid having been read fragmentarily, in isolation besides in a piecemeal manner, especially with the Sub Judge 1st Class, Bilaspur, being wholly oblivious to the occurrence of an entry in the apposite column of rent of the apposite record qua khasra number 115 wherein there is a reflection of Ram Murti holding possession of Khasra number 115 as "bila lagan bewaja Dharmath". Hence, when Ram Murthi was not paying rent to deceased Lachhman while holding possession of Khasra No.115 in sequel the mere occurrence of a depiction in the apposite record of his being gair marusi would not constitute him to be a gair marusi, unless the existence of a relationship of landlord and tenant arising from palpable evidence connoting payment of rent by the tenant to the landlord emanates. However, when the entry in the column of rent does not bespeak of rent thereto being paid or payable by Ram Murti to the land owner, the mere description of Ram Murti as a gair marusi in the apposite column would neither tantamount to theirs having come into existence inter-se him and deceased Lachhman any relationship of landlord and tenant nor oust the claim of Ram Murti to stake title to Khasra No.115 on the anchor of it having been gifted by deceased Lachhman to his father Ram Sarup which manner of assertion of title to it, stands in consonance with his standing depiction as "billa lagan bewaja dharamarth" in the apposite column of rent of the relevant record. In sequel, this Court concludes that the entry in the column of the rent of the apposite record qua Khasra No. 115 describing Ram Murti to be holding possession thereof without rent arising from the fact of delivery of its possession to him having arisen from Dharmath of the alienor rather gives succor to the espousal of the defendant Ram Murti, of it having been gifted in favour of his predecessor-in-interest by deceased Lachhman during his life time. Moreso, when the connotation of "Dharmarth" is akin to besides bears affinity to donation, as is a gift.

11. The learned District Judge, Bilaspur had while relying upon the testimony of DW-3 pronouncing the fact of defendants being the legal heir of Smt.Jhalla, who being the real sister of deceased Lachhman had hence concluded that with failure of proof at the instance of the plaintiff Ram Dittu qua valid and due execution of Ext.PA rather with the proof emanating qua valid and due execution of Ext.DW-4/A rendered the estate of deceased Lachhman to be inheritable by defendants 1 and 2. Even though the best evidence was not adduced at the instance of the defendants No. 1 and 2 to proof the factum of their mother Jhalla being the sister of deceased Lachhman nontheless when the common ancestor of both deceased Lachhman and Smt. Jhalla died before coming into force of the Hindu Succession Act hence when Smt. Jhalla could not have inherited the estate of her deceased father hence when the preparation of the pedigree table or shajra nasab portrays the name of only those legal heirs who inherited the property of the deceased common ancestors obviously when Smt. Jhalla could not have given the factum of the demise of her predecessor in interest Hiru, having occurred prior to the enactment of the Hindu

Succession Act inherited the estate of Hiru on the latter's demise. Consequently, the non occurrence of her name in the Shajra nasab would not ipso facto constitute the fact of hers not being sister of deceased Lachhman nor would debar the defendants No.1 and 2 to inherit the estate of deceased Lachhman while being the legal heirs of Smt.Jhalla. Even otherwise the plaintiff in rebuttal evidence has omitted to examine the sisters of his father or his children to prove that Smt.Jhalla was not the sister of Lachhman. Consequently when he omits to rebut the testimony of DW-3 the Numberdar qua the factum of Jhalla being the sister of Lachhman, the mere fact of DW-3 being not related to deceased Lachhman would not oust his testimony qua Smt. Jhalla, being the sister of Lachhman. Consequently with defendants No. 1 and 2 being sons of Smt. Jhalla, sister of deceased Lachhman, are the legal heirs of deceased Lachhman hence on his demise are entitled to succeed his estate. Substantial questions law are accordingly answered.

12. For the foregoing reasons, there is no merit in this appeal, which is accordingly dismissed. In sequel, the judgment and decree rendered by the learned District Judge, Bilaspur, Himachal Pradesh, is affirmed and maintained. The parties are left to bear their own costs. All the pending applications also stand disposed of. Records be sent back forthwith.

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

Sumit Kumar son of Hari Bhadur. ...Appellant.

Vs.

State of H.P. ...Respondent.

Cr. Appeal No.112 of 2013.
Judgment reserved on: 13.7.2015
Date of Judgment: August 24, 2015.

N.D.P.S. Act, 1985- Section 20- Accused had hatched a conspiracy and were found in possession of 5.500 Kgs. of charas- recovery was effected by chance when accused were trying to run away on seeing the policy- merely because description of the bag was not made in the report of the analysis is not sufficient to doubt the prosecution case- no independent witness was available and the prosecution case cannot be rejected due to non-association of independent witness - recovery was effected from secluded place and it was not possible to associate independent witnesses - minor contradictions in the testimonies of the prosecution witnesses, when they were deposing after a considerable period of time will not make their testimonies doubtful- held, that in these circumstances, prosecution version was duly proved and the accused were rightly convicted by the trial Court. (Para-11 to 20)

Cases referred:

Bhartbhai Bhagwan Ji Bhai Vs. State of Gujarat, AIR 2003 SC 7
State of HP Vs. Sunil Kumar, AIR 2014 SC 2564
Gurbax Vs. State of Haryana, AIR 2001 SC 1002
State of HP Vs. Puran Chand, 2015 (1) SLC 162
Tahir Vs. State (Delhi), 1996 (3) SCC 338
Govindaraju @ Govinda Vs. State, 2012 (4) SCC 722
Girja Prasad Vs. State of M.P, 2007 (7) SCC 625

State of Gujarat Vs. Raghunath, AIR 1985 SC 1092
Kulwinder Singh and another Vs. State of Punjab, AIR 2015 SC 2488
State of Govt. of NCT Delhi Vs. Sunil and another, 2001 (1) SCC 652
C.Muniappan and others Vs. State of Tamil Nadu, 2010 (9) SCC 567
Sohrab and another Vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of 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 151
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. K.B.Khajuria, Legal Aid Counsel.
For the respondent: Mr. V.S.Chauhan, Addl. Advocate General with Mr. Kush Sharma, Deputy Advocate General and 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 Kullu HP in Session Trial No. 28 of 2010 titled State of HP Vs. Sumit Kumar and another decided on 23.11.2011.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 4.4.2010 at 3.45 PM at a place named Jachhni District Kullu accused persons namely Sumit Kumar and Chaman Lal hatched conspiracy and were found in exclusive and conscious possession of 5.500 Kg charas. It is alleged by prosecution that co-accused Sumit Kumar who was in possession of bag was caught and other co-accused Chaman Lal could not be nabbed. It is alleged by prosecution that place of incident was secluded place and investigating officer associated ASI Naresh Chand and ASI Hari Singh as witnesses. It is further alleged by prosecution that investigating officer had suspicion regarding possession of some contraband and investigating officer apprised co-accused Sumit Kumar about his legal right to be searched either before magistrate or gazetted officer. It is further alleged by prosecution that co-accused Sumit Kumar had given option to be searched by police officials. It is further alleged by prosecution that police officials have also given their personal search to co-accused Sumit Kumar. It is further alleged by prosecution that co-accused Sumit Kumar was carrying 5.500 Kg charas in connivance with another co-accused Chaman Lal. It is further alleged by prosecution that investigating officer filled NCB forms in triplicate. It is further alleged by prosecution that specimen impressions of seal 'T' was obtained on pieces of cloth. It is further alleged by prosecution that investigating officer prepared rukka Ext PW7/A and also prepared spot map Ext PW7/B. It is further alleged by

prosecution that investigating officer deposited case property along with NCB forms, sample of seal 'T' and other documents with MHC Paras Ram. It is further alleged by prosecution that investigating officer prepared special report Ext PW6/A and the same was submitted to Deputy Superintendent of Police Kullu. It is further alleged by prosecution that FIR Ext PW1/F was also recorded. It is further alleged by prosecution that case property was deposited in malkhana and entry was recorded in the register. It is further alleged by prosecution that thereafter PW1 MHC Paras Ram handed over cloth parcel Ext P1 sealed with six seals of 'T' along with NCB forms in triplicate, sample of seal and docket Ext PW1/D to constable Laxman Dass vide RC No. 41/2010 with the direction to deposit the same in FSL Junga for chemical analysis. It is further alleged by prosecution that PW4 HHC Laxman Dass on dated 6.4.2010 deposited case property in the office of FSL Junga vide receipt Ext PW1/E. It is further alleged by prosecution that investigating officer took into possession copies of special report, abstract of special report register, copy of RC and abstract of register No.19 annexed with challan. It is further alleged by prosecution that as per report of FSL Junga the contraband was sample of charas. Charge was framed against co-accused Sumit Kumar under Section 20 of Narcotic Drugs and Psychotropic Substances Act and under Section 25 of the Arms Act 1959. Charge was framed against co-accused Chaman Lal under Section 20 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act 1985. Accused persons did not plead guilty and claimed trial.

3. Prosecution and accused persons examined following witnesses.

Sr.No.	Name of Witness
PW1	HC Paras Ram
PW2	ASI Hari Singh
PW3	Krishan Lal
PW4	HHC Laxman Dass
PW5	Lal Singh
PW6	HC Nirat Singh
PW7	SI Narayan Singh
PW8	Kapil Sharma
DW1	Dr. J.R. Gaur
DW2	C.L. Sharma
DW3	HHC Chet Ram
DW4	Uma Shankar
DW5	Ghanshyam Singh

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description:
Ex. PW.1/A	Abstract of malkhana register
Ex. PW1/B	Road certificate
Ex. PW1/C	NCB form
Ex. PW1/D	Letter sent for chemical examination of contraband
Ex. PW1/E	Receipt of case property

Ex. PX	Rapat
Ex.PX-1	Rapat No.10 dated 17.5.2011
Ex. PW1/F	FIR No.52 dated 4.4.2010
Ex. PW1/G	Endorsement of FIR
Ex. PW2/A	Memo under section 50 NDPS Act
Ex. PW2/B	Memo regarding personal search of police officials.
Ex. PW2/C	Sketch map of arm.
Ex. PW2/D	Seizure memo of contraband 5.500 Kg.
Ex. PW2/E	Specimen impression of seal upon plain cloth.
Ex. PW2/F	Arrest Memo of co-accused Sumit Kumar.
Ex. PW5/A	Departure report.
Ex. PW6/A	Copy of Special report sent to DSP Kullu HP.
Ex. PW6/B	Endorsement of DSP regarding receipt of special report.
Ex. PW6/C	Abstract of register
Ex. PW7/A	Rukka
Ex. PW7/B	Site Plan
Ex. PW7/C	FSL report Junga HP
Ex. PW7/D	Arrest Memo of co-accused Chaman Lal dated 1.9.2010
Ex. DW4/A	Copy of affidavit filed by Narayan Singh in HP High Court.
Ex. DW4/B	Copy of certificate issued by patwari.
Ex. PW4/C	Copy of order passed by HP High Court dated 4.1.2011 upon bail application filed by co-accused Chaman Lal.

5. Statement of accused persons were recorded under Section 313 Cr.PC. Co-accused Sumit Kumar has stated that he was sitting in tea shop and unclaimed bag was found by police officials. Co-accused Sumit Kumar has stated that police officials took him to police station Bhunter and a false case was filed against him. Co-accused Chaman Lal stated that false and concocted case filed against him.

6. Learned Special Judge Kullu convicted co-accused Sumit Kumar under Section 20 of NDPS Act and under Section 25 of Arms Act. Learned trial Court sentenced convict Sumit Kumar to undergo rigorous imprisonment for ten years and to pay fine of Rs.100000/- (One lac) for the commission of offence punishable under Section 20 of NDPS Act. Learned trial Court further directed that in default of payment of fine the convict Sumit Kumar would undergo further imprisonment of one year. Learned trial Court further directed that convict co-accused Sumit Kumar would undergo rigorous imprisonment for one year and to pay fine of Rs.1000/- (One thousand) for the offence punishable under Section 25 of the Arms Act. Learned trial Court further directed that in default of payment of fine convict Sumit Kumar would further undergo imprisonment for one month. Learned trial Court further directed that both sentence would run concurrently. Learned trial Court

further directed that period of detention of convict Sumit Kumar during the trial and investigation of case would set off under Section 428 Cr.PC. Learned trial Court acquitted co-accused Chaman Lal qua offence punishable under Sections 20 read with section 29 of the NDPS Act.

7. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant Sumit Kumar filed present appeal.

8. We have heard learned Advocate appearing on behalf of appellant and learned Additional Advocate General appearing on behalf of respondent and also gone through the entire record carefully.

9. Point for determination before us is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice to appellant Sumit Kumar.

10.ORAL EVIDENCE ADDUCED BY PROSECUTION:

10.1 PW1 Paras Ram has stated that he remained posted as Head Constable in police station Bhunter w.e.f. March 2007 to March 2010. He has stated that he brought original record of register No.19. He has stated that on dated 4.4.2010 SI Narayan Singh deposited case property with him relating to FIR No.52 of 2010. He has stated that case property was consisting of two parcels. He has stated that total charas was 5.500 Kg. He has stated that parcel was sealed. He has stated that along with said parcel, specimen seal impression of seal 'T', NCB forms in triplicate and other documents were also deposited with him. He has stated that investigating officer also deposited another parcel containing an iron chopper (long knife). He has stated that he entered parcels in register No. 19 at serial No.87. He has stated that on dated 5.4.2010 he handed over one parcel containing 5.500 Kg charas to constable Laxman Dass along with specimen of seal impression, NCB forms in triplicate and other documents vide RC No.41 of 2010 with direction to deposit the same with FSL Junga. He has stated that abstract of register No.19 is Ext PW1/A and copy of RC is Ext PW1/B. He has stated that before handing over case property to constable Laxman Dass he also filled column No.12 of NCB form. He has stated that constable Laxman Dass deposited case property in the office of FSL Junga on dated 6.4.2010 vide receipt Ext PW1/E. He has denied suggestion that no rukka mark 'A' was received by him. He has denied suggestion that he did not record FIR. He has denied suggestion that no case property was deposited with him. He has denied suggestion that he did not enter case property in register No.19. He has denied suggestion that case property was tampered by him. He has denied suggestion that receipt Ext PW1/E did not bear seal and stamp of FSL Junga.

10.2. PW2 ASI Hari Singh has stated that in April 2010 he was posted in police station Bhunter. He has stated that on dated 4.4.2010 police officials headed by SHO Narain Singh police station Bhunter consisting PW2 Hari Singh, ASI Naresh Chand, HC Pune Ram and constable Krishan Chand were on patrolling duty in official vehicle to detect crimes regarding excise and narcotics. He has stated that when police officials at about 3.45 PM reached at a place near village Jachhni police officials noticed two persons were coming from Manikaran side. He has stated that one person was in possession of black coloured rucksack bag on his back. He has stated that when accused persons saw the vehicle of police officials both accused persons tried to run away. He has stated that one co-accused who was in possession of black coloured rucksack bag on his back ran towards uphill side and second person ran towards Manikarn side. He has stated that with the help of police officials co-accused Sumit Kumar was nabbed at a secluded place. He has stated that no independent witness was available.He has stated that upon inquiry co-accused disclosed his name as Sumit Kumar. PW2 identified co-accused Sumit Kumar in Court. He has stated

that thereafter SHO had given option to co-accused Sumit Kumar under section 50 of NDPS Act. He has stated that co-accused Sumit Kumar had given his option to be searched before police offciails. He has stated that thereafter rucksack bag which was in possession of co-accused Sumit Kumar was opened by investigating officer and charas was found in the rucksack bag. He has stated that charas was weighed and same was found 5.500 Kg. He has stated that thereafter recovered charas was again placed in the sealed rucksack bag. He has stated that investigating officer also filled NCB forms in triplicate. He has stated that copy of seizure memo was supplied to co-accused Sumit Kumar. He has stated that investigating officer prepared rukka and the same was sent to police station Bhunter for registration of FIR. He has stated that seal after use was handed over to him by investigating officer. Witness also identified another co-accused Chaman Lal in Court. He has stated that rucksack bag is Ext P3, polythene wrapper is Ext P4 and charas is Ext P5. He has stated that iron chopper is Ext P6. He has denied suggestion that no police official was present near village Jachhni. He has denied suggestion that no charas was recovered from co-accused Sumit Kumar. He has denied suggestion that no option was given to co-accused Sumit Kumar. He has denied suggestion that police officials found unclaimed bag containing 15 ½ Kg Charas near Chhronallah. He has denied suggestion that co-accused Summit Kumar was nabbed by police officials from a tea shop at Chhrornallah. He has denied suggestion that ten kilograms charas was given to one Budh Ram resident of Ramshila and a false case was filed against co-accused Sumit Kumar. He has denied suggestion that co-accused Chaman Lal was not noticed by him. He has denied suggestion that co-accused Chaman Lal did not fled away from the spot.

10.3. PW3 constable Krishan Lal has stated that on dated 4.4.2010 he was member of police party. He has stated that at about 3.45 PM when police officials reached near village Jachhni police officials noticed two persons coming from Manikaran side.He has stated that when accused persons saw police officials one of co-accused climbed towards uphill side and second co-accused fled towards Manikaran side. He has stated that co-accused Sumit Kumar was in possession of black coloured bag. He has stated that all police officials chased co-accused Sumit Kumar and he was nabbed. He has stated that co-accused Sumit Kumar was directed to remove the bag from his shoulder.He has stated that thereafter investigating officer had given option to co-accused Sumit Kumar as per section 50 of NDPS Act.He has stated that co-accused Sumit Kumar had given option to be searched before police officials.He has stated that thereafter police officials had given their personal search to co-accused Sumit Kumar. He has stated that thereafter bag of co-accused Sumit Kumar was searched. He has stated that total 22 ½ pieces of black substance were found in the bag. He has stated that on weighing 5.500 Kg charas was found. He has stated that charas was placed in parcel and sealed by investigating officer at the spot which was recovered from the possession of co-accused Sumit Kumar. He has stated that iron chopper Ext P6 was placed in separate cloth parcel which was sealed with seal impressions 'T'. He has stated that parcel containing iron chopper is Ext P2. He has stated that NCB forms in triplicate were filled by investigating officer. He has stated that thereafter investigating officer inquired from co-accused Sumit Kumar regarding another co-accused Chaman Lal who fled away from the spot. He has stated that co-accused Sumit Kumar had disclosed the name of another co-accused as Chaman Lal. Witness also identified co-accused Chaman Lal in Court. He has stated that case property was took into possession vide memo Ext PW2/D and rukka was prepared by investigating officer and the same was given to him with direction to take the same to police station Bhunter for registration of FIR. He has stated that he submitted rukka mark 'A' to MHC police station Bhunter. He has stated that black coloured bag is Ext P3. He has stated that polythene envelope Ext P4 and charas Ext P5 are the same which were recovered from co-accused Sumit Kumar. He has stated that chopper Ext P6 is the same which was recovered from bag Ext P3. He has denied suggestion that police officials

were not present at the spot. He has denied suggestion that co-accused Sumit Kumar did not climb towards uphill side. He has denied suggestion that no option was given to co-accused Sumit Kumar under Section 50 of NDPS Act. He has denied suggestion that no bag was found from the possession of co-accused Sumit Kumar. He has denied suggestion that no charas was recovered from co-accused Sumit Kumar. He has denied suggestion that co-accused Sumit Kumar was falsely implicated in present case. He has denied suggestion that no seizure memo was prepared at the spot by investigating officer. He has denied suggestion that no letter was sent to police station Bhunter. He has denied suggestion that police officials found a bag containing 15 ½ Kg Charas. He has denied suggestion that 10 Kg charas was given to Budh Ram resident of Ramshila. He has denied suggestion that false case was filed against accused persons.

10.4. PW4 HHC Laxman Dass has stated that he was posted as constable on general duty in police station Bhunter since February 2010. He has stated that on dated 5.4.2010 MHC police station Bhunter handed over to him parcel Ext P1 along with NCB forms in triplicate, copy of FIR, copy of seizure memo, sample seal and docket with direction to deposit the same in the office of SFSL Junga. He has stated that he deposited case property in the office of SFSL Junga on dated 6.4.2010 vide receipt Ext PW1/E. He has stated that case property remained intact in his custody. He has denied suggestion that no case property was given to him by MHC police station Bhunter. He has denied suggestion that he did not deposit case property in the office of SFSL Junga. He has denied suggestion that case property was tampered by him.

10.5. PW5 constable Lal Singh has stated that from the year 2006 to March 2011 he remained posted as constable on general duty at police station Bhunter. He has stated that he brought the record of rapat No.22 dated 4.4.2010. He has stated that SI Narayan Singh got recorded his departure report along with other police officials. He has stated that copy of the report is Ext PW5/A which is correct as per original record. He has denied suggestion that record of rapat No.22 was later on fabricated.

10.6 PW6 HC Nirat Singh has stated that since January 2007 to 11th April 2010 he was posted as Reader to Additional Superintendent of Police Kullu. He has stated that on dated 5.4.2010 at about 4 PM the then Deputy Superintendent of Police Nihal Chand handed over special report to him relating to FIR No. 52 of 2010. He has stated that he recorded entry of relevant register at serial No.33. He has stated that copy of special report is Ext PW6/A. He has stated that abstract of register is Ext PW6/C which is correct as per original record. He has denied suggestion that no special report Ext PW6/A was given to him by the then Deputy Superintendent of Police. He has denied suggestion that all entries were recorded later on in fabricated manner.

10.7. PW7 SI Narayan Singh has stated that he was posted SHO in police station Bhunter since September 2008. He has stated that on dated 4.4.2010 he along with ASI Naresh Chand, ASI Hari Singh, HC Pune Ram and constable Krishan Chand were on patrolling duty in government vehicle. He has stated that at about 3.45 PM when they reached near a place Jachhni they noticed two persons coming from Manikaran side. He has stated that when two persons saw police officials one person went towards uphill side and another person who was in possession of black coloured rucksack bag on his back had climbed towards forest side. He has stated that co-accused Sumit Kumar was nabbed. He has stated that place of incident was secluded and isolated place and no independent person could be available. He has stated that thereafter he associated ASI Naresh chand and ASI Hari Singh as witnesses. He has stated that co-accused Sumit Kumar disclosed his address as resident of Nepal**.** He has stated that rucksack bag which was in possession of co-accused Sumit Kumar was removed from his person. He has stated that co-accused Sumit

Kumar was apprised about his legal right to be searched before magistrate or gazetted officer. He has stated that co-accused Sumit Kumar had given consent to be searched by police officials. He has stated that thereafter police officials have given their personal search. He has stated that rucksack bag which was in possession of co-accused Sumit Kumar was opened and charas was found. He has stated that charas was weighed and the same was found 5.500 Kg. He has stated that NCB form was filled in triplicate. He has stated that copy of seizure memo was supplied to accused persons free of cost. He has stated that rukka was prepared and same was sent to police station Bhunter for registration of FIR. He has stated that he prepared site plan Ext PW7/B and recorded the statement of witnesses as per their versions. He has stated that case property, NCB form, sample of seal and seizure memo were deposited with MHC Paras Ram. He has stated that special report was prepared by him and same was delivered to Deputy Superintendent of Police Kullu. He has stated that case property was deposited in the office of FSL Junga. He has stated that on receipt of chemical report Ext PW7/C he prepared challan. He has denied suggestion that co-accused Sumit Kumar was consuming tea in the tea stall and was falsely implicated in present case. He has denied suggestion that charas was not recovered from co-accused Sumit Kumar. He has denied suggestion that he tampered with case property. He has denied suggestion that black coloured bag was planted against accused persons. He has denied suggestion that charas was not sent for chemical examination. He has denied suggestion that all documents were filled in police station.

10.8. PW8 Kapil Sharma has stated that he was posted as Assistant Director and Assistant Chemical Examiner in NDPS Division of SFSL Junga. He has stated that he was appointed as scientific officer in NDPS Division SFSL Junga on dated 9.1.2009. He has stated that one sealed cloth parcel along with reference letter No. 1199/5A dated 5.4.2010 issued by SHO police station Bhunter District Kullu, Xerox copy of FIR, seizure memo, NCB forms in triplicate and sample seal of 'T' were brought by constable Laxman Dass police station Bhunter District Kullu vide RC No. 41/2010 dated 5.4.2010. He has stated that parcel was bearing six seals impression 'T'. He has stated that seals were found intact and tallied with specimen seal sent by forwarding authority. He has stated that parcel was kept in his safe custody till the report was signed and dispatched. He has stated that on opening the parcel exhibit was weighed on electronic scale and same was found 5.500 Kg. He has stated that on chemical examination of exhibit sample of charas was found. He has stated that report Ext PW7/C bears his seal and signature and the same is correct. He has stated that NCB form filled in triplicate bears his signature and same is correct. He has denied suggestion that he had not carried out any specialization in the field of narcotics. He has denied suggestion that he is not competent to give report relating to NDPS cases.

10.9. DW1 Dr.J.R.Gaur has stated that he was posted as Director SFSL Junga since 6.1.1998. He has denied that his appointment as Director was challenged before Hon'ble High Court. Self stated that OA was filed regarding his deputation as Assistant Director in SFSL Junga. He has stated that he has no experience of examining NDPS cases. He has stated that there is microscope in the NDPS division. He has stated that NDPS division is located in the first floor. He has stated that he had heard that appointment of Mr.Kapil Sharma as Assistant Director was challenged in the Hon'ble High Court of HP. He has stated that Mr. Kapil Sharma was appointed through Public Service Commission as Scientific officer and thereafter as Assistant Director by government of HP.

10.10 DW2 C.L.Sharma Assistant Chemical Examiner has stated that he was working in State FSL Junga for the last 21 years. He has stated that he is not frequent visitor of NDPS division. He has stated that he could not state whether use of potassium hydroxide could destroy sample.

10.11. DW3 HHC Chet Ram has stated that he was posted as HHC on general duty in police station Bhunter. He has stated that he brought the summoned record. He has stated that as per summoned record official electronic scale was issued to police station Bhunter on dated 3.3.2011. He has stated that electronic scale was available. He has stated that some of investigating officers have purchased their own kits in Himachal Pradesh and they are using kits including weighing scales in the cases.

10.12 DW4 Sh Uma Shankar Junior Assistant posted in H.P. High Court has stated that he brought the summoned record. He has stated that document Ext DW4/A is true and correct copy of affidavit. He has stated that documents Ext DW4/B and Ext DW4/C are true and correct copies of record brought by him.

10.13. DW5 Ghanshyam Singh Chauhan has stated that in 1995 he joined HP University as lecturer in chemistry department. He has stated that he had qualified his Ph.D in organic chemistry with polymer specialization from same University. He has stated that in HP university there is no specialization qua narcotic drugs and psychotropic substances. He has stated that in his opinion potassium hydroxide is strong base and chloral hydrate is mild acid. He has stated that their reactions are different when mixed with contents of charas. He has stated that after completing M.Sc specialized training in analysis of narcotic drugs is provided. He has stated that after specialized training sample of contraband could be analyzed.

11. Submission of learned Advocate appearing on behalf of appellant that prosecution failed to prove that appellant was apprised about his legal right to be searched either before magistrate or gazetted officer and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Present case is not a case of prior information regarding commission of offence under NDPS Act. Present case is a case of chance recovery. It is the case of prosecution that on dated 4.4.2010 at about 3.45 PM police officials were on patrolling duty and when they reached near Jachhni two persons came from opposite side and when they saw police officials they fled from the spot and appellant namely Sumit Kumar was caught who was in possession of bag. It is the case of the prosecution that bag of appellant Sumit Kumar was searched and 5.500 Kg charas was found in the bag of appellant Sumit Kumar. It was held in case reported in AIR 2003 SC 7 Bhartbhai Bhagwan Ji Bhai Vs. State of Gujarat that in chance recovery mandatory provision of Section 50 of NDPS Act would not be applicable. Also see AIR 2014 SC 2564 titled State of HP Vs. Sunil Kumar and also see AIR 2001 SC 1002 titled Gurbax Vs. State of Haryana. Also see 2015 (1) SLC 162 titled State of HP Vs. Puran Chand. Even PW2 Hari Singh has stated in positive manner that option was given to appellant as per provision of Section 50 of NDPS Act. PW2 Hari Singh has stated in positive manner that appellant Sumit Kumar had given his option to be searched before police officials. Even PW3 constable Krishan Lal h as stated in positive manner that option was given to appellant Sumit Kumar as per provision of Section 50 of NDPS Act. PW3 Krishan Lal has stated that appellant had given his option that he should be searched before police officials. Even PW7 Narayan Singh has specifically stated in positive manner that option was given to appellant as per provision of Section 50 of NDPS Act. Testimonies of PW2 Hari Singh, PW3 Krishan Lal and PW7 Narayan Singh to this effect are trust worthy, reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of PW2, PW3 and PW7 to this effect.

12. Another submission of learned Advocate appearing on behalf of appellant that link evidence qua sending of case property to FSL Junga is missing in the present case and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. PW1 Paras Ram has specifically stated in positive manner that on dated 5.4.2010 he handed over one parcel containing 5.500 Kg

charas to constable PW4 Laxman Dass along with specimen seal 'T', NCB forms in triplicate and other documents vide RC No.41 of 2010 dated 5.4.2010 with direction to deposit the same in the office of FSL Junga. PW4 HHC Laxman Dass has specifically stated in positive manner that on dated 5.4.2010 MHC police station Bhunter handed over him parcel Ext P1 which was sealed with seal 'T' along with NCB forms in triplicate, copy of FIR, copy of seizure memo, sample seal and docket with direction to deposit the same in the office of SFSL Junga. PW4 HHC Laxman Dass has stated in positive manner that he deposited case property at SFSL Junga on dated 6.4.2010 vide receipt Ext PW1/E. PW8 Kapil Sharma Assistant Chemical Examiner NDPS Division SFSL Junga has specifically stated that one sealed parcel along with reference letter No.1199/5A dated 5.4.2010, Xerox copy of FIR, seizure memo, NCB forms in triplicate and sample seal of 'T' was brought by constable Laxman Dass police station Bhunter vide RC No.41/2010 dated 6.4.2010. PW8 has specifically stated that seals were intact and tallied with specimen seal sent by forwarding authority. Testimonies of PW1 Paras Ram, PW4 Laxman Dass and PW8 Kapil Sharma are trustworthy, reliable and inspire confidence of Court. There is no positive, cogent and reliable evidence on record in order to prove that PW1, PW4 and PW8 have hostile animus against appellant at any point of time. Hence it is held that link evidence of sending parcel of contraband to SFSL Junga proved on record beyond reasonable doubt in present case.

13. Another submission of learned Advocate appearing on behalf of appellant that learned Special Judge has failed to consider the fact that description of bag does not mention in the chemical report Ext PW7/C and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused report Ext PW7/C submitted by SFSL Junga. State Forensic Science Laboratory Junga has specifically mentioned in report reference No. 1199/5A dated 5.4.2010 and FIR No. 52 of 2010 dated 4.4.2010. State Forensic Science Laboratory Junga has specifically mentioned in examination report date of receipt, mode of receipt and description of the parcel. In view of the fact that SFSL Junga has specifically mentioned in examination report (1) Reference number (2) FIR number (3) Date of receipt (4) Mode of receipt (5) Description of parcel. We are of the opinion that non mentioning of description of bag is not fatal to prosecution case because in the present case material fact is the recovery of contraband from exclusive and conscious possession of co-accused Sumit Kumar which is duly proved on record as per oral and documentary evidence adduced by parties on record.

14. Another submission of learned Advocate appearing on behalf of appellant that no independent witness was examined by prosecution and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. PW7 Narayan Singh has specifically stated that place of incident was secluded and isolated place and no independent witness was available. PW2 ASI Hari Singh has stated in positive manner that place of incident was secluded place and no independent person was available. PW2 Hari Singh and PW7 Narayan Singh have satisfactorily explained the reasons for non association of independent witness. It was held in case reported in 1996 (3) SCC 338 titled Tahir Vs. State (Delhi) that conviction could be given on the testimony of police officials. Also see 2012 (4) SCC 722 titled Govindaraju @ Govinda Vs. State. Also see 2007 (7) SCC 625 titled Girja Prasad Vs. State of M.P. It was held in case reported in AIR 1973 SC 2783 titled Nathu Singh Vs. State of M.P that the mere fact that witness 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 witness. Also see AIR 1985 SC 1092 titled State of Gujarat Vs. Raghunath. It was held in case reported in AIR 2015 SC 2488 titled Kulwinder Singh and another Vs. State of Punjab that if evidence of official witnesses is trustworthy and credible the same should not be rejected solely on the ground of non examination of independent witnesses. Also see 2001 (1) SCC 652 titled State

of Govt. of NCT Delhi Vs. Sunil and another. It is held that in chance recovery association of independent witnesses was not mandatory requirement of law.

15. Another submission of learned Advocate appearing on behalf of appellant that sample seal was not handed over to the witnesses and same was handed over to ASI Hari Singh and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the seizure memo placed on record. As per seizure memo placed on record ASI Hari Singh is the eye witness of seizure memo. It is held that it is proved on record that seal after use was handed over to ASI Hari Singh who is the eye witness of seizure memo.

16. Another submission of learned Advocate appearing on behalf of appellant that in view of testimonies of DW1 Dr.J.R.Gaur, DW2 C.L.Sharma, DW3 HHC Chet Ram, DW4 Uma Shankar and DW5 Ghanshyam Singh the appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that DW1 to DW5 were not present at place Jachhni near Manikaran on dated 4.4.2010 at 3.45 PM when 5.500 Kg charas was recovered from exclusive and conscious possession of appellant. DW1 to DW5 are not eye witnesses of recovery of contraband. Recovery of contraband from exclusive and conscious possession of appellant is proved on record beyond reasonable doubt as per oral testimonies of eye witnesses and documentary evidence placed on record in present case.

17. Another submission of learned Advocate appearing on behalf of appellant that there are material contradictions in the testimony of police officials and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Appellant did not point out any material contradiction which goes to the root of case. It is well settled law that minor contradictions are bound to come in criminal case when testimony of prosecution witnesses is recorded after a gap of sufficient time. In the present case contraband i.e. 5.500 Kg charas was recovered from exclusive and conscious possession of the appellant on dated 4.4.2010 at 4.30 PM and statement of prosecution witnesses were recorded by learned trial Court on dated 8.3.2011, 17.5.2011, 28.6.2011 and 8.7.2011. It is well settled law that minor contradictions in criminal case should be ignored when testimony of prosecution witnesses is recorded after a gap of sufficient time. See 2010 (9) SCC 567 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 151 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.

18. As per chemical analysis report placed on record it is proved beyond reasonable doubt that as per scientific test such as physical identification, chemical and chromatographic analysis and after microscopic examination it is proved that charas was recovered from exclusive and conscious possession of co-accused Sumit Kumar. PW8 Kapil Sharma Assistant Chemical Examiner NDPS division SFSL Junga had proved the report submitted by SFSL Junga. Testimony of PW8 Kapil Sharma Assistant Chemical Examiner is also trustworthy, reliable and inspires confidence of Court. There is no reason to

disbelieve the testimony of PW8 Kapil Sharma. There is no evidence on record in order to prove that PW8 Kapil Sharma has hostile animus against appellant at any point of time.

19. Another submission of learned Advocate appearing on behalf of appellant that appellant was sitting in tea shop and unclaimed bag was found by police officials and thereafter police officials also took him to police station and false case was filed against appellant and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. The plea of appellant that false case was planted upon appellant when appellant was sitting in a tea shop is defeated on the concept of ipse dixit (Assertion made without proof). Appellant did not examine owner of tea shop and appellant also did not examine any other persons who were present in tea shop in order to prove the fact that unclaimed bag was found by police officials when appellant was sitting in tea shop. The defence of appellant is not proved on record in the present case. On the contrary it is proved on record that 5.500 Kg charas was found from exclusive and conscious possession of co-accused Sumit Kumar in the presence of PW2 ASI Hari Singh and PW3 Krishan Lal. Oral testimonies of prosecution witnesses are corroborated by documentary evidence i.e. abstract of malkhana register, NCB forms, seizure memo, site plan, special report and SFSL report.

20. In view of the above stated facts appeal filed by appellant is dismissed. Judgment and sentence passed by learned Special Judge are affirmed. Case property will be confiscated to the State of HP after expiry of limitation for filing further legal proceedings. File of learned trial Court along with certify copy of judgment will be sent back forthwith. File of Cr. Appeal No. 112 of 2013 after due completion be consigned to record room. Appeal is disposed of. Pending applicant(s) if any are also disposed of.

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

Yogesh Mehta .... Petitioner.

Vs.

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

CWP No. 2216 of 2014.
Date of Decision: 24/08/2015

Constitution of India, 1950- Article 226- Respondents No.2 to 4 issued an advertisement for eliciting applications from the candidates falling in the handicapped quota for participation in an auction regarding the shop/stall – petitioner along with one 'D' participated in an auction – petitioner was the highest bidder, however, his bid was cancelled on the ground that only two persons had participated in the bid- held, that no material was placed on record to show that bid was cancelled on the ground that highest bid offered by the petitioner was lesser than the one offered by the allottees regarding the similar properties- writ petition allowed. (Para-1 and 2)

For the petitioner: Mr. Dibender Ghosh, Advocate.

For the respondents : Mr. Vivek Singh Attri, Dy. A.G. for respondent No.1.
Mr. Umesh Kanwar vice Mr. Manish Sharma, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(Oral):*

The respondents No. 2, 3 and 4 issued an advertisement comprised in Annexure P-2 for eliciting applications from the candidates falling in the handicapped quota for theirs participating in an auction qua shop/stall No. 99 scheduled to be conducted on 23/08/2013 at 3 p.m in the office of the Municipal Council. The petitioner as apparent from a perusal of Annexure P-5 belongs to the handicapped quota. He alongwith Smt. Dev Sarni participated in the auction/bid conducted on 23/08/2013 in the office of the Municipal Council, Rampur Bushahr. A perusal of the record placed before this Court divulges that the petitioner was the highest bidder. However, the respondents though were enjoined, by Clause 8 of the Leasing out of Stalls/Shops constructed by the Municipalities in Himachal Pradesh Rules, 2001, which stands extracted hereinafter, to after the acceptance of the highest bid offered in the auction conducted for allotment of shop/stall No. 99 located in Rampur Bushahr by the statutorily competent executive officer of the Municipal Council, Rampur Bushahr, to confirm it by an appropriate resolution being passed by the Municipal Council, Rampur Bushahr.

> ***"Conduction of Auction:-8***
>
> The auction shall be conducted by the Executive Officer or the Secretary of Municipality and the same will be confirmed by the Municipal or Nagar Panchayat through a proper resolution."

However, the respondents despite the auction having been conducted by the Executive Officer, Municipal Council, Rampur Bushahr, the statutorily empowered authority to hold/conduct it, wherein though the petitioner being the highest bidder, omitted to obtain its confirmation by an appropriate resolution having been passed by the Municipal Council concerned. Rather the respondents through Annexure P-4 have proceeded to cancel the bid on the ground meted out therein of only two participants/aspirants from the handicapped quota having participated in the auction for allotment of Shop/Stall No. 99. The aforesaid ground as meted out by the respondents to not proceed to confirm the highest bid offered by the petitioner herein in an auction conducted by the Executive Officer, Municipal Council, Rampur Bushahr, rather proceeding to cancel his bid on the score of their being only two participants in the auction aforesaid per se appears to be nebulous, pretextual as well as flimsy, especially in the face of the advertisement notice issued for eliciting participation of aspirants from the handicapped quota having come to be given wide publicity as imminent from its having stood published in a news paper widely disseminated besides circulated in the area where Shop/Stall No. 99 is located. Even if two aspirants had participated in the bid in compliance to a wide publicity besides circulation in the manner aforesaid having been given to the advertisement notice does obviously for reiteration constrain a formidable inference that it hence was not a tenable ground to oust the petitioner herein to, seek its allotment in the manner contemplated in the apposite rules extracted hereinabove, in his favour, from the Municipal Council, Rampur Bushahr. The meting out of a flimsy ground by the respondents in not accepting the highest bid of the petitioner herein per se tantamounts to its having acted in an arbitrary manner, more so when the petitioner by offering the highest bid qua the aforesaid stall/shop had a legitimate expectation for its allotment in his favour by the respondents.

2. The learned counsel for the respondents has not been able to place on record any material divulging the fact that the respondents were constrained to cancel the bid on the ground that the highest bid offered by the petitioner was lesser than ones offered by the allottees/bidders qua locations enjoying a compatible commercial value viz.a.viz the property

put to auction by the respondents, which material in case placed on record would have rendered vindicable the impugned annexures. Even otherwise, though the learned counsel for the respondents contends with force before this Court that it is not open for this Court in the exercise of its writ jurisdiction to judicially review the order of cancellation of the bid constituted in Annexure P-4, yet the above contention would acquire vigor as well as strength only in the face of Annexure P-4 communicating a legally sound reason constituted in the fact that the highest bid offered by the petitioner herein was neither equivalent besides abysmally low viz.a.viz bids offered for compatible proximate commercial locations at a time contemporaneous to the holding of or conducting of auction qua Stall/shop No. 99 located in Rampur Bushahr. Rather the aforesaid lack of a communication in Annexure P-4 does give ground for this Court to while its exercising writ jurisdiction to judicially review the palpably legally insagacious besides the legally frail reasoning bespoken therein of the highest bid offered by the petitioner warranting cancellation merely on the score of two aspirants having participated in the auction conducted by an authorized officer of the respondent. Writ petition is accepted and the impugned Annexure P-4 of 26.10.2013 for cancelling the auction and allotment of shop/stall No. 99 and Annexure P-6 letter No.1940 of 19.12.2013 are quashed and set-aside. The respondents are directed to confirm the bid offered by the petitioner within three weeks from today. 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.

Anil Kumar ..... Petitioner.

Versus

The State of HP and others ....Respondents.

CWP No. 1396 of 2015.
Date of decision: 25th August, 2015.

Constitution of India, 1950- Article 12- Co-operative Society is not a State within the meaning of Article 12 of the Constitution of India and no writ lies against it- hence, writ petition dismissed as not maintainable. (Para-2 and 3)

Case referred:
Sushil Kumar Dogra versus State of H.P. and others, ILR 2015 HP XLV (IV) 535 (D.B.)

For the petitioner: Mr. Ajay Sharma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General for respondents No. 1 to 3.
Mr. Surinder Saklani, Advocate, for respondents No. 4 and 5.
Ms. Nishi Goel, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The petitioner, by the medium of this writ petition, has questioned the selection and appointment of respondent No. 6 made by respondent No.4-Upper Lahla Cooperative Agriculture Service Society Ltd., on the ground of fairness.

2. The moot question is whether the Cooperative Society-respondent No. 4 is State within the meaning of Article 12 of the Constitution of India and whether the writ will lie?

3. We have already dealt with this issue in ***CWP No. 6608 of 2014*** decided on 14.7.2015 titled ***Sushil Kumar Dogra versus State of H.P. and others*** and held that the Cooperative Society is not a State within the meaning of Article 12 of the Constitution of India.

4. In view of the judgment supra, the writ petition merits to be dismissed and is dismissed. The judgment referred to supra, shall form part of this judgment also. However, the petitioner is at liberty to seek appropriate remedy.

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

Ranjit Singh and others ...Appellants.

Versus

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

LPA No. 74 of 2010
Decided on: 25.08.2015

Constitution of India, 1950- Article 226- Two writ petitions had been filed challenging one notification- writ petitions were allowed and the notification was quashed- appeal was allowed in one writ petition- no appeal was preferred in second writ petition- held, that second judgment quashing the notification had attained finality and the appeal in the second case challenging the quashing of notification will not be maintainable. (Para-3 and 4)

For the appellants: Mr. K.D. Sood, Senior Advocate, with Mr. Mukul Sood, Advocate.

For the respondent: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.
Mr. Ajay Sharma, Advocate, for respondents No. 3 to 11.

The following judgment of the Court was delivered:

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

CMP No. 8929 of 2015

Learned counsel for the appellants has laid this motion for taking on record certain documents. The other side has no objection to the same. Accordingly, the application is granted and the documents are ordered to be taken on record with all just exceptions. The application is disposed of accordingly.

LPA No. 74 of 2010

2. Challenge in this appeal is to the judgment and order, dated 16.03.2010, whereby two writ petitions, being CWP No. 55 of 2003, titled as Jaswant Singh & others

versus State of H.P. & others, and CWP No. 209 of 2006, titled as Kapil Kumar versus State of H.P. & another, came to be determined and notification, dated 22.12.2001, was quashed (for short "the impugned judgment").

3. Respondents No. 3 to 5 in CWP No. 55 of 2003 have questioned the impugned judgment, by the medium of the instant appeal, so far it relates to CWP No. 55 of 2003. The other respondents in the said writ petition and the respondents in CWP No. 209 of 2006 have not questioned the impugned judgment on any count, thus, has attained finality so far it relates to them.

4. It is worthwhile to record herein that in both the writ petitions, notification, dated 22.12.2001, relating to the same village, was the subject matter of the writ petitions, which was quashed in terms of the impugned judgment, has attained finality.

5. In view of the said fact, we are of the considered view that this appeal is not maintainable and the same is dismissed as such alongwith all pending applications.

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

Atma Ram .....Appellant.

Versus

Smt. Surji & ors. .....Respondents.

RSA No. 189 of 2015.
Reserved on: 24.8.2015.
Decided on: 26.8.2015.

Specific Relief Act, 1963- Section 34- 'M' and 'B' non-occupancy tenants conferred proprietary rights qua the suit land to the extent of ½ share each – on his death 'B' succeeded by L.Rs Bhagat Ram, Surji, Thopali and Mahajanu and 'M' succeeded by Sh. Atma Ram- Shri Bhagat Ram, Smt. Thopali and L.R of M sold their share to other defendants excess to their entitlement- plaintiffs Surji etc. who had ¼ share each felt aggrieved- suit for declaration of their share and injunction filed- plaintiffs claiming that they have never sold their share nor created any tenancy qua the same- GPA of Sh. Bhagat Ram, in favour of defendant No.2, was challenged on the ground that Sh. Bhagat Ram was deaf and dumb- trial Court on appreciation of evidence found that GPA is null and void document- sale on the basis of GPA not valid, and secondly, land exceeding the share could not be sold- defendants taking up the plea of adverse possession but failed for want of evidence- suit rightly decreed- sale deed in favour of defendant No.8 declared as void- since, defendant No.8 was bonafide purchaser, therefore, defendant No.1 rightly directed to compensate her for the loss suffered by her- both Courts rightly appreciated the facts and law- hence, appeal without merits and dismissed. (Para-7 to 13)

For the appellant(s): Mr. R.L.Chaudhary, Advocate.

For the respondents: Mr. Vikrant Chandel, Advocate, for respondents No.3 & 4.
Mr. G.R.Palsra, Advocate, for respondent No. 14.

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 Additional District Judge (I), Mandi, H.P. dated 29.6.2013, passed in Civil Appeal No.93/12/11.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs), have instituted a suit for declaration and injunction with a prayer for consequential relief for permanent prohibitory injunction against the appellants defendants(hereinafter referred to as the defendants). According to the plaintiffs, the proprietary rights were conferred on Masadi and Basantu during their life time and after their death the suit land was inherited by the legal representatives of Basantu having half share. The plaintiffs alongwith their brother Bhagat Ram and defendant No. 4 Smt. Thopali each had ¼ share in the half of the suit land. The defendant No. 4 sold her share and the LRs of Masadi also sold their share to other defendants recorded as owner-in-possession of the suit land in excess to their entitlement, thus, decreasing the share of the plaintiffs, without their knowledge. The plaintiffs have never sold their share to any of the defendants nor created any tenancy to any of the defendants. Sh. Bhagat Ram, brother of the plaintiffs died during the pendency of the suit. He was deaf and dumb. He was living in the care and custody of his sister i.e. plaintiff No.1. Defendant No. 2 in connivance with defendant No. 1 and his mother Kununu manipulated wrong and illegal General Power of Attorney from Bhagat Ram. No such General Power of Attorney was ever executed by Bhagat Ram. The mutation Nos. 493 and 494 were attested on the basis of the sale made to father of defendant No. 8, in an illegal manner. The defendant No. 1 Atma Ram had moved an application for correction of revenue entries against Bhagat Ram in connivance with defendant No. 2 and obtained order of Tehsildar on 16.6.1994. The entries regarding Kh. Nos. 1253, 1227 and 1254 were wrongly recorded. No General Power of Attorney was ever given by the mother of Bhagat Ram i.e. Smt. Purni Devi to compromise the suit. Mutation No. 208 dated 28.4.1974 was illegal. The defendants started interfering with the suit land in the month of November, 2003. The matter was reported to the Deputy Commissioner, Mandi, vide letter dated 17.4.2004. The cause of action has arisen in their favour in the month of November, 2003. The defendants were asked by the plaintiffs to get the entries corrected, however, they refused to do so in the month of March, 2005. The suit was instituted praying for declaration to the effect that plaintiffs, deceased Bhagat Ram and defendant No. 4 have equal shares in the suit land. The share of Bhagat Ram after his death has been inherited by plaintiffs and defendant No. 4 i.e. 1/3rd share each in the half of the suit land. The entries in the revenue record reducing the share of the plaintiffs, the alleged General Power of Attorney of Bhagat Ram, order dated 16.6.1994 passed by Tehsildar regarding the correction of revenue entries have been prayed to be declared as illegal, wrong, null and void. The alleged sale made by defendant No. 7 in favour of defendant No. 6 was illegal, null and void.

3. The suit was contested by the defendants. According to the written statement filed by defendants No. 2 & 4, Bhagat Ram was of sound disposing mind. He has executed the general power of attorney and mutation Nos. 493 and 494 were properly attested. The defendants No. 1 & 3 have stated in their written statement that the revenue entries have not been changed and previous possession of Masadi and Basantu have been admitted. Smt. Kununu has been conferred the proprietary rights in the suit land. It was also denied that plaintiffs alongwith Bhagat Ram and defendant No. 4 have ¼ share in the half of the suit land. Defendant No. 8 has stated in the written statement that she has purchased the part of the suit land in the year 1983, being a bonafide purchaser. Defendant No. 6 stated in his written statement that the land comprised in Khewat No. 179, Khatauni No. 315, Kh. No. 1228, measuring 2-0-16 bighas situated in village Kota Dhar is exclusively owned and possessed by him. Earlier Purnu, Kunanu and Bhagat Ram filed a suit against defendant No. 6 and in that suit Pune Ram, General Power of Attorney holder of plaintiff compromised the same on 18.8.1986 with defendant No. 6 and that defendant No. 6 gave Rs. 800/- and consequently the appeal filed by the plaintiffs was dismissed.

4. The replication was filed by the plaintiffs. The learned trial Court framed the issues on 14.9.2009. The suit was decreed vide judgment dated 24.8.2011. Defendants Atma Ram and Smt. Maltu, preferred an appeal against the judgment and decree dated 24.8.2011. Smt. Indira Devi also filed an appeal against the judgment and decree dated 24.8.2011 bearing Civil Appeal No. 117 of 2011. Both the appeals were dismissed by the learned Additional District Judge(I), Mandi, on 29.6.2013. Hence, this regular second appeal by Atma Ram.

5. Mr. R.L.Chaudhary Advocate, for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misread the documentary as well as the oral evidence placed on record. The General Power of Attorney Ext. DW-1/A was duly executed. He also contended that the suit was barred by limitation. He then contended that the Civil Court had no jurisdiction to declare order dated 16.6.1994 as illegal. On the other hand, Mr. G.R.Palsra and Mr. Vikrant Chandel, Advocates for the respective respondents have supported the judgments and decrees passed by the Courts below.

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

7. Since all the substantial questions of law are inter-connected, hence are taken up together to avoid repetition of discussion of evidence.

8. Plaintiff Surji Devi has appeared as PW-1. According to her statement-affidavit, previously Masadi and Basantu were *marusi* tenants over the suit land and proprietary rights were granted to them. The legal representatives of Basantu were having half share and the legal representatives of Masadi became entitled for the half share in the suit land. PW-2 Shanti Lal Patwari and PW-3 Farman Singh have corroborated the statement of PW-1 Surji Devi. PW-4 Gulab Singh has also stated that half share in the suit land went to the legal representatives of Bansatu. DW-6 Atma Ram has categorically admitted that the suit land was earlier owned by Masadi, Basantu and Gaddi. On the death of Gaddi, Basantu and Masadi were cultivating the suit land as non-occupancy tenants. Bhagat Ram, Surji, Thopali and Mahajanu received the share of Basantu and only the share of Masadi went to Atma Ram. The defendants have admitted the joint nature of the suit land. The plaintiffs have conclusively proved that the suit land was originally owned and possessed by the legal representatives of Basantu, namely, Bhagat Ram, Surji Devi, Thopali and Mahajanu.

9. Now, the Court will advert to the question as to whether the General Power of Attorney Ext. DW-1/A, was executed in accordance with law. Bhagat Ram was deaf and dumb. He was feeble minded. The General Power of Attorney is dated 1.11.1983. The judgment of the Civil Court Ext. P-1, dated 9.11.1981 describes Bhagat Ram son of Basantu son of Dhaniya as deaf and dumb. He was sued through next friend i.e. his mother Smt. Purnu. PW-3 Farman Singh testified that Bhagat Ram was mentally feeble and was deaf and dumb. PW-4 Gulab Singh has corroborated the statement of PW-3 Farman Singh. According to the defendants, Bhagat Ram had put his thumb impression on the General Power of Attorney after understanding the contents of the same to be true and correct. Ext. DW-1/A was scribed by DW-1 Dina Nath Sharma. However, he has admitted that he was not personally known to him. DW-2 Yog Raj was the witness of DW-1/A. He has stated that Bhagat Ram was not deaf and dumb. He was confronted with Mark "Y", whereby Bhagat Ram was shown to be represented through next friend. DW-2 Yog Raj had no knowledge as to whether Bhagat Ram was married or not. The statement of DW-3 Bhagwan Dass does

not support the case of the defendants. The other witness of General Power of Attorney is Atma Ram. He is none other than defendant No. 1. According to the judgment Ext. PA, Bhagat Ram son of Basantu has been shown as deaf and dumb. He was sued through next friend i.e. mother.

10. The plaintiffs have led overwhelming evidence to prove that Bhagat Ram was deaf and dumb and he was of feeble mind. Thus, the General Power of Attorney executed vide Ext. DW-1/A was not legal. Sh. Pune Ram had sold the land in share of Bhagat Ram vide sale deed Ext. PW-7/A on the basis of Ext. DW-1/A. Since the General Power of Attorney has been declared to be null and void, the sale executed by Pune Ram vide sale deed Ext. PW-7/A is also illegal. The Tehsildar has summoned Thopali, Mahajanu and Surji on 5.4.1994 to appear before the him on 16.6.1994. They were proceeded ex-parte. The copies of the summons are marked as D, E and F, respectively. The service was effected by way of affixation, however, there was no order whereby the affixation was to be made for effecting service on Thopali, Mahajanu and Surji. It is not the case of the defendants that Thopali, Mahajanu and Surji were avoiding service. Thus, the order dated 16.6.1994 was also illegal and in violation of principles of natural justice. Similarly, any sale effected on the basis of the General Power of Attorney was illegal and void.

11. Mr. R.L.Chaudhary, Advocate, has also argued that the defendants have acquired title by way of adverse possession. However, no evidence was led to this effect by the defendants. It was necessary for the defendants to prove continuous, hostile and peaceful possession to the knowledge of the owners.

12. The cause of action has arisen to the plaintiffs in the month of November, 2003 and also on 7.3.2005. The defendants started interfering with the possession of the plaintiffs in the month of November, 2003. The defendants have refused to admit the claim of the plaintiffs on 7.3.2005. The revenue entries came to the knowledge of the plaintiffs in the month of November, 2003 after that written letter was addressed to the Deputy Commissioner, Mandi for correction of entries. The letter dated 17.4.2004 has also been proved on record. These averments were not controverted by the defendants. Thus, it cannot be said that the suit was barred by limitation. Since the order dated 16.6.1994 has been passed in violation of principles of natural justice, the Civil Court had the necessary jurisdiction to decide the same.

13. Now, as far as the compromise dated 28.8.2006 is concerned, it has not come on record that compromise was for the benefit of Bhagat Ram who was being sued through next friend. Bhagat Ram was deaf and dumb. The learned trial Court has though declared sale made in favour of defendant No. 8 as void, but she has been held to be bonafide purchaser. Thus, defendant No. 1 was ordered to compensate defendant No. 8 for the loss caused to her while deciding issue No. 14. The Courts below have correctly appreciated the oral as well as documentary evidence on record. The General Power of Attorney Ext. DW-1/A was not legal and valid. The plea of adverse possession has neither been pleaded specifically nor any evidence has been led by the defendants to prove the same.

14. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any. The judgments and decrees passed by both the Courts below are affirmed.

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

Mehar Chand alias Mehar Singh. ...Petitioner.

Versus

Kalyan Singh. ...Respondent.

CMPMO No. 21 of 2015
Reserved on: 11.8.2015
Decided on: 26.8.2015

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a application for injunction with a suit against the defendant- claiming temporary injunction restraining the defendant from causing interference in the suit land, destroying its boundary and raising construction- defendant came up with the case that there was a passage (pucca path) used by the public passing through suit land and he intended to lay water supply line through the same without causing any interference in the suit land- defendant placed on record sufficient material to show that he was deprived of water from the main scheme and have to approach even before Consumer Redressal Forum- defendant alleged that suit and application were filed to create hindrance in obtaining the water supply connection- plaintiff not produced any material to deny existence of path through the suit land- pucca path constructed by the panchayat- plaintiff was not to suffer irreparable loss and injury in case, defendant permitted to lay pipe line through pucca path- both Courts rightly came to the conclusion that water is necessity of life and Courts rightly declined temporary injunction- petition also dismissed. (Para-3 to 7)

For the Petitioner : Mr. Rajneesh K. Lall, Advocate.
For the Respondent : In person.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the judgment dated 22.12.2014 rendered by the Additional District Judge, Hamirpur in Civil Misc. Appeal No. 8 of 2014.

2. "Key facts" necessary for the adjudication of this petition are that petitioner-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) has instituted a suit for decree of permanent prohibitory injunction with respect to land comprised in Khata No.5 min, Khatauni No.12 min, Khasra Nos.93, 95, 96, 206, 207, 210 kitas 6 measuring 0-12-57 hectares situated at Mahaal Jangal Khohar, Mauza Jalari, Tehsil Nadaun, District Hamirpur as per Jamabandi for the year 2007-08. The suit land is owned and possessed by the plaintiff and other co-sharers and the respondent-defendant (hereinafter referred to as the "defendant" for convenience sake), being stranger, has no right, title or interest in the same. Defendant in the second week of September, 2012 started encroaching upon the suit land by destroying its boundaries by way of digging to raise forcible construction and further threatened to forcible lay water pipes through the suit land. Alongwith the suit, plaintiff has also filed an application under order 39 rules 1 and 2 of the Code of Civil Procedure.

3. Suit was contested by the defendant. According to the averments made in the written statement, IPH, Nadaun at Gugal had sanctioned a private water connection in the name of his father which after the demise of his father has been transferred in his name and the water supply through said connection was being made from ***Jalari-Tiloo scheme***.

In the year 2006-07, a new scheme was passed under which the water supply was to be made from a big over head tank to the village of defendant and for same the water supply pipes were laid from other side and the general as well as private water supply was made from northern side. Defendant met the official of IPH, Gugal for restoring of water connection from the said supply. It was disclosed that Rasil Singh and his son Ashok Kumar were not allowing to lay water supply pipes alongwith pucca path constructed by Panchayat. Defendant filed a complaint before the District Consumer Disputes Redressal Forum, Hamirpur. The District Consumer Disputes Redressal Forum vide order dated 11.8.2011 allowed the complaint and IPH, Nadaun at Gugal and the brother of the plaintiff and his son were directed to provide water connection to the defendant from water distribution point and to secure regular supply of water as provided to other villagers. Rasil Singh challenged the said order before the H.P. State Consumer Disputes Redressal Commission, Shimla. The appeal filed by Rasil Singh was dismissed by the H.P. State Consumer Disputes Redressal Commission, Shimla on 31.5.2012. Defendant moved an application on 8.8.2012 for execution of the order of District Consumer Redressal Forum. The same came up for hearing on 11.9.2012. It is in these circumstances the plaintiff has filed the suit to create hindrance. Plaintiff was residing at Delhi for the last about 30 years. Defendant has no concern with the suit land except laying of water supply pipes alongwith pucca path already constructed by the Panchayat.

4. Replication was filed by the plaintiff. The application bearing C.M.A. No. 329/2012 in Civil Suit No. 218/2012 was rejected by the learned Civil Judge (Senior Division), Nadaun. Plaintiff preferred an appeal, as noticed hereinabove. The appellate authority dismissed the appeal on 22.12.2014. Hence, the present petition.

5. It has come on record that earlier there was an old scheme for the supply of water known as "***Tiloo-Jalari lift water supply scheme***". In order to augment the water supply, new water supply scheme ***Sai-Matwar*** came into existence. Thus, the water connections were required to be shifted to get the benefit of ***Sai-Matwar*** water supply scheme. All the villagers except defendant have been connected to the distribution of the new pipe lines scheme. It is in these circumstances, defendant was constrained to approach the District Consumer Disputes Redressal Forum. The application was allowed by the District Consumer Disputes Redressal Forum on 11.8.2011. The appeal preferred by the plaintiff was dismissed by the H.P. State Consumer Disputes Redressal Commission, Shimla on 31.5.2012. It has come on record that a pucca path passes through the suit land. Path is being used by the defendant and other villagers. The District Consumer Disputes Redressal Forum has also visited the spot and tried to settle the matter in between the parties. However, the matter could not be settled. Pucca path also leads to the house of defendant. It is used since the time of his father. He only wanted to lay water pipe line alongwith this path. Plaintiff has not produced any material to deny the existence of the path through the suit land. Defendant only wanted to lay water supply pipes through the suit land without causing any interference in the suit land. Pucca path has been constructed by the Panchayat. Plaintiff is not going to suffer irreparable loss and injury in case defendant is permitted to lay pipe line alongwith the pucca path. Both the courts below have rightly come to the conclusion that the water is necessity of life.

6. This Court on 30.4.2015 passed the following order:

> **"It is mutually agreed between the parties that parties as also their learned counsel shall personally remain present on the spot on 10th May, 2015, when endeavour shall be made to have the dispute amicably resolved. Mr. Jai Ram Sharma, Advocate, who is present in the Court, has volunteered to remain present on the spot on that date.**

List the matter in Court on 20th May, 2015."

7. In sequel to order dated 30.4.2015, spot inspection was carried out. The report has been placed on record. It is evident from the report that mutual settlement was tried between the parties. However, neither of the parties was ready and willing to compromise the matter. Fact of the matter is that dispute could not be resolved even when the spot inspection was carried out and both the parties were present. Neither prima facie case nor balance of convenience is in favour of the plaintiff. It cannot be accepted at this stage, as argued by Mr. Rajneesh K. Lal, that if ad-interim injunction is not granted, suit would become infructuous. The suit is to be tried on its own merits and it is reiterated that defendant could not be deprived of water connection through the second augmentation scheme.

8. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed so also the pending applications, if any. It is made clear that the observations made hereinabove shall have no bearing on the merit of the main case. No costs.

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

Ravi Dutt .....Petitioner.

Versus

Joga Singh .....Respondent.

CMPMO No. 424 of 2014.
Reserved on: 10.8.2015.
Decided on: 26.8.2015.

Code of Civil Procedure,1908- Order 17 Rule 3- Plaintiff filed a suit for specific performance of agreement- during trial evidence of the plaintiff was closed by order of the Court as witnesses not produced- defendant's evidence also closed after few opportunities- plaintiff was ill and had undergone surgery - plaintiff has taken all necessary steps by engaging his counsel and instructing him to take necessary steps to produce witnesses- plaintiff came to know about the closure of his evidence by the Court in November, 2014 and filed a petition in December, 2014- evidence wrongly closed by the trial Court by taking a hyper technical view- medical evidence placed by the plaintiff on record shows that he had sufficient cause for non-production of evidence- the orders closing plaintiff's evidence and later on defendant's evidence; quashed- one more opportunity granted to the plaintiff to lead evidence and defendant also permitted to lead evidence thereafter. (Para-3 to 8)

For the petitioner: Ms. Devyani Sharma, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 1.2.2014, rendered by the learned Civil Judge (Sr. Divn.), Nalagarh, H.P. in case No. 56/1/2011.

2. "Key facts" necessary for the adjudication of this petition are that petitioner-plaintiff (hereinafter referred to as the plaintiff) has instituted a suit for specific performance of agreement to sale dated 31.7.2007, whereby the respondent-defendant (hereinafter referred to as the defendant) has agreed to sell the land measuring 0-10 biswas alongwith the structure standing thereon.

3. The written statement was filed by the defendant. The issues were framed by the learned trial Court on 25.9.2012. The matter was ordered to be listed for evidence of the plaintiff for 13.12.2012. Since no steps were taken by the counsel for the plaintiff, the matter was adjourned for 29.1.2013. Thereafter, again the counsel for the plaintiff failed to take steps and the matter was adjourned for 14.5.2013. The matter was again taken up on 22.10.2013 and listed for plaintiff's evidence on 24.12.2013. The plaintiff was directed to take steps within 5 days, failing which, the evidence was to be produced at self responsibility. On 24.12.2013, one PW Preet Mohinder Singh was examined the summons issued to the other witnesses were received unserved. They were directed to be served through dasti process for 1.2.2014 on taking necessary steps within three days, filing which, the evidence of the plaintiff was deemed to have been closed.

4. I have heard Ms. Devyani Sharma, for the petitioner and gone through the impugned order dated 1.2.2014, carefully.

5. The fact of the matter is that on 1.2.2014, statement of one PW Sukhwinder Singh was recorded. No other PWs were present. The evidence of the plaintiff was closed on 1.2.2014 and thereafter, the matter was listed for defendant's evidence on 5.6.2014. No evidence on behalf of defendant was present on 5.6.2014. Thereafter, the evidence of the defendant was also closed on 16.8.2014. The matter was referred to Special Lok Adalat scheduled to be held on 23.8.2014. The matter was not settled in the Special Lok Adalat. Thereafter, the matter was listed for final hearing on 28.10.2014 and then for 9.12.2014.

6. Ms. Devyani Sharma, Advocate, for the petitioner has vehemently argued that the plaintiff's counsel has not disclosed to the plaintiff about the factum of closing of his evidence on 1.2.2014. The plaintiff has been operated upon for transplantation of kidney. He deputed one Swaranjeet Singh to enquire about the proceedings of the case to Nalagarh. He visited Nalagarh on 21.11.2014. The case file was examined and it transpired that the evidence of the petitioner has been closed by the order of the Court on 1.2.2014. Thereafter, the present petition was filed.

7. The respondent was duly served, however, there is no representation on his behalf. The issues were framed by the trial Court on 25.9.2012. The plaintiff has placed on record medical evidence to prove that he was suffering from kidney ailment. It was the responsibility of the plaintiff's counsel to procure the presence of all the witnesses by taking necessary steps. The statement of one witness was recorded on 24.12.2013 and thereafter the statement of another witness Sukhwinder Singh was also recorded on 1.2.2014. The plaintiff has taken all the necessary steps by engaging the counsel and instructing him to take all necessary steps to produce witnesses. The defendant has also not led his evidence despite repeated opportunities. The trial Court has taken a hyper-technical view by not giving at least one more opportunity to the plaintiff to produce the remaining witnesses. The plaintiff came to know only in the month of November, 2014 that his evidence has been closed and thereafter, he has approached this Court by filing the present petition on 12.12.2014. It cannot be said that the present petition is delayed. Moreover, no prejudice would have been caused to the defendant if one more opportunity was granted to the plaintiff to lead evidence. The plaintiff cannot suffer for the negligent acts of his counsel.

8. Accordingly, the petition is allowed. The order dated 1.2.2014 passed in Civil Suit No. 56/1/2011 alongwith order dated 16.8.2014 are quashed and set aside. The plaintiff is allowed to produce his entire evidence on 18.9.2015 before the learned trial Court. It shall be open to the defendant to lead his evidence after recording of the plaintiff's evidence in accordance with law. The parties are directed to appear before the trial Court on 18.9.2015.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

Himachal Pradesh State Electricity Board & another .....Appellants
Versus
Shri Joginder Singh Attal ....Respondent

LPA No. 126 of 2010
Decided on : 27.08.2015

Constitution of India, 1950- Article 226- Respondents were directed to consider the case of the petitioner for claiming extraordinary pension- held, that pension is the right of employee and cannot be denied on the ground of delay and latches- appeal dismissed. (Para-1 and 2)

For the Appellants : Mr. Satyan Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.
For the Respondent : Mr. Kush Sharma, Advocate vice Mr. Shivnak Singh Panta, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this Letters Patent Appeal is to the judgment dated 5th March, 2010, passed by the learned Single Judge in **CWP (T) No. 4662 of 2008**, titled **Shri Joginder Singh Attal** versus **The Secretary, HPSEB & another**, whereby the writ petition came to be allowed and the writ respondents-appellants herein, were directed to consider the case of the writ petitioner-respondent herein, for grant of extraordinary pension, for short 'the impugned judgment'.

2. We have gone through the impugned judgment, which is well reasoned. Pension is the right of an employee and cannot be denied to him/her on the ground of delay and laches. The Writ Court has rightly made the impugned judgment.

3. Having said so, no case for interference is made out. Accordingly, the impugned judgment is upheld and the appeal is dismissed.

4. Pending application stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

LPA No. 18 of 2009 a/w
CWPs No. 3355 & 4928 of 2010
Decided on: 27.08.2015

LPA No. 18 of 2009

Mohar Singh Thakur ...Appellant.
Versus
State of H.P. and others ...Respondents.

.....

CWP No. 3355 of 2010

Sheela Kashyap ...Petitioner.
Versus
The Chairman and another ...Respondents.

.....

CWP No. 4928 of 2010

Ranjit Singh ...Petitioner.
Versus
The Kailash Distt. Co-operative M&C Federation Ltd. and another ...Respondents.

Constitution of India, 1950- Article 226- Petitioner, an employee of co-operative society, filed a Writ Petition against the society claiming that he be allowed to continue with his services till he attains the age of 58 years- held, that co-operative society does not fall within the definition of State- no Writ Petition lies against it- petition dismissed. (Para-3 to 6)

Cases referred:

Sanjeev Kumar and others versus State of H.P. and others, Latest HLJ 2014 (HP) 1061
Chandresh Kumar Malhotra vesus H.P. Stte Coop. Bank and others, 1993 (2) Sim.L.C. 243
Vikram Chauhan versus The Managing Director and ors., Latest HLJ 2013 (HP) 742 (FB)
Thalappalam Ser. Co-op. Bank Ltd. and others versus State of Kerala and others, 2013 AIR SCW 5683

LPA No. 18 of 2009:

For the appellant: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, for respondents No. 1 and 2.
Mr. S.C. Sharma, Advocate, for respondent No. 3.

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CWP No. 3355 of 2010:

For the appellant: Mr. Pranay Pratap Singh, Advocate.
For the respondents: Mr. S.C. Sharma, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, for respondent No. 2.

.....

CWP No. 4928 of 2010:

For the appellant: Mr. B.M. Chauhan, Advocate.

For the respondents: Mr. S.C. Sharma, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

These three cases are being disposed of by this common judgment since common questions of law and facts are involved.

LPA No. 18 of 2009

2. This Letters Patent Appeal is directed against the judgment and order, dated 18.12.2008, made by the Writ Court in CWP No. 1208 of 2005, titled as Mohar Singh versus State of H.P. & others, whereby the writ petition filed by the writ petitioner-appellant herein came to be dismissed (for short "the impugned judgment").

3. The writ petitioner-appellant herein invoked the jurisdiction of the Writ Court by the medium of the writ petition for directing the respondents to allow him to serve till he attains the age of superannuation and retire him at the age of 58 years, which was rejected and the writ petition came to be dismissed on the ground that as per the Rules of the Society governing the field, it was nowhere provided that the employees of the Society are to retire on attaining the age of 58 years.

4. The moot question is - whether writ petition will lie against the Society?

5. This Court in **CWP No. 6709 of 2013,** titled as **Sanjeev Kumar and others versus State of H.P. and others,** reported in **Latest HLJ 2014 (HP) 1061,** while relying on the earlier decision of this Court in **Chandresh Kumar Malhotra vesus H.P. Stte Coop. Bank and others,** reported in **1993 (2) Sim.L.C. 243,** which decision was also affirmed by the Full Bench of this Court in **Vikram Chauhan versus The Managing Director and ors.,** reported in **Latest HLJ 2013 (HP) 742 (FB),** has held that the Societies cannot be termed as 'State' within the meaning of Article 12 of the Constitution of India.

6. The Apex Court in the decision rendered in the case titled as **Thalappalam Ser. Co-op. Bank Ltd. and others versus State of Kerala and others,** reported in **2013 AIR SCW 5683,** after discussing the entire law on the subject, has also held that a Cooperative Society does not fall within the expression 'State' or an 'instrumentality of the State' within the meaning of Article 12 of the Constitution of India.

7. Applying the test to the instant case, the writ petition was not maintainable.

8. Having said so, the writ petition as well as the LPA is not maintainable and both are dismissed as such. However, the petitioner is at liberty to seek appropriate remedy, if any available.

CWPs No. 3355 & 4928 of 2010

9. In view of the dismissal of the writ petition and the LPA (supra), both these writ petitions are also dismissed being not maintainable alongwith all pending applications.

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

Prithvi Raj ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 266 of 2012
Judgment Reserved on : 28.7.2015
Date of Decision : August 27, 2015

Prevention of Corruption Act, 1988- Sections 7 and 13 (2)- Accused was caught red handed receiving an illegal gratification of Rs. 500/-- a complaint was lodged that accused had demanded gratification for release of last installment under Indira Vikas Yojna- however the complainant had deposed in the court that Pardhan had demanded Rs.1,000/- out of which Rs. 500/- were to be paid to the accused and remaining amount was to be kept with the Pardhan- Pardhan was not arrayed as an accused- construction of the house was not completed and the money was to be released only on the completion of the house- shadow witness did not say anything regarding the demand- there were contradictions in the testimonies of the prosecution witnesses- mere recovery without demand is not sufficient to implicate accused- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- appeal allowed. (Para-9 to 28)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Suraj Mal vs. State (Delhi Administration), (1979) 4 SCC 725
M.K. Harshan vs. State of Kerala, (1996) 11 SCC 720
Banarsi Dass vs. State of Haryana, (2010) 4 SCC 450
T. Subramanian vs. State of T.N., (2006) 1 SCC 401.
Meena (Smt) w/o Balwant Hemke vs. State of Maharashtra, (2000) 5 SCC 21
Major E.G.Barsay vs. State of Bombay, AIR 1961 SC 1762
Mukut Bihari & others vs. State of Rajasthan, (2012) 11 SCC 642
Bal Krishan Sayal vs. State of Punjab, (1987) 2 SCC 647
Amba Lal vs. Union of India & others, AIR 1961 SC 264 (Constitutional Bench)
Ganga Kumar Srivastava vs. State of Bihar, (2005) 6 SCC 211
Narender Champaklal Trivedi vs. State of Gujarat, (2012) 7 SCC 80

For the appellant : Mr. Anoop Chitkara and Mr. Dheeraj Vaishsht, Advocates, for the appellant.

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.

Assailing the judgment dated 26.6.2012/ 28.6.2012, passed by the learned Special Judge, Una, H.P., in Corruption Case No. 4 of 2010, titled as State of Himachal Pradesh vs. Prithvi Raj, whereby the appellant-accused stands convicted for having committed offences punishable under the provisions of Sections 7 and 13 (2) of the

Prevention of Corruption Act, 1988 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of one year and pay fine of Rs.2000/- for offence punishable under Section 7 of the Act and rigorous imprisonment for a period of one year and fine of Rs.3000/- for offence punishable under Section 13(2) of the Act, the accused has filed the present appeal under the provisions of Section 27 of the Act read with Section 374 of the Code of Criminal Procedure, 1973.

2. Pursuant to the registration of F.I.R. No. 3 of 2009, dated 30.7.2009 (Ext. PW-10/A), registered at Police Station, SV&ACB, Una, accused was charged to face trial for having committed offences punishable under the provisions of Sections 7 and 13(2) of the Act.

3. As per the case of prosecution, in the course of discharge of his official duties as Gram Panchayat Secretary, of Gram Panchayat Khanpur, Distt. Una, as a public servant, on 30.7.2009, accused demanded and received illegal gratification of Rs.500/- from the complainant Shiv Rattan (PW-1). The alleged demand was made for release of last instalment, due and payable, under the Indira Aawas Yojna for construction of the complainant's house.

4. In order to establish its case, prosecution examined as many as ten witnesses and the statement of accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took plea of innocence and false implication. Noticeably accused admits to have received Rs.500/- from the complainant, but claims it to be donation for construction of a cremation ground. The accused specifically denied having raised any demand or received the said amount, for clearing the papers of the complainant. In defence, he examined four witnesses.

5. Appreciating the material placed on record by the prosecution, trial Court convicted the accused of all the charged offences and sentenced as aforesaid. Hence the present appeal.

6. Having heard learned counsel for the parties as also perused the record, Court is of the considered view that findings as also the impugned judgment are not based on correct and complete appreciation of evidence and material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

7. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ....
>
> (Emphasis supplied)

8. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

9. In the instant case complainant Shiv Rattan (PW-1), has himself deposed that it was only Pradhan Ishwar Dayal who raised demand of illegal gratification from him. It

was for clearing papers for release of last instalment of the amount due and payable to him. Demand was for a sum of Rs.1000/-, out of which Rs.500/- was to be paid to accused Prithvi Chand and the remaining amount was to be retained by Ishwar Dayal. He is categorical that both the Pradhan and the Secretary (appellant herein) delayed release of the installment by one week. He wants the court to believe that by taking loan from the Agricultural Co-operative Society he arranged the money. He contacted the concerned officials by making complaint (Ext.PW-1/A) on the basis of which a raiding party was constituted. Since Pradhan was not available he went to accused Prithvi Chand and offered the money at which he denied having made any demand of Rs.1000/-. He is categorical in stating that "*accused Prithi Chand told me that he had not demanded Rs. 1000/-*". He further states that Rs.500/- was retained by the accused and Rs.500/- returned back.

10. It be only observed that Pradhan Ishwar Dayal who had in fact raised demand of alleged illegal gratification has not been arrayed as a co-accused. Also he is not a witness. Complainant is categorical of the accused never demanding any money. Rs.500/- so handed over by the complainant to the accused cannot be termed as an illegal gratification for clearing the papers for release of the third installment towards construction of his house, for evidently, as is so admitted by the complainant that the "*Block Development Officials had told"* him that he *"would be paid last installment only on completion of my house"*. Undisputedly, as on the date of alleged demand or payment of money, construction of his house was not complete and as such there was no occasion for release of money towards the third/last installment. It be only observed that the first two installments stood released in favour of the complainant. Out of the total sanctioned amount of Rs.38500/-, only Rs.8500/- was left to be paid and none had demanded any money for release of the first two installments. Also version of the complainant that he had borrowed Rs.1000/- from the Agricultural Co-operative Society stands contradicted, in fact, belied, by Sanjeev Kumar (DW-1) according to whom no person by the name of Shiv Rattan s/o Kishori Lal (complainant) had applied for loan during the period of either demand or payment.

11. Also in the complaint (Ext. PW-1/A), it is nowhere mentioned that accused had raised any demand.

12. There is yet another mitigating circumstance in favour of the accused. Dharam Pal (PW-3), a shadow witness, does not state anything with regard to the conversation which took place between the accused and the complainant. He did not overhear anything. No demand was made in his presence. Also no money was paid in his presence.

13. The otherwise uninspiring statement of the complainant required corroboration which was not so done in the instant case. There is no presumption that a public servant from whose custody marked notes are recovered, accepted the same as an illegal gratification. The statutory presumption would arise only with the prosecution discharging the initial burden of proving its case, beyond reasonable doubt, which in the instant case has not been so done.

14. Further, Pravesh Joshi (PW-6) admits that no resolution of the Panchayat, for release of the amount in question, was received. Significantly this was to be so done by the Panchayat and not the Secretary, who in any event had no say in the matter.

15. It be also observed that the defence taken by the accused stands largely probablized. Through the testimony of Malkiat Singh (DW-4), resolution dated 1.3.2009 stands proved, establishing the fact that prior to commission of the alleged crime, resolution

of the Panchayat stood passed seeking contribution from local residents for development of the cremation ground. A sum of rupees two lacs was to be collected as donations.

16. Even if testimony of Dharam Pal (PW-3) is to be ignored for the reason that he was declared hostile, still there are material contradictions in the testimonies of Shiv Rattan (PW-1), Anjali Kumar (PW-2), Constable Anant Kumar (PW-5) and Dy.S.P. Sukhdev Singh (PW-10) with regard to the manner and the place where the accused was apprehended.

17. According to Shiv Rattan and Sukhdev Singh, seeing the trap party, accused who fled away from the spot was apprehended after some time. Whereas, according to Anjali Kumar, immediately after money was handed over, accused was apprehended inside the Panchayat Ghar. Yet a third version has emerged through the testimony of Constable Anant Kumar, who states that with the signaling of Dharam Pal, raiding party entered the Panchayat Ghar and nabbed the accused. As to whether any signal was given or not cannot be said with certainty for it has not come in the version of either Shiv Rattan or Dy.S.P Sukhdev Singh.

18. It be also observed that Rs.500/- allegedly returned to the complainant, which in fact was the case property, was never seized by the police.

19. It is a settled principle of law that mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused. [*Suraj Mal vs. State (Delhi Administration),* (1979) 4 SCC 725]

20. Further the apex Court in *M.K. Harshan vs. State of Kerala,* (1996) 11 SCC 720 has held as under:-

> "8. … In all this type of cases of bribery, two aspects are important. Firstly, there must be a demand and secondly there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence." …

21. Also the apex Court in *Banarsi Dass vs. State of Haryana,* (2010) 4 SCC 450, as held as under:-

> "25. Reliance on behalf of the appellant was placed upon the judgment of this Court in the case of C.M. Girish Babu vs. CBI, (2009) 3 SCC 779 where in the facts of the case the Court took the view that mere recovery of money from the accused by itself is not enough in absence of substantive evidence for demand and acceptance. The Court held that there was no voluntary acceptance of the money knowing it to be a bribe and giving advantage to the accused of the evidence on record, the Court in para 18 and 20 of the judgment held as under :
>
> > "18. In Suraj Mal v. State (Delhi Admn.) [1979 (4) SCC 725] this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.
> >
> > … … …

20. A three-Judge Bench in M. Narsinga Rao v. State of A.P.[2001 (1) SCC 691: 2001 SCC (Cri) 258] while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p. 700, para 24)

> '24. ... we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide Madhukar Bhaskarrao Joshi v. State of Maharashtra [2000 (8) SCC 571]).The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned counsel: (Madhukar case, SCC p. 577, para 12)
>
> > "12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted 'as motive or reward' for doing or forbearing to do any official act. So the word 'gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word 'gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it." ' "

In fact, the above principle is no way derivative but is a reiteration of the principle enunciated by this Court in Suraj Mal v. State (Delhi Admn.) [1979 (4) SCC 725], where the Court had held that mere recovery by itself cannot prove the charge of prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money. Reference can also be made to the judgment of this Court in Sita Ram v. State of Rajasthan [1975 (2) SCC 227], where similar view was taken.

26. C.M. Girish Babu vs. CBI, (2009) 3 SCC 779 case was registered under the Prevention of Corruption Act, 1988, Section 7 of which is in pari materia with Section 5 of the Prevention of Corruption Act, 1947. Section 20 of the 1988 Act raises a rebuttable presumption where the public servant accepts gratification other than legal remuneration, which presumption is absent in the 1947 Act. Despite this, the Court followed the principle that mere recovery of tainted money divorced from the circumstances under which it is paid would not be sufficient to convict the accused despite presumption and, in fact, acquitted the accused in that case."

Similar view was taken by the apex Court in *T. Subramanian vs. State of T.N.,* (2006) 1 SCC 401.

22. Since testimony of Dharam Pal (PW-3) cannot be relied upon to corroborate the otherwise shaky version of Shiv Rattan (PW-1), Court is of the considered view that it was incumbent upon the prosecution to have led some evidence to give strength to its case.

23. The apex Court in *Meena (Smt) w/o Balwant Hemke vs. State of Maharashtra,* (2000) 5 SCC 21 has held that "Law has always favoured the presence and importance of a shadow witness in the trap party, not only to facilitate such witness to see but also to overhear what happens and how it happens". The Court further held that "The Corroboration essential in a case like this for what actually transpired at the time of the alleged occurrence and acceptance of bribe is very much wanting in this case".

24. Also the apex Court in *Major E.G.Barsay vs. State of Bombay,* AIR 1961 SC 1762 has held as under:-

> "41. ... ... The corroboration must be by independent testimony confirming in some material particulars not only that the crime was committed but also that the appellant committed it. It is not necessary to have corroboration of all the circumstances of the case or every detail of the crime. It would be sufficient if there was corroboration as to the material circumstances of the crime and of the identity of the accused in relation to the crime. These principles have been settled in R. vs. Baskerville, (1916) 2 KB 658 which has rightly been considered as the locus classicus of the law of approver's evidence and has been followed by courts in India."

25. Also the apex Court in *Mukut Bihari & others vs. State of Rajasthan,* (2012) 11 SCC 642 has held as under:-

> "11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act, 1988. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person. [Vide: Ram Prakash Arora v. The State of Punjab (1972) 3 SCC 652:AIR 1973 SC 498; Panalal Damodar Rathi v. State of Maharashtra (1979) 4 SCC 526:AIR 1979

SC 1191; Suraj Mal v. The State (Delhi Admn.) (1979) 4 SCC 425:AIR 1979 SC 1408; Smt. Meena Balwant Hemke v. State of Maharashtra (2000) 5 SCC 21:AIR 2000 SC 3377; T. Subramanian v. The State of T.N., (2006) 1 SCC 401:AIR 2006 SC 836; A. Subair v. State of Kerela (2009) 6 SCC 587; State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede (2009) 15 SCC 200; C.M. Girish Babu v. CBI, (2009) 3 SCC 779:AIR 2009 SC 2022; and State of Kerala v. C.P. Rao (2011) 6 SCC 450]"

26. It is also a settled principle of law that shadow witnesses must overhear the conversation of demand of bribe and unequivocally depose such fact in court. In this regard reliance can be sought on the following observations made by the apex Court in *Bal Krishan Sayal vs. State of Punjab,* (1987) 2 SCC 647 as under:-

> "3. Two outsider witnesses had been examined in the case being Khazan Singh and Ram Chander in support of the case. Khazan Singh, as noticed by the High Court, did not speak as to what transpired in the conversation between the bribe giver and the appellant. The other witness too was not very clear as to what talk preceded the passing of the two currency notes. The High Court took the view that even if the prosecution had not indicated what exactly the conversation was, once the passing of the two currency notes was accepted it was for the appellant to explain the circumstances under which the same had been received. Another contention which had been raised before the High Court was that the total penal rent due from Gurcharan Ram was Rs. 102/- and to obtain waiver of this it was unlikely that Gurcharan would have agreed to pay a sum of Rs. 100/- as bribe. We, wanted to find out exactly how much of penal rent was due and, therefore, sent for the record. From the record it is apparent that the demand was of Rs. 102/- which Gurcharan Ram wanted to be waived. There is no material to show whether there was likelihood of any additional demand to be raised against him. Taking the unsatisfactory character of the prosecution evidence in regard to the conversation preceding the passing of the currency notes and the feature that for waiver of Rs. 102/-, the bribe of Rs. 100/- was offered, we are inclined to take the view that the prosecution has failed to establish its case beyond reasonable doubt and the appellant is entitled to this benefit of this situation. The appeal is allowed and the convictions and the sentences are set aside."

27. It is not that every civil servant is corrupt. There cannot be any presumption in that regard. Unless proved otherwise presumption is to the contrary. The statutory onus would shift upon the accused only if initial burden is discharged by the prosecution. [*Amba Lal vs. Union of India & others,* AIR 1961 SC 264 (Constitutional Bench); *Ganga Kumar Srivastava vs. State of Bihar,* (2005) 6 SCC 211; *C.M. Girish Babu (supra);* and *Narender Champaklal Trivedi vs. State of Gujarat,* (2012) 7 SCC 80].

28. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

29. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 26.6.2012/28.6.2012, passed by learned Special Judge,

Una, H.P., in Corruption Case No. 4 of 2010, titled as State of Himachal Pradesh vs. Prithvi Raj, is set aside and the accused is acquitted of the charged offences. Fine amount, if deposited, be refunded to the accused. Bail bonds furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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

State of H.P. and another .....Petitioners.
Versus
Raj Kumar .....Respondent.

CWP No.3010 of 2015.
Date of decision: 27.08.2015.

Constitution of India, 1950- Article 226- State filed a Writ Petition against the award passed by the Labour Court on the grounds of delay in approaching the authorities and delay in reference by the appropriate government to the Labour Court- grounds are not available- held, that the remedy available was to challenge the order making the reference and not to challenge the award passed by the Labour Court- petition dismissed. (Para-4 to 7)

Cases referred:
Karan Singh versus Executive Engineer, Haryana State Marketing Board (2007) 14 SCC 291
Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 SCC 301
Jasmer Singh versus State of Haryana and another (2015) 4 SCC 458
H.P. State Forest Corporation versus Presiding Judge, Labour Court, Shimla and another 2012 LLR 770

For the Petitioners : Mr.Virender Kumar Verma, Ms.Meenakshi Sharma and Mr.Rupinder Singh, Additional Advocate Generals.
For the Respondent : Mr.Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J. (Oral).

This writ petition at the instance of the State is directed against the award passed by the Labour Court whereby the artificial breaks being given to the respondent-workman were held to be wrong and illegal and he was held entitled to seniority and continuity in service from the date of his initial engagement except back wages. The State was further directed to consider the case of the workman for regularization of his services as per the policy framed by it from time to time. It was also clarified that in case the juniors to the workman have already been regularized, in that event, he shall be entitled to regularization from the date/month of the regularization of the services of his juniors.

2. Exception to the award has been taken mainly on two scores:-

i) Delay on behalf of the workman in approaching the authorities.

ii) Reference made by the appropriate government for adjudication to the Labour Court on the basis of such belated demand.

I have heard Shri Virender Kumar Verma alongwith Ms.Meenakshi Sharma and Shri Rupinder Singh, Additional Advocate Generals, for the petitioners and Shri Rahul Mahajan, Advocate, for the respondent.

3. Both the issues in the instant case are interconnected and inter-related and are otherwise no longer res integra in view of the settled law of the Hon'ble Supreme Court.

4. The Hon'ble Supreme Court in ***Karan Singh*** *versus* ***Executive Engineer, Haryana State Marketing Board (2007) 14 SCC 291*** has held that the Labour Court is bound to decide the reference made by the State Government and the same is required to be adjudicated upon merits without touching the aspect of delay and laches. It was held as under:-

> "10. In the appeal the main issue which arises for determination is as follows:
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> > "Whether the reference of the Petitioner/workman could be rejected on the sole ground of delay when Government itself made reference for adjudication of the issue/ dispute?"
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> 11. In Express Newspapers (P) Ltd. v. Workers AIR 1963 SC 569 it has been held that the jurisdiction of the Tribunal in dealing with industrial disputes is limited to the points mentioned in Section 10(4).
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> 12. In National Engineering Industries Ltd. v. State of Rajasthan (2000) 1 SCC 371) it has been held vide para 24 that the High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute which could be the subject-matter of reference for adjudication to the Industrial Tribunal under Section 10. This is because existence of the industrial dispute is a jurisdictional fact. Absence of such jurisdictional fact results in the invalidation of the reference. For example, even under the Income Tax Act, 1961 as it stood earlier, the Income Tax Officer must have reason to believe escapement of income. This "reason to believe" is a jurisdictional fact, therefore, writ petitions were maintainable in cases where the High found absence of basic facts for reopening the assessment. The industrial Tribunal under Section 10 gets its jurisdiction to decide an industrial dispute only upon a reference by the appropriate government. The Industrial Tribunal cannot invalidate the reference on the ground of delay. If the employer says that the workman has made a stale claim then the employer must challenge the reference by way of Writ petition and say that since the claim is belated, there was no industrial dispute. The Industrial Tribunal cannot strike down the reference on this ground.
>
> 13. In the present case, the Industrial Tribunal has held that the employer has violated Section 25F. If so, the order of termination is bad in law. It has to be struck down. In the present case, it has been struck down. However, the Tribunal had refused to grant any relief on the ground of delay. The Tribunal has no authority to invalidate the reference, particularly when it has found that the order of termination violates Section 25F of the Industrial Disputes Act, 1947.
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> 14. In Sapan Kumar Pandit v. U.P. State Electricity Board (2001) 6 SCC 222), it has been held, vide para 15, as follows: (SCC p. 228)
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> > " 15. There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval, it is reasonably possible to conclude in a

particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons, it does not cause the dispute to wane into total eclipse. In this case, when the Government have chosen to refer the dispute for adjudication under Section 4-K of the U.P. Act the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudicating authorities while moulding its reliefs. That is a different matter altogether. The High Court has obviously gone wrong in axing down the order of reference made by the Government for adjudication. Let the adjudicatory process reach its legal culmination."

15. “10. So far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on facts of each individual case.

11. However, certain observations made by this Court need to be noted. In Nedungadi Bank Ltd. v. K.P. Madhavankutty (2000) 2 SCC 455) it was noted at paragraph 6 as follows: (SCC pp. 459-60)

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex-facie bad and incompetent."

12. In S.M. Nilajkar and Ors. v. Telecom District Manager, Karnataka (2003) 4 SCC 27) the position was reiterated as follows: (SCC pp. 39-40 para 17)

"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in M/s. Shalimar Works Ltd. v. Their Workmen (supra) (AIR 1959 SC 1217), that merely because the Industrial Disputes Act does not provide for a limitation for raising

the dispute it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefor. There is no limitation prescribed for reference of disputes to an industrial tribunal, even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even reemployment of the most of the old workmen was held to be fatal in M/s. Shalimar Works Limited v. Their Workmen (supra) (AIR 1959 SC 1217), In Nedungadi Bank Ltd. v. K.P. Madhavankutty and others (supra) AIR 2000 SC 839, a delay of 7 years was held to be fatal and disentitled to workmen to any relief. In Ratan Chandra Sammanta and others v. Union of India and others (supra) (1993 AIR SCW 2214, it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in Daily Rated Casual Employees Under P&T Department v. Union of India (supra) (AIR 1987 SC 2342), the department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16-1-1990 they were refused to be accommodated in the scheme. On 28-12-1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal cum-Labour Court. We do not think that the appellants deserve to be non suited on the ground of delay."

The above position was highlighted recently in Sudamdih Colliery of Bharat Coking Coal Ltd. v. Workmen (2006) 2 SCC 329, SCC pp. 334-36, paras 10-12 and Chief Engineer, Ranjit Sagar Dam v. Sham Lal (2006) 9 SCC 124."

5. Similar issue came up before the Hon'ble Supreme Court in ***Raghubir Singh*** *versus* ***General Manager, Haryana Roadways, Hissar (2014) 10 SCC 301***, wherein the Hon'ble Supreme Court has categorically held that the Limitation Act has no applicability to the reference made by the appropriate government to the Labour Court/Industrial Tribunal for adjudication of existing industrial dispute. It was held:-

"*10. The learned Additional Advocate General for the State of Haryana, Mr. Narender Hooda has vehemently contended that the Labour Court was right in rejecting the reference of the industrial dispute being on the ground that it was barred by limitation by answering the additional issue No. 2 by placing reliance upon the decision of this Court in the case of Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota v. Mohan Lal (2013) 14 SCC 543 wherein this Court has held as under:- (SCC p. 551, para 19)*

> *"19. We are clearly of the view that though Limitation Act, 1963 is not applicable to the reference made under the Industrial Disputes Act, 1947, but delay in raising industrial dispute is definitely an important circumstance which the Labour Court must keep in view at the time of exercise of discretion irrespective of whether or not such objection has been raised by the other side. The legal position laid down by this Court in Assistant Engineer, Rajasthan Development Corporation and Anr. v. Gitam Singh (2013) 5 SCC 136 that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute, must be invariably followed."*

11. In our view of the facts and circumstances of the case on hand, the reference was made by the State Government to the Labour Court for adjudication of the existing industrial dispute; it has erroneously held it to be barred by limitation. This award was further erroneously affirmed by the High Court, which is bad in law and therefore the same is liable to be set aside. According to Section 10(1) of the Act, the appropriate government 'at any time' may refer an industrial dispute for adjudication, if it is of the opinion that such an industrial dispute between the workman & the employer exists or is apprehended. Section 10(1) reads as follows:

> ***"10. Reference of disputes to Boards, Courts or Tribunals**:--(1) Where the appropriate government is of 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; or*
>
> *(b) refer any matter appearing to be connected with or relevant to the dispute to a court for inquiry; or*
>
> *(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; or*
>
> *(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication."(emphasis supplied)*

Thus, it is necessary for us to carefully observe the phrase 'at any time' used in this section. Therefore, there arises an issue whether the question of limitation is applicable to the reference of the existing industrial dispute that would be made by the State Government either to the Labour Court or Industrial Tribunal for adjudication at the instance of the appellant.

12. This Court in Avon Services Production Agencies (Pvt.) Ltd. v. Industrial Tribunal, (1979) 1 SCC 1, after interpreting the phrases "at any time" rendered in Section 10(1) of the Act, held thus:- (SCC p. 7,para 7)

> *"7.……Section 10(1) enables the appropriate Government to make reference of an industrial dispute which exists or is apprehended at any time to one of the authorities mentioned in the section. How and in what manner or through what machinery the Government is apprised of the dispute is hardly relevant.……The only requirement for taking*

> *action under Section 10(1) is that there must be some material before the Government which will enable the appropriate Government to form an opinion that an industrial dispute exists or is apprehended. This is an administrative function of the Government as the expression is understood in contradistinction to judicial or quasi-judicial function."*

Therefore, it is implicit from the above case that in case of delay in raising the industrial dispute, the appropriate government under Section 10(1) of the Act has the power, to make reference to either Labour Court or Industrial Tribunal, if it is of the opinion that any industrial dispute exists or is apprehended at any time, between the workman and the employer.

13. Further, in Sapan Kumar Pandit v. U.P. SEB (2001) 6 SCC 222, it is held by this Court as under: (SCC p. 228, para 15)

> *"15.There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons it does not cause the dispute to wane into total eclipse. In this case when the Government have chosen to refer the dispute for adjudication under Section 4-K of the U.P. Act the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudicating authorities while moulding its reliefs. That is a different matter altogether. The High Court has obviously gone wrong in axing down the order of reference made by the Government for adjudication. Let the adjudicatory process reach its legal culmination."(emphasis supplied)*

14. Therefore, in our considered view, the observations made by this Court in the Rajasthan State Agriculture Marketing Board case upon which the learned Additional Advocate General for the State of Haryana has placed reliance cannot be applied to the fact situation of the case on hand, for the reason that the Labour Court has erroneously rejected the reference without judiciously considering all the relevant factors of the case particularly the points of dispute referred to it and answered the 2nd issue regarding the reference being barred by limitation but not on the merits of the case. The said decision has no application to the fact situation and also for the reason the catena of decisions of this Court referred to supra, wherein this Court has categorically held that the provisions of Limitation Act under Article 137 has no application to make reference by the appropriate government to the Labour Court/Industrial Tribunal for adjudication of existing industrial dispute between workmen and the employer.

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

10(1)(c) of the Act and referred the points of dispute to the Labour Court as the same are in accordance with the law laid down by this Court in Avon Services and Sapan Kumar Pandit cases referred to supra.

16. Further, the workman cannot be denied to seek relief only on the ground of delay in raising the dispute as held in the case of S.M. Nilajkar & Ors. v. Telecom District Manager (2003) 4 SCC 27, it was held by this Court as follows: (SCC pp. 39-40, para 17)

> *"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree..... In Ratan Chandra Sammanta and Ors. v. Union of India 1993 Supp (4) SCC 67, it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief." (emphasis supplied)*

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

18. In Ajaib Singh v. The Sirhind Co-Operative Marketing Cum- Processing Service Society Limited (1999) 6 SCC 82, this Court has opined that relief cannot be denied to the workman merely on the ground of delay, stating that: (SCC p. 90, para 10)

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

6. The issue in question was yet again subject matter of the recent decision of the Hon'ble Supreme Court in ***Jasmer Singh*** *versus* ***State of Haryana and another (2015) 4 SCC 458*** and it was held as under:-

> *"14. On issue No. 3, after adverting to the case of State of Punjab v. Kalidass (1996) 7 SLR 446 wherein the High Court has observed that the workman cannot be allowed to approach the Labour Court after 3 years of termination of his services, upon which reliance placed by the respondent-employer with reference to the said plea the Labour Court has rightly placed reliance upon the judgment of this Court in Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd. (1999) 6 SCC 82 in which it is observed by this Court that there is no period of limitation to the proceedings in the Act.*
>
> *15. Accordingly, Issue No. 3 is answered against the respondent-management. The relevant paragraph from Ajaib Singh's case (supra) are extracted herein below: (SCC p.90, para 10)*
>
> > *"10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay in shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/ termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages."*

7. Further, in case the petitioners were really aggrieved by the reference made on the ground that it was belated and no dispute exists, then the remedy available to them was to challenge the order making reference and if they choose not to do so, it cannot be at this stage questioned the reference as being time barred. Similar issue came before a learned Division Bench of this Court in ***H.P. State Forest Corporation*** *versus* ***Presiding Judge, Labour Court, Shimla and another 2012 LLR 770*** wherein it was held as follows:-

> *"4. If the employer is aggrieved by the reference being made on the ground that it is belated and no dispute exists then remedy available to the employer is to challenge the order making the reference and if it does not challenge the said order, it can not in reference proceedings claim that the petition should be dismissed on the ground of limitation, delay or laches."*

8. In view of the settled proposition of law, no irregularity, illegality or perversity is found in the award passed by the Labour Court-cum-Industrial Tribunal as it has taken into consideration not only the factual aspects, but has also taken into consideration the law on the subject. Once, a reference had been made to it, the Labour Court-cum-Industrial Tribunal was bound to decide the reference so made and the same was required to be adjudicated upon merits without touching the aspect of delay and laches.

9. In view of the aforesaid discussion, there is no merit in this petition and the same is accordingly dismissed leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Cr.A. No. 98 of 2013 along with
Cr.A.P. No. 164 of 2013
Reserved on: 26.8.2015
Decided on: 27.8.2015

1. Cr. Appeal No. 98 of 2013

Sukhdev alias Sonu alias Deepa alias Sukha. ..Appellant

Versus

State of H.P. ...Respondent

2. Cr. Appeal No. 164 of 2013

Jyoti Bala ...Appellant

Versus

State of H.P. ...Respondent.

Indian Penal Code, 1860- Sections 302, 102 and 34- Deceased consumed alcohol – he went to sleep and asked his wife not to wake him up- husband did not wake on calling- he was found dead with blue mark on the left side of the neck- a complaint was made against the wife that she had killed her husband and had manipulated a false story- post mortem examination revealed that deceased had died due to asphyxia caused by strangulation- witnesses to disclosure statement did not support the prosecution version- recovery was doubtful- prosecution witnesses had not narrated the incident to any person- medical evidence pointed towards hanging and not strangulation- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- accused acquitted.

(Para-31 to 34)

For the appellant(s): Mr. Anup Chitkara, Advocate in Cr. A.No. 98 of 2013 and Mr. Ashwani Kaundal, Advocate in Cr. A. No. 164 of 2013.

For the Respondent: Mr. P.M. Negi, Dy. A.G. in both the appeal.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

Since both the appeals have arisen out from the common judgment, the same were taken up together and are being disposed of by a common judgment.

2. These appeals are instituted against the judgment dated 22.2.2013 rendered by the Additional Sessions Judge, Fast Track Court, Una in Sessions Trial No. 29/2011, whereby the appellants-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under sections 302 and 201/34 IPC have been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- each under section 302 read with section 34 IPC and for want of payment of fine to undergo simple imprisonment for a period of six months. The co-accused Ajay Kumar was acquitted.

3. Case of the prosecution, in a nutshell, is that information was received in Police Station, Haroli to the effect that Ved Prakash son of Harika Dass has died under mysterious circumstances. PW-28 ASI Krishan Kumar alongwith HC Santosh Singh and other police officials went to the spot. PW-29 HC Kewal Krishan was already on patrolling in the area. He was directed to visit the spot. Ved Parkash was 40 years old and was a labourer. He was married to Jyoti Bala. Deceased Ved Parkash had three sons. According to the statement of Jyoti Bala, Ved Parkash was addicted to liquor. On 17.5.2011, there was marriage of son of Gurmail Singh near the house of Ved Parkash. Deceased came to his house at about 8.30 P.M. alongwith 3-4 bottles of liquor. He consumed liquor in his courtyard and later on due to electricity failure went to his room and continued drinking. At about 11.30 P.M., deceased told his wife that he would not accompany the Barat in the morning and she should not wake up him. At about 5-6 A.M. wife of deceased went to attend the marriage alongwith her children and on return, she found her husband sleeping, who did not wake up even on calling. Jyoti Bala raised hue and cry. People gathered on the spot. Initially, proceedings under section 174 Cr.P.C. were initiated and Dy. S.P. also visited the spot. On the left side of neck of the deceased, a blue mark was found and no other external injury was noticed on the body of deceased. The post-mortem was got conducted. Statement of PW-8 Jagjiwan Ram Ex.PW-8/A was recorded under section 154 Cr.P.C. According to the statement of the complainant, Jyoti Bala individually or with the help of others has killed his brother and in order to misguide the people has manipulated the story of death due to excessive drinking of liquor. FIR Ex.PW-5/A was registered under sections 302 and 201 read with section 34 IPC at Police Station, Haroli. Post-mortem report Ex.PW-1/C was obtained. There were ligature marks present on the neck of the deceased. The dead body of deceased after postmortem was handed over to his uncle PW-9 Meet Chand. Accused Jyoti Bala was arrested on 19.5.2011. Accused Sukhdev was arrested on 22.5.2011. Jyoti Bala made disclosure statement Ex.PW-10/A and got recovered a Darat vide memo Ex.PW-14/A. Sukhdev made disclosure statement Ex.PW-10/B in the presence of witnesses Jaswant and Harnam and got recovered Parna vide memo Ex.PW-14/D. Site plan was prepared. Motorcycle was taken into possession. Case property was also taken into possession. Statements of the witnesses were recorded. The police investigated the case and the challan was put up in the Court after completing all the codal formalities.

4. Prosecution examined as many as 28 witnesses to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. They have denied the case of the prosecution in entirety. Learned trial Court convicted and sentenced the accused as noticed hereinabove. Hence, this appeal.

5. Mr. Anup Chitkara and Mr. Ashwani Kaundal, learned counsel for the accused, have vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. P.M. Negi, learned Deputy Advocate General has supported the judgment passed by the trial Court.

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

8. PW-1 Dr. Daljeet Singh has proved post-mortem report Ex.PW-1/C. According to his observation, on the basis of external appearance dark brown colouration was present around the neck. Blackish colouration was present around the neck. Blood from the nose was present. The face was cyanosed with prominent eyes. Abrasions were present on the side of arms and left side of the chest. There was no injury to underlying cartilages. Ligature mark of rope was present around the neck. Hyoid bone was found to be

fractured. According to his opinion, deceased died due to asphyxia. However, the final opinion was kept under observation. The final opinion is Ex.PW-1/E. According to the final opinion, deceased died due to asphyxia due to strangulation. In his cross-examination, he has admitted that in the postmortem report Ex.PW-1/C, they have not mentioned time of postmortem. He has admitted that in Ex.PW-1/C, there were cutting, over-writings and additions. He has also admitted that application for postmortem is always accompanied by inquest report and the doctor must go through the report before conducting the post-mortem. He has also admitted that doctor must sign the inquest report as well as request application. He has also admitted that they have not signed or initialed the application. According to the inquest report and application, the cause of death was mentioned due to excessive drinking. He did not preserve any soft part of body around the fracture for further analysis as according to him it was not required. He has admitted that on 19.5.2011, the opinion of the Medical Board about the death was asphyxia. Second opinion about asphyxia due to strangulation was given by them on 16.7.2011. He has admitted that when the first and second opinions were given, there was no change in the circumstances. He has also admitted that the fracture of hyoid bone is accorded considerable importance in distinguishing hanging from strangulation. He has also admitted that in case of hanging, hyoid bone fracture is common whereas in strangulation, it is rare. He has also admitted that the neck of deceased was found to be starched. He has admitted that in the case of hanging neck is always stretched. However, in the strangulation it is never so. Ligature mark was found above the thyroid cartilage.

9. PW-2 Rohit Kumar has deposed that on 17.5.2011 accused Sukhdev came to his house at Garshankar to take him to the marriage of accused Ajay's cousin. He and accused Sukhdev firstly came to the village Dulehar and thereafter to village Baliwal Jorian in the marriage on motorcycle in the evening. The house of Jyoti Bala was 30-40 meters away from the house where they had come in the marriage. He stayed in the house where marriage was being solemnized for about 10-15 minutes. Thereafter, he and accused Sukhdev came to the house of accused Jyoti Bala. Deceased Ved Parkash was present in the house. Accused Jyoti Bala served them tea. They again went to attend the marriage. At about 10.00 P.M., he alongwith accused Sukhdev and Jyoti Bala came to the house of Jyoti Bala. Jyoti Bala told them that Ved Parkash has consumed 3-4 bottles of liquor and he wound not take meals. Deceased Ved Parkash had not consumed liquor nor he was appearing to have drunk. He and accused Ajay were sleeping in the courtyard whereas Ved Parkash deceased was sleeping with his son in the same courtyard. Accused Sukhdev was sleeping keeping his head on the thigh of accused Jyoti Bala. Accused Jyoti Bala kissed accused Sukhdev at which Ved Parkash got up and stated that he was already knowing about illicit relations of Jyoti with accused Sukhdev and he had to see with his eyes. Deceased Ved Parkash first tried to set the house on fire. He and accused Ajay advised him not to do so. Deceased demanded Rs. 1000/- from accused Jyoti Bala, which he had given to her. Jyoti Bala refused to give money to the accused. Deceased pushed her. She fell down. Accused Sukhdev intervened and asked Ved Parkash not to quarrel with accused Jyoti Bala. Deceased told his wife that she may live with her friends and he was leaving the house. Ved Parkash left the house alongwith Parna. Accused Jyoti told the accused to sleep and Ved Parkash shall come in the morning. He and accused Ajay slept in the courtyard again. After about an hour, accused Jyoti and accused Sukhdev woke up them and told that Ved Parkash has hanged himself. Accused Sukhdev and Jyoti Bala took them to the place where Ved Parkash was hanging on Sheesham tree. The place was at a distance of 100 meters. Deceased was found in a sitting posture with Sheesham tree. Jyoti asked him to climb the Sheesham tree as he was tall. He could not open the knot. Jyoti brought Darat from her house. He cut the Parna and dead body fell down on the ground. Thereafter, accused Jyoti asked them to throw the dead body in some well or in some canal. However,

the dead body was brought to the house of deceased. It was put on the cot. He slept thereafter. He and accused Sukhdev left the house of deceased and came to village Dulehar. On 20.5.2011, they came to village Garshankar from where they had gone to Dera Beas. At Dera Beas, accused Sukhdev told him that he and accused Jyoti Bala have murdered deceased Ved Parkash and the story regarding suicide was a drama. Accused Sukhdev Singh told that he and accused Jyoti Bala have murdered deceased by strangulating with Parna. He has identified Parna Ex.P-1. His statement under section 164 Cr.P.C. was recorded by the Judicial Magistrate, Una on 25.7.2011. In his cross-examination, he has deposed that his statement was recorded by the police on 23.7.2011. His statement was recorded under section 164 Cr.P.C. vide Ex.PW-2/A. He told the Magistrate in his statement Ex.PW-2/A that he and accused Ajay were sleeping in the courtyard of the house of deceased Ved Parkash whereas Ved Parkash was sleeping with his son in the same courtyard and accused Sukhdev was sleeping keeping his head on the thigh of accused Jyoti Bala. (Confronted with his statement Ex.PW-2/A wherein it was not so recorded). He has also told the Magistrate that deceased Ved Parkash was already knowing about illicit relations of accused Jyoti with accused Sukhdev. (Confronted with his statement Ex.PW-2/A wherein it was not so recorded). He had also told the Magistrate that deceased Ved Parkash left the house alongwith Parna and accused Jyoti asked the accused to sleep stating that Ved Parkash shall come in the morning. (Confronted with his statement Ex.PW-2/A wherein it was not so recorded). He has told the Magistrate that accused Jyoti and Sukhdev woke up them and told that Ved Parkash has hanged himself. (Confronted with statement Ex.PW-2/A wherein, name of accused Jyoti was not recorded). He has told the Magistrate that accused Jyoti asked him to climb Sheesham tree as he was tallest and accordingly, he climbed the tree. (Confronted with his statement Ex.PW-2/A wherein it was not so recorded). He has told the Magistrate that he cut the Parna and dead body fell on the ground. (Confronted with statement Ex.PW-2/A wherein it was recorded that accused Jyoti had cut the Parna). He has told the Magistrate that at Dera Beas, accused Sukhdev told him that he and accused Jyoti Bala have murdered deceased Ved Parkash by strangulating him with Parna. (Confronted with his statement Ex.PW-2/A wherein strangulating with Parna was not recorded). He has told the Magistrate that story regarding suicide was a drama. (Confronted with his statement Ex.PW-2/A wherein it was no so recorded). He has admitted that Ved Parkash had alone left the house in his presence. Thereafter, he slept. On 19.5.2011, he did not go to the house where marriage was being solemnized. He had gone to his house on 20.5.2011. He did not disclose about the incident to anybody either at village Shekhowal or at his house. They went to Dera Beas by train on 20.5.2011. The incident was not disclosed to him by accused Sukhdev on 20.5.2011. He disclosed the incident on 21.5.2011. He came back alone from Dera Beas on 22.5.2011. He did not disclose the incident from 21.5.2011 till 23.7.2011 to anybody including his parents. He has admitted that when they left the house of deceased Ved Parkash, they did not report the matter to the Panchayat or Police.

10. PW-3 Gurmail Singh has deposed that marriage of his son was solemnized on 17/18.5.2011. Accused Ajay and Sukhdev were not invited in the marriage.

11. PW-4 Jogi Ram alias Nikku has deposed that he had come to attend the marriage of brother of his friend in village Baliwal Jaurian. He did not see accused in the house of accused Joyti. He was declared hostile.

12. Statement of PW-5 HHC Harmesh Kumar is formal in nature.

13. PW-6 Gurmail Chand has deposed that at about 9.00 P.M. a motorcycle driven by accused Deepa alias Sukhdev reached the spot on which two other persons were travelling. One of them was accused Ajay. They remained at the venue of marriage for

about half an hour and thereafter they left. Again at 10.00 P.M., they reached the spot alongwith accused Jyoti Bala and were moving at the venue of marriage. Thereafter, they went to nearby shop. There was electricity failure due to which the ceremony of Tamol could not take place. Accused Jyoti again came at about 11.00 P.M. and remained there for about ten minutes and thereafter left the place. At about 11.15 P.M. he heard the noise from the house of accused Jyoti Bala. He visited the house of accused Jyoti Bala. She told him that something has happened to her husband Ved Parkash. She also told that Ved Parkash had consumed liquor.

14. PW-7 Santosh Kumar has deposed that he was Ex-President of Gram Panchayat Pubowal. Deceased was known to him. Accused Jyoti Bala was not having good character. She used to leave the place of her residence for many months leaving behind her children. He came to know about the death of Ved Parkash through a telephonically message.

15. PW-8 Jagjiwan Ram is the brother of deceased. The relations between his brother and his wife were not cordial. She used to pick up quarrel with his brother. His brother used to tell him that his wife used to give threatening to kill him. On 18.5.2011, at about 1.00 P.M. a telephonic message was received from the house of Ved Parkash. He was informed that Ved Parkash has died. The police checked the dead body and filled up forms/inquest report Ex.PW-1/D. His statement Ex.PW-8/A was recorded. In his cross-examination, he has admitted that during the search of the room, police took into passion one Chuni and one Darat on that day.

16. PW-9 Meet Chand has deposed that relations between Ved Parkash and his wife Jyoti Bala were not cordial and they used to quarrel.

17. PW-10 Harnam Singh has deposed that on 25.5.2011, Jyoti Bala made statement to the police that she could get Darat and Parna recovered. He was declared hostile by the learned Public Prosecutor. He has denied the suggestion in his cross-examination that accused Sukhdev made disclosure statement that he has concealed one Parna, which was torn with the Darat at the back side of the house of Jyoti.

18. PW-11 Jaswant Singh has deposed that he visited the police station. Witness Harnam Singh was also present in the Police Station. Nobody gave any statement in his presence. He was declared hostile. He was cross-examined by the learned Public Prosecutor. In His cross-examination, he has admitted that Jyoti Bala had also put her signatures on Ex.PW-10/A. He has also admitted that accused Jyoti stated to the Police that she has concealed one Darat underneath Petti (box) and she could get the same recovered. However, in his cross-examination by the learned defence counsel, he has admitted that documents Ex.PW-10/A and Ex.PW-10/B were already prepared by the police before their arrival in the Police Station and they only signed the same.

19. Statement of PW-12 Constable Joginder Kumar is formal in nature.

20. PW-13 Dr. Sanjay Mankotia was one of the members of the Medical Board, who has conducted the postmortem examination on the body of Ved Parkash. Their final opinion was that deceased died to asphyxia due to strangulation. In his cross-examination, he has admitted that immediately after strangulation if a person is hanged by 2-3 persons then ligature marks may be disturbed and neck may be slightly stretched, however, this opinion was never obtained by the police. He has further admitted in his cross-examination that ligature mark was not disturbed.

21. PW-14 Santosh Kumari has deposed that in their presence accused Jyoti led the police party to her house and got recovered Darat from underneath the iron petti (big trunk). She was declared hostile by the learned Public Prosecutor. In her cross-examination by the learned defence counsel, she has deposed that the contents of memo were not read over to her. The Parna was recovered from the open place. She had not visited the spot on the day of death. The police handed over Darat to accused Jyoti and then clicked the photographs. Similarly, Parna Ex.P-1 was handed over to accused Sukhdev and thereafter photographs were taken.

22. PW-15 Chaman Lal has deposed that accused Jyoti and Sukhdev were present with the police during investigation. Accused Ajay Kumar was not present. Accused Jyoti led the police to her house and got recovered Darat Ex.P-2. Police took photograph of Darat. He did not know where the Darat Ex.P-2 was kept. He was also declared hostile and was cross-examined by the learned Public Prosecutor. He has denied the suggestion that Darat was got recovered by accused Jyoti from underneath iron petti. Volunteered that in his presence nothing had happened and the Darat had already been recovered. Police had taken photographs when he reached the spot. He has denied the suggestion that in his presence Darat was put in a cloth parcel and sealed with six seals of impression 'M'. He has also denied that police vide memo Ex.PW-14/A took Darat Ex.P-2 in possession. The same were read over and explained to them.

23. Statements of PW-16 Mindo, PW-17 Deepak Thakur, PW-18 Ashwani Kumar, PW-19 Jagdish Ram, PW-20 Gurmail Singh and PW-21 Ashok Kumar are formal in nature.

24. PW-22 HC Vipan Kumar has deposed that he remained posted as MHC in Police Station, Haroli from August, 2009 to September, 2011. Case property was handed over to him. He sent the same to FRSL, Dharamshala. The chemical reports are Ex.PW-22/B and Ex.PW-22/C. Photocopies of Malkhana register are Ex.PW-22/D, copies of RC are Ex.PW-22/E and Ex.PW-22/F.

25. Statement of PW-23 Balwinder Singh is formal in nature.

26. PW-24 ASI Ashok Kumar has deposed that Rohit Kumar had expressed his intention to make statement before the Magistrate on 25.7.2011.

27. PW-25 SI Nishant Kumar has deposed that accused Jyoti has made disclosure statement and accused Sukhdev also made disclosure statement to the effect that they have kept Darat and Parna concealed backside the house of accused Jyoti Bala.

28. PW-26 Happy was 13 years of age. He was examined on oath. He has only deposed about there was marriage on 17.5.2011. His mother was arrested on 18.5.2011. He did not know whether the police had taken away Darat and Parna from the spot on that day.

29. PW-27 SI Shakti Singh Pathania has deposed that statement of Rohit Kumar was recorded by the Judicial Magistrate 1st Class, Court No.2, Una vide Ex.PW-2/A.

30. PW-28 ASI Krishan Kumar has visited the spot after receiving information. Photographs were taken. Statements were recorded. Inquest form was filled in. Disclosure statements Ex.PW-10/A and PW-10/B were made by the accused, on the basis of which recoveries were effected. In his cross-examination, he has admitted that Santosh Kumar, Manpreet and Meet Chand had disclosed him while recording their statements that deceased died due to consuming excess liquor. He has also admitted that none of these persons raised any suspicion against anyone. He has also admitted that in DDR Ex.PW-24/B, it was mentioned that no suspicious or mysterious circumstances were existing about the death of

Ved Parkash. He examined the dead body minutely from all angles and only one bluish spot on left side of the neck was noticed. He did not measure it.

31. Statement of PW-29 Kewal Krishan is formal in nature.

32. Case of the prosecution precisely is that accused have killed deceased Ved Parkash and thereafter hanged his body on a Sheesham tree. Thereafter, accused cut the Parna and body was brought to the house of Jyoti Bala and put on the cot. Post-mortem was got conducted on the body on 19.5.2011. PW-1 Dr. Daljeet Singh has categorically deposed that the neck was stretched. No injury was found underlying cartilages. Initially, according to Ex.PW-1/C, cause of death was asphyxia. However, in the final opinion, it was mentioned that deceased died due to asphyxia due to strangulation as per Ex.PW-1/A. In his cross-examination, PW-1 Dr. Daljeet Singh has categorically admitted that when the first and second opinions were given, there was no change in the circumstances. He has admitted that on 19.5.2011, it was not mentioned by them that cause of death was asphyxia due to strangulation. The second opinion about asphyxia due to strangulation was given by them on 16.7.2011. He has admitted that the fracture of hyoid bone is accorded considerable importance in distinguishing hanging from strangulation. He has also admitted that in case of hanging, hyoid bone fracture is common whereas in strangulation it is rare. He has admitted that in the case of hanging neck is always stretched. However, in the strangulation it is never so. He has also admitted that ligature mark was found above the thyroid cartilage. He has admitted that in case of hanging, ligature mark is usually above thyroid cartilage whereas in the strangulation it is usually below the thyroid cartilage. Thus, possibility could not be ruled out that deceased died due to hanging.

33. Similarly, PW-13 Dr. Sanjay Mankotia has also deposed that if a person is hanged by 2-3 persons, ligature marks may be disturbed and neck may be slightly stretched but this opinion was never sought by the police. He has also admitted that in the instant case, the ligature mark was not disturbed. Thus, it casts doubt whether the deceased died due to hanging or strangulation.

34. Case of the prosecution is that accused Jyoti Bala had made disclosure statement Ex.PW-10/A that she could get the Darat recovered. Similar statement was also made by accused Sukhdev Ex.PW-10/B that he could get the Parna recovered. PW-10 Harnam Singh was declared hostile. Similarly, PW-11 Jaswant Singh was also declared hostile. These two witnesses were cross-examined by the learned Public Prosecutor. PW-11 Jaswant Singh in his cross-examination by the learned Defence Counsel has admitted that Ex.PW-10/A and Ex.PW-10/B were already prepared by the police before their arrival. PW-14 Santosh Kumari has deposed that in her presence accused Jyoti got recovered Darat from underneath the iron petti (big trunk) and put the Darat in cloth parcel. In her cross-examination by the learned counsel appearing on behalf of the accused, PW-14 has deposed that Parna was recovered from an open place. The police handed over the Darat to accused Jyoti and then photographs were taken. PW-15 Chaman Lal was also declared hostile. He was cross-examined by the learned Public Prosecutor. He has denied the suggestion that before signing Ex.PW-14/A, the contents of the same were read over to him. Since PW-10 Harnam Singh, PW-11 Jaswant Singh, PW-14 Santosh Kumari and PW-15 Chaman Lal have not supported the case of prosecution in entirety, the recovery of Darat and and Parna is doubtful. Moreover, the Parna has been recovered from an open place, which was accessible to all. Ex.PW-10/A and Ex.PW-10/B were already prepared as per the statement of PW-11 Jaswant Singh before the arrival of PW-10 Harnam Singh and PW-11 Jaswant Singh. PW-2 Rohit Kumar has deposed that he was in the house of Ved Parkash. Accused Sukhdev was sleeping keeping his head on the thigh of accused Jyoti Bala. Accused Jyoti kissed accused Sukhdev, at which Ved Parkash got up and stated that he was already knowing about illicit

relations of Jyoti with accused Sukhdev and he had to see with his eyes. Deceased Ved Parkash first tried to set the house on fire. Deceased demanded Rs. 1,000/- from accused Jyoti which he had given to her. Accused Jyoti Bala refused to give money. Accused Ved Parkash left the house alongwith Parna. Accused Jyoti Bala told the accused to sleep and that Ved Parkash shall come in the morning. They went to sleep. Thereafter, after about an hour, accused Jyoti and Sukhdev woke up them and told that Ved Parkash has hanged. Thereafter, they went to Sheesham tree and the body was removed. However, fact of the matter is that the incident has happened during the intervening night of 17/18.5.2011, but PW-2 Rohit Kumar did not disclose the incident either to the Panchayat or to the Police. His normal conduct would have been to inform at least his relatives or the member of the Panchayat. He was confronted on the material facts stated by him in Ex.PW-2/A. PW-3 Gurmail Singh whose son's marriage was being solemnized was also declared hostile including PW-4 Jogi Ram. According to PW-8 Jagjiwan Ram and PW-9 Meet Chand, character of Jyoti Bala was doubtful, but no specific incident has been given by these witnesses except making bald assertion that relation between accused Jyoti and deceased Ved Parkash were not cordial and she used to pick up quarrel with Ved Parkash. PW-28 ASI Krishan Kumar, in his cross-examination, has admitted that initially when the statements of Santosh Kumar, Manpreet and Meet Chand were recorded, they disclosed that deceased died due to consuming excessive liquor. He has admitted that in DDR Ex.PW-24/B, it was mentioned that no suspicion or mysterious circumstances have been found. He has also admitted that Dy.S.P. has visited the spot and inspected the dead body thoroughly and nobody raised any doubt on any person at that time. He examined dead body minutely and only one bluish spot on left side of the neck was noticed. Cause of death in inquest report was also excessive drinking. When neither Dy. S.P. nor PW-28 ASI Krishan Kumar has noticed any injury except bluish spot on left side of the neck, how ligature mark appeared on the neck has not been explained by the prosecution at the time postmortem examination. According to Modi A Textbook of Medical Jurisprudence and Toxicology 24th Edition 2011, in the case of hanging, asphyxia is the most common cause of death. The ligature is usually situated above the thyroid cartilage, and the effect of its pressing the neck in that situation is to force up the epiglottis and the root of the tongue against the posterior wall of the pharynx. The ligature mark is usually situated above the thyroid cartilage between the larynx and the chin and is directed obliquely upward following the line of the mandible and interrupted at the back or may show an irregular impression of a knot, reaching the mastoid processes behind the ears towards the point of suspension. The neck is found to be stretched and elongated and the head is always inclined to the side opposite to the knot and the arms of the loop of ligature. In strangulation, ligature mark is well defined and slightly depressed mark corresponding roughly to the breadth of the ligature, usually situated low down in the neck below the thyroid cartilage and encircling the neck horizontally and completely. In the instant case, the neck was stretched. According to PW-1 Dr. Daljeet Singh, ligature mark was found above the thyroid cartilage. All the characters, as per Modi A Textbook of Medical Jurisprudence and Toxicology 24th Edition 2011, point out towards hanging and not strangulation.

35. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for offence under section 302 read with section 34 of the Indian Penal Code beyond reasonable doubt against the accused.

36. Accordingly, the appeals are allowed. Judgment of conviction and sentence dated 22.2.2013 rendered in Sessions Trial No. 29/2011 is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if already deposited, be refunded to the accused. Since the accused are in jail, they be released forthwith, if not required in any other case.

37. The Registry is directed to prepare the release warrants 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.

Brig. Ranjit Singh Verma .....Appellant
Versus
Himachal Road Transport Corporation & another ..... Respondents

FAO No.309 of 2008
Date of decision: 28.08.2015

Motor Vehicles Act, 1988- Section 166- Car of the petitioner was damaged due to the negligence of the driver of the bus- it was proved on record that claimant had suffered because of rash and negligent driving of the driver of the offending vehicle- compensation of Rs.1 lac awarded in lump sum without any interest. (Para-5 to 7)

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. N.K. Thakur, Senior Advocate, with Mr. Jagdish Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 18th March, 2008 passed by the Motor Accident Claims Tribunal, Shimla in MACC No.43-8/2 of 2005, titled Brig. Ranjit Singh Verma vs. Himachal Road Transport Corporation & another, whereby the claim petition came to be dismissed (for short "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimant/appellant invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehciles Act, 1988, (for short, the Act), seeking compensation on the ground that the driver, namely, Jagdish Chand, while driving bus bearing registration No.HP-07A-2167 rashly and negligently, belonging to the Himachal Road Transport Corporation (for short "HRTC"), hit the car of the claimant on its rear and thereby caused damage to the said car. Accordingly, the claimant filed the Claim Petition claiming compensation to the tune of Rs.1,38,000/-.

3. The respondents contested the claim petition by filing the reply.

4. The following issues came to be framed in the claim petition:-

1. *Whether Car of the petitioner bearing No.HR-51N- 0974 was damaged on 11.10.2004 near Deo Ghat Solan due to rash and negligent driving of bus No.HP-07A-2167 by the driver respondent No.2, as alleged? ...OPP*

2. If issue No.1 is proved, whether the petitioner is entitled for compensation for damages to his vehicle as alleged, if so, what amount? ...OPP

3. Whether the petitioner has no cause of action? ...OPR.

4. Relief.

5. In order to prove their claim, the parties led their evidence. The Tribunal, after examining the pleadings and the evidence, held that the claim petition was not maintainable before it.

6. I have gone through the record. It was a third party claim and it has been proved on record that the claimant had suffered because of rash and negligent driving of the driver of the offending bus, thus, the claimant was entitled to compensation as third party.

7. I have gone through the evidence. In paragraph 20 of the claim petition, the claimant has given the details of the damage, which he suffered due to rash and negligent driving of the driver of the offending bus and has claimed Rs.1,38,000/- as compensation. However, in the facts of the case, I deem it proper to award Rs.1,00,000/- in lump sum without any interest and direct the respondent-HRTC to deposit the same within six weeks from today. In default, the respondent-HRTC shall be liable to pay interest @ 7.5% per annum from the date of claim petition till its final realization.

8. Appeal is accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Chaudhary Ram & another .....Appellant

Versus

Mohinder Singh and another ....Respondents

FAO (MVA) No. 85 of 2009
Date of decision: 28th August, 2015.

Motor Vehicles Act, 1988- Section 166- Death caused in a vehicular accident- petition filed by the claimants was rejected by the Tribunal on the ground of rashness and negligence on the part of driver of offending vehicle not established- the Tribunal fell in error while expecting the petitioner to prove the rashness and negligence of the driver of the offending vehicle beyond the reasonable doubt- rashness and negligence to be established by preponderance of probabilities and prima facie proof is sufficient- driver/co-owner had himself admitted the accident and made an evasive denial of the allegations- FIR lodged against the driver, sufficient proof of rashness and negligence- other evidence also led by the petitioner not favourably met with by the respondent- appeal allowed and taking into account, the age of the deceased as 62 years- multiplier of '5' applied and award of Rs.1,80,000/- along with interest passed. (Para-4 to 9)

For the appellant: Ms. Ritu Sharma, Advocate.

For the respondents: Mr. Trilok Jamwal, Advocate, for respondent No.1.
Mr. J.S. Bagga, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is the judgment and award dated 31.10.2008, made by the Motor Accident Claims Tribunal, Bilaspur in M.A.C. No. 19 of 2007, titled *Shri*

Chaudhary Ram and another versus Shri Mohinder Singh and another, whereby the claim petition was dismissed, hereinafter referred to as "the impugned award", for short.

2. It appears that the claimants had invoked the jurisdiction of the Motor Accident Claims Tribunal, Bilaspur, for the grant of compensation to the tune of Rs.10 lacs, as per the break-ups given in the claim petition, on the ground that the driver, namely, Mohinder Singh has driven Truck No.HP-23-5554 rashly and negligently on 6.2.2007 at 11.40 A.M. Beri Chowk, Police Station Barmana, District Bilaspur, H.P. FIR No. 37 of 2007 under Sections 279 and 337 of the Indian Penal Code was registered against the driver.

3. The claim petition was resisted and contested by the respondents and following issues came to be framed.

(i) Whether late Shri Tulsi Ram had died on account of injuries sustained by him in an accident which took place on 6.2.2007 at about 11.40 A.M. near Beri Chowk , P.S. Barmana, District Bilaspur, H.P. due to rash and negligent driving of Truck No. HP-23-5554 being driven by respondent No.1 as alleged? OPP

(ii) If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? OPP

(iii) Whether respondent No. 1 was not having a valid and effective driving license at the time of accident ? OPR2.

(iv) Whether the offending Truck was being plied without valid documents at the relevant time? OPR-2.

(v) Relief.

4. The claimants have examined three witnesses, namely, H.C. Kishori Lal, Dr. Yuv Raj Shori, Liaq Ram and claimant Chaudhary Ram himself appeared as PW3. Mohinder Singh owner-cum- driver has also stepped into the witness-box and has examined one Smt. Sneh Lata.

5. The Tribunal has held that the claimants have failed to prove that the driver of the offending vehicle was driving the offending vehicle rashly and negligently beyond reasonable doubt. The Tribunal has fallen in an error. It appears that the learned Tribunal was working under misconception of law for the reason that the claim petition has to be determined by applying the principle of preponderance of probabilities and *prima facie proof* is sufficient. It is also beaten law of the land that the claim petition is to be determined summarily and that is why the Code of Civil Procedure is not applicable. Some of the provisions of Code of Civil Procedure have been made applicable in terms of the provisions of the Rules framed by the Central Government as well as State Government.

6. The claimants have specifically averred that the driver has driven the offending vehicle rashly and negligently. The respondents have filed the reply and in para 13 they have admitted that the accident has taken place but has pleaded that it was not the result of rash and negligent driving of the driver. Further, it is stated that even if it is found that the driver has driven the vehicle rashly and negligently, the insurer is liable to pay the amount.

7. In the given circumstances, driver-cum- owner has admitted the cause of death of the deceased but has evasively denied the rashness and negligence of the driver. There is proof and evidence on record, i.e. copy of FIR Ext. PW1/A, which do disclose that the case was registered against the driver and the driver has faced the trial.

8. Having said so, the claimants have proved issue No. 1 and the findings on issue No. 1 are set aside and it is held that the driver has driven the vehicle rashly and negligently. The issue is thus, decided in favour of the claimants and against the owner/driver and insurer.

9. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 and 4. The Tribunal has not determined these issues, which are to be determined. It was for the insurer to prove that the driver was not having a valid and effective driving license and owner has committed willful breach, has failed to lead evidence, thus, failed to discharge the onus. Accordingly, issues No. 3 and 4 are decided in favour of the claimants and against the insurer. Having said so, the insurer is held liable to pay the compensation.

10. **Issue No.2.** Admittedly, deceased was 62 years of age at the time of accident and has pleaded that he was earning Rs.6300-8000/- per month. By a guess work, it can safely be held that the deceased was earning Rs.4500/- per month and 1/3rd was to be deducted. Thus, it is held that the claimants have lost source of dependency to the tune of Rs.3000/- per month and multiplier applicable is "5".

11. Having said so, the claimants are entitled to Rs.3000x12x5. Rs.1,80,000/- alongwith interest at the rate 7.5% per annum from the date of claim petition till the realization of the same and the insurer is saddled with the liability.

12. The insurer is directed to deposit the amount along with interest from the date of filing of the claim petition till its realization, within six weeks from today in the Registry. On deposit, the entire amount be released to the claimants, through payees' cheque account.

13. Accordingly, the appeal is allowed and the impugned award is set aside. 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.

Sh. Inder Singh and another ...Appellants.
Versus
Smt. Sunita Nagraik and another ...Respondents.

FAO No. 129 of 2009
Decided on: 28.08.2015

Motor Vehicles Act, 1988- Section 166- Award challenged by the claimants on the ground of adequacy of compensation- age of the deceased was 30 years at the time of accident- multiplier of '16' was applicable, per settled law in **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104 and Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120-** Tribunal has fallen in an error and wrongly applied multiplier of '12'- Tribunal also fell in error while wrongly deducting 2/3rd amount towards personal expenses of the deceased- only 50% deduction was permissible in view of law laid down by Apex Court in **Sarla Verma's case and Reshma Kumari's case supra-** award modified accordingly - enhanced award amount to be deposited by the insurer within 6 weeks in the Registry. (Para-3 to 12)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. Gulzar Singh Rathore, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Appellants-claimants have called in question the judgment and award, dated 04.12.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla , H.P. (for short "the Tribunal") in M.A.C. No. 102-S/2 of 2005/2004, titled as Shri Inder Singh and another versus Smt. Sunita Nagraik and another, whereby compensation to the tune of Rs. 3,93,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The insurer and the owner-insured of the offending vehicle have not questioned the impugned award on any ground, thus, has attained finality so far it relates to them.

3. The appellants-claimants have questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is - whether the amount awarded is inadequate?

5. I have gone through the claim petition, record and the impugned judgment and am of the considered view that the Tribunal has fallen in an error while making calculations and the award.

6. The amount awarded by the Tribunal, in terms of the impugned award, is inadequate for the following reasons:

7. The age of the deceased was 30 years at the time of the accident, which is not in dispute. The multiplier of '16' was to be applied keeping in view the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Viewed thus, the Tribunal has fallen in an error while applying the multiplier of '12'.

8. The deceased was a government employee, had drawn his last salary to the tune of Rs. 7,447/- in terms of his last pay certificate, Ext. PW-2/B, which can be rounded off to Rs.7,500/-. The Tribunal has wrongly deducted two third towards his personal expenses. 50% was to be deducted while keeping in view the principles laid down by the

Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra).**

9. In view of the above, it is held that the claimants, who are the parents of the deceased, have lost source of income/dependency to the tune of Rs.3,750/- per month, i.e. Rs.3,750/- x 12 = Rs.45,000/- per annum. Thus, the claimants are entitled to compensation to the tune of Rs.45,000/- x 16 = Rs. 7,20,000/-. The claimants are also held entitled to Rs.10,000/- under the head 'loss of love and affection, Rs.10,000/- under the head 'funeral charges' and Rs.10,000/- under the head 'loss of estate' and Rs.10,000/- under the head 'transportation charges'.

10. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.7,20,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs. 7,60,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization.

11. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

12. The insurer is directed to deposit the enhanced awarded amount before the Registry within six weeks from today. On deposition of the same, the entire awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

13. 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.

National Insurance Company Ltd. ...Appellant

Versus

Ms. Honaifa Bibi & others ...Respondents

FAO No. 106 of 2009
Decided on : 28.08.2015.

Motor Vehicles Act, 1988- Section 149- Award passed by the Tribunal challenged by the Insurer on the ground that it has wrongly been held liable as Tractor was being put to use in contravention to the terms and conditions of the policy- Claim Petition shows that tractor was hired to carry the labourers for the purpose of Murti Visarjan- this fact not denied specifically by the insurer- insurance policy showing that tractor could be used only for the purpose for which it was registered and not to carry the passengers- Tribunal fell in an error by holding insurer liable; as there was contravention of the policy- insurer held liable to satisfy the award with right to recovery. (Para-5 to 12)

For the appellant : Ms. Devyani Sharma, Advocate.

For the respondents : Mr. Amrinder Singh Rana, Advocate, for respondents No. 1 to 5.
Mr. B.C. Verma, Advocate, for respondents No. 6 & 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

The insurer has questioned the award dated 8th August, 2008, passed by the Motor Accident Claims Tribunal-II, Solan, District Solan, Camp at Nalagarh,

(hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 8NL/2 of 2007, whereby compensation to the tune of Rs.5,89,200/- with interest at the rate of 12% 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, herein and the insurer-appellant, herein was saddled with liability (for short, the "impugned award").

2. The claimants, owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with the liability.

4. Heard.

5. The claimants have specifically averred in para-23 of the claim petition that they had hired the offending vehicle, i.e. tractor bearing registration No. HP-12A-5637 on the occasion of 'Vishavkarma Day' and were going towards a Nullah near Vardhman for 'Murti Visarjan'. It is apt to reproduce para-23 of the claim petition herein:

> "*23. The accident took place on 18.09.2006 at about 4.30 p.m. near Tempo Union, Baddi, when the deceased and other persons boarded a Tractor which was hired by them on the occasion of Vishavkarma Day and they were going towards a Nullah near Vardhman for Murti Visarjan. In the meantime the respondent No. 2 who was driving the said Tractor in a very rash and negligent manner could not control the vehicle. The respondent No. 2 lost control over his vehicle and caused the said Tractor to get turned upside down. The Accident was caused due to the rash and negligent driving of the vehicle No. HP-12-5637 at the relevant time by the respondent No. 2. Due to the upside down turning of the said vehicle, the deceased fell down and was badly crushed which resulted in his death."*

6. Owner and driver have filed joint reply to the claim petition and have denied the averments contained in the aforesaid para of the claim petition.

7. The insurer has not specifically denied the averments contained in para-23 of the claim petition.

8. The claimants in the claim petition have specifically averred that they had hired the offending vehicle. The Insurance Policy Ext. R-2 is on the record, which does disclose that the tractor in question is not a passenger vehicle and can be used only for the purpose, for which it was registered and the risk is only covered for the driver and workers and not for the persons, who had hired it.

9. Having said so, I am of the considered view that the Tribunal has fallen in an error in saddling the insurer with the liability.

10. At this stage, learned Counsel for the insured and the owner stated at the Bar that the deceased was working as a labourer.

11. It was not a case of the claimants before the Tribunal.

12. Having said so, the insurer is held liable to satisfy the impugned award with right of recovery.

13. Accordingly, the appeal is disposed of and impugned award is modified, as indicated hereinabove.

14. Learned Counsel for the appellant stated at the Bar that the amount stands already deposited before the Tribunal. The Tribunal is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned award.

15. The insurer is at liberty to move an application for recovery before the Tribunal.

16. Send down the records after placing a copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. .....Appellant

Versus

Neelam Sharma and others ..... Respondents

FAO No.137 of 2008
Date of decision: 28.08.2015

Motor Vehicles Act, 1988- Section 166- Award challenged by Insurer on the grounds that driver of offending vehicle not possessing a valid and effective driving licence; rashness and negligence of the driver not established and award amount was excessive- evidence led on record establishes existence of valid driving licence and rashness and negligence on the part of driver- Tribunal had rightly passed the impugned award- however, Tribunal fell in an error while applying the multiplier of '15'- age of the deceased at the time of accident was 45 years- multiplier of '13' was applicable in view of law laid down by Apex Court in **Sarla Verma's case and Reshma Kumari's case-** award accordingly modified. (Para-2 to 7)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and anr, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.

For the respondents: Mr.Bhim Raj Sharma, Advocate, for respondents No.1 and 2.
Mr.Narender Sharma, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of the instant appeal, the insurer has questioned the award, dated 15th September, 2006, passed by the Motor Accident Claims Tribunal(III), Shimla, (for short, the Tribunal), in Claim Petition No.60-S/2 of 2005/02, titled Neelam Sharma and another vs. Dev Krishan and others, whereby compensation to the tune of Rs.11,20,000/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till

deposit, came to be awarded in favour of the claimants and the insurer/appellant was saddled with the liability, (for short the impugned award).

2. The insured/owner, the driver and the claimants have not questioned the impugned award on any count, thus the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has questioned the impugned award on three grounds, namely – i) the driver of the offending vehicle was not having a valid and effective driving licence to drive the vehicle; ii) the claimants have failed to prove that the driver of the offending vehicle was driving the offending vehicle rashly and negligently; and iii) the amount awarded by the Tribunal is excessive.

4. I have gone through the impugned award and the record of the case. The driving licence of the driver has been proved on record as RW-1/A. The driver was having a valid and effective driving licence to drive a heavy motor vehicle and also he was competent to drive a light motor vehicle as also a passenger vehicle. The driver was also duly authorized to drive a transport vehicle, as is evident from the endorsement made on the driving licence Ext.RW-1/A. The Tribunal has rightly held that the driver was having a valid and effective driving licence to drive the offending vehicle. Therefore, the first contention raised by the learned counsel for the appellant/insurer is turned down.

5. Coming to the second ground urged by the learned counsel for the appellant, the claimants have examined Neelam Sharma, Dinesh Kumar, Gian Chand and Ramesh Lal, as PW-1 to PW-4, respectively, who have stated with one voice that the driver of the offending vehicle was driving the offending vehicle rashly and negligently. Copy of the FIR was also proved on record as Ext.P-1, a perusal of which shows that a case was registered against the driver of the offending vehicle under Sections 279, 337 and 304A of the Indian Penal Code.

6. Having said so, the Tribunal has rightly held that the driver of the offending vehicle, namely, Meer Chand, had driven the offending vehicle rashly and negligently. Accordingly, the second point urged by the learned counsel for the appellant is also rejected being devoid of any force.

7. As far as third point raised by the learned counsel for the appellant is concerned, the same is the outcome of issue No.2 framed by the Tribunal. Admittedly, the age of the deceased, at the time of accident, was 45 years and the Tribunal has fallen in error in applying the multiplier of 15. In terms of Second Schedule attached to the Motor Vehicles Act, 1988 and the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** multiplier of 13 was applicable.

8. Accordingly, the impugned award is modified to the extent that instead of multiplier 15, multiplier 13 is applicable. Thus, the claimants are held entitled to Rs.6000 x 12 x 13 = Rs.9,36,000/- under the head loss of source of dependency and Rs. 40,000/-, awarded by the Tribunal under other heads, which, in all, comes to Rs.9,76,000/-. The above amount shall carry interest as awarded by the Tribunal.

9. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the impugned award, after making calculations as indicated above, and the excess amount, if any, deposited by the insurer/appellant be released in its favour through payee's account cheque.

10. The appeal stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. .....Appellant

Versus

Raj Kumari and others. ..... Respondents

FAO No.117 of 2009
Date of decision: 28.08.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence, amount of compensation awarded by the Tribunal is excessive, claimants had filed a petition under Workmen's Compensation Act which was dismissed in default and the claimants are precluded from invoking the jurisdiction under the Motor Vehicles Act- driver possessed a driving licence authorized him to drive heavy goods vehicle, therefore, he was competent to drive heavy transport vehicle- Tribunal had assessed monthly income of the deceased as Rs. 3,000/- per month- after making deduction, loss of dependency was taken to be Rs. 2,000/- per month- after applying multiplier of '14' Tribunal had awarded compensation of Rs. 3,36,000/-- thus, amount awarded by Tribunal was not excessive but was meager – order of dismissal in default is not a decree and cannot operate as a bar for filing fresh suit/claim petition- appeal dismissed. (Para-3 to 8)

For the appellant: Mr.Suneet Goel, Advocate.
For the respondents: Ms.Geeta, Proxy Counsel, for respondents No.1 to 4.
Mr.Rupinder Singh, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 10th November, 2008, passed by the Motor Accident Claims Tribunal(I), Sirmaur at Nahan, (for short, the Tribunal), in Claim Petition No.33-MAC/2 of 2007, titled Raj Kumari and others vs. Vijay Kumar and others, whereby compensation to the tune of Rs.3,40,000/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the impugned award).

2. The insured/owner, the driver and the claimants have not questioned the impugned award on any count, thus the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has questioned the impugned award on the grounds, namely – i) the driver of the offending vehicle was not having a valid and effective driving licence to drive the offending vehicle; ii) the amount of compensation awarded by the Tribunal is excessive; and iii) the claimants, at the first instance, filed a petition under the Workmen's Compensation Act, which was dismissed in default, therefore, the claimants are precluded from invoking the jurisdiction under the Motor Vehicles Act, 1988.

4. All the three grounds urged by the learned counsel for the appellant-insurer are not tenable in the eyes of law for the following reasons. The driver of the offending vehicle was having a driving licence and he was made competent to drive a heavy goods vehicle in the year 1995, as is borne out from a perusal of the copy of the driving licence proved on record as Ext.RW-1/C. In the year 1995, the driver was 21 years of age. Thus, it cannot be said that the driver was a minor at the time when he was issued driving licence to drive a heavy goods vehicle and was not competent to drive the heavy transport vehicle. The Tribunal has correctly made discussion on issue No.3 and has rightly decided the said issue against the insurer, which findings of the Tribunal are liable to be upheld and the same are upheld.

5. As far as second point urged by the learned counsel for the insurer that the amount of compensation awarded by the Tribunal is excessive, the Tribunal has assessed the monthly income of the deceased at Rs.3,000/- per month and after making deductions, it was held that the claimants lost source of dependency to the tune of Rs.2,000/- per month. After applying the multiplier of 14 keeping in view the fact that the deceased was 33 years of age at the time of accident, the Tribunal held the claimants entitled to Rs.3,36,000/- under the head loss of source of dependency. Thus, it is clear that the amount of compensation awarded by the Tribunal is not excessive, rather it is meager. However, the claimants have not challenged the impugned award. Therefore, the findings recorded by the Tribunal on issue No.2 are reluctantly upheld.

6. The third point urged by the learned counsel for the appellant/insurer was that since the claimants had, at the first instance, filed a petition under the Workmen's Compensation Act and the said petition was dismissed in default, therefore, they were precluded from claiming compensation under the Motor Vehicles Act. The order of dismissal in default is not a decree and in terms of Order 9 Rule 4 of the Code of Civil Procedure, the said order cannot operate as a bar for filing fresh suit/claim petition.

7. Section 167 of the Motor Vehicles Act provides that the claimants have option either to invoke the jurisdiction under the Workmen's Compensation Act or to file a petition under the Motor Vehicles. The claimants can also invoke the jurisdiction under both the Acts (supra), but in case the Commissioner under the Workmen's Compensation Act decides the petition at the first place, the other remedy is barred.

8. In the instant case, the petition under the Workmen's Compensation Act was dismissed in default. Therefore, it was rightly held by the Tribunal that the Claim Petition was maintainable.

9. In view of the above discussion, there is no merit in the appeal filed by the appellant and the same is dismissed.

10. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the impugned award.

11. The appeal stands disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company ...Appellant.

Versus

Bihari Lal and others ...Respondents.

FAO No. 135 of 2009
Decided on: 28.08.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence and the insurer had committed willful breach of the terms and conditions of the policy- offending vehicle was a Mahindra Pick Up whose gross weight was 2820 kilograms which falls within the definition of light motor vehicle- driver having a driving licence authorizing him to drive light motor vehicle does not require an endorsement of PSV vehicle- held, that findings recorded by Tribunal that driver had a valid driving licence cannot be faulted. (Para- 5 to 17)

Cases referred:
Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
National Insurance Company Ltd. vs Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Parmod Singh Thakur, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is the judgment and award, dated 29.10.2008, made by the Motor Accident Claims Tribunal, Kinnaur Civil Division at Rampur Bushahr, H.P. (for short "the Tribunal") in M.A.C. Petition No. 20 of 2006, titled as Shri Bihari Lal versus Shri Dikshit Thakur and others, whereby compensation to the tune of Rs.1,02,668/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured, against the respondents and the insurer was directed to satisfy the award (for short "the impugned award").

2. The claimant-injured, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the ground that the driver of the offending vehicle was not having a valid and effective driving licence, thus, the owner-insured has committed a willful breach and the Tribunal has fallen in an error in saddling it with liability.

4. I have gone through the record, perused the impugned award and am of the considered view that this ground is not tenable and the Tribunal has rightly saddled the appellant-insurer with liability for the following reasons:

5. Admittedly, the driver was driving Mahindra Pick Up, the gross vehicle weight of which is 2820 kilograms, as per the Registration Certificate, Ext. RB, is a light motor vehicle.

6. I deem it proper to reproduce the definitions of “driving licence”, “light motor vehicle”, “private service vehicle” and “transport vehicle” as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> xxx xxx xxx
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*
>
> *xxx xxx xxx*
>
> *(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."*

7. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

8. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

9. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

> ***"3. Necessity for driving licence.*** *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

> *(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."*

10. 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.

11. 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."*

12. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stands 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.

13. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle*

includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
>
> *.....*
>
> *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*
>
> *In the given circumstances of the case PSV endorsement was not required at all."*

14. The 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'."

15. 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."

16. Having said so, I hold that the endorsement of PSV was not required.

17. Viewed thus, the Tribunal has not committed an error in holding that the driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle and the owner-insured has not committed any willful breach.

18. Having glance of the above discussions, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

19. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

20. 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.

FAO No.686 of 2008 a/w FAOs No.685 and 695 of 2008
Date of decision: 28.08.2015

1.	**FAO No.686 of 2008**	
	Oriental Insurance Co. Ltd.	.....Appellant
	Versus	
	Gulab Singh & another	..... Respondents
2.	**FAO No.685 of 2008**	
	Oriental Insurance Co. Ltd.	.....Appellant
	Versus	
	Kasturu Devi & another	..... Respondents
3.	**FAO No.695 of 2008**	
	Oriental Insurance Co. Ltd.	.....Appellant
	Versus	
	Bhima Devi & others	..... Respondents

Motor Vehicles Act, 1988- Section 149- Other appeal arising out of the same accident was dismissed- held, that present appeal was the outcome of the same accident- insurer is caught by the law of res-judicata and estoppel and it cannot be said that insurer is not liable- appeal dismissed. (Para-4 to 6)

In FAOs No.686 & 685 of 2008

For the appellant(s): Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate, for respondent No.1.
Mr. Varun Rana, Advocate, for respondent No.2.

In FAO No.695 of 2008

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate, for respondents No.1 to 11.
Mr. Varun Rana, Advocate, for respondent No.12.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

The awards, impugned in these appeals, passed by Motor Accident Claims Tribunal, Mandi, H.P., (for short, the Tribunal), are the outcome of one accident caused by respondent/driver Karam Singh, while driving Jeep (Mahendra) bearing No.HP-31-4731 rashly and negligently, on 8th March, 2004. Therefore, all the appeals are being disposed of by this common judgment.

2. The Tribunal, after examining the entire evidence, held that the claimants have proved their case and accordingly, passed separate awards in each Claim petition

granting compensation in favour of the claimants and the insurer/appellant came to be saddled with the liability, for the reasons given in each award.

3. Feeling aggrieved, the insurer has filed the instant appeals challenging the impugned awards, on the grounds taken in the memos of the appeals. The owner and the claimants have not assailed the findings recorded by the Tribunal, thus, the same have attained finality so far as these relate to them.

4. During the course of hearing, Mr.Varun Rana, learned counsel appearing for the respondent-owner, namely, Karam Singh argued that the instant appeals merit to be dismissed in view of the fact that Claim Petition No.51 of 2004, arising out of the same accident, was decided by the Tribunal by saddling the insurer with the liability. Feeling dissatisfied, the claimants filed appeal, being FAO No.97 of 2006 and sought enhancement of the compensation, and the insurer challenged the same by way of FAO No.109 of 2006 on the ground that the Tribunal had wrongly fastened the insurer with the liability. The said appeals were disposed of by this Court, by a common judgment, dated 11th September, 2009, whereby the appeal filed by the claimants was allowed and the appeal filed by the insurer came to be dismissed. It was further stated by Mr.Varun Rana, Advocate, that the said judgment passed by this Court has attained finality.

5. The record of FAO No.97 of 2006 was called for. The appeal was the outcome of the same accident. Thus, the insurer is caught by law of res- judicata and estoppel.

6. In view of the above stated position, it cannot be said that the insurer is not liable. Thus, the Tribunal has rightly fastened the insurer with liability.

7. Having said so, the impugned awards are upheld and the instant appeals are dismissed. A copy of this judgment as also the judgment, dated 11th September, 2009, passed in FAO No.97 of 2006, be placed on the record of each file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company ...Appellant

Versus

Smt. Raj Rani & others ...Respondents

FAO No. 120 of 2009
Decided on : 28.08.2015.

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving license and a route permit- insurer had not led any evidence to prove the plea taken by it- evidence led by the claimant and the owner had gone un-rebutted- held, that Tribunal had rightly decided the issue regarding the driving license and the route permit against the insurer.

(Para-9 and 10)

For the appellant : Mr. J.S. Bagga, Advocate.

For the respondents : Mr. V.S. Chauhan, Advocate vice Mr. B.S. Nainta, Advocate, for respondents No. 1 to 5.

Mr. Diwakar Dev Sharma, Advocate vice Mr. B.N. Sharma, Advocate, for respondents No. 6 & 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award dated 16th October, 2008, passed by the Motor Accident Claims Tribunal (II), Shimla, Camp at Rohru (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 9-R/2 of 2006, whereby compensation to the tune of Rs.3,66,800/- with interest at the rate of 8% 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 to 5, herein and the insurer-appellant herein was saddled with liability (for short, the "impugned award").

2. The claimants, insured-owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer has questioned the impugned award on two grounds (i) the driver was not having a valid and effective driving licence at the time of accident and (ii) the owner has committed willful breach by plying the offending vehicle without route permit.

Brief Facts:

4. The claimants being victims of the motor vehicular accident, had invoked the jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.11,00,000/-, as per the break-ups given in the claim petition. It is averred in the claim petition that driver, namely, Krishan Chand, had driven the vehicle-Jeep bearing registration No. HP-10-1165, rashly and negligently, on 19.07.2004, at about 8.45 p.m., at Samala, Tehsil and Police Station Rohru, caused the accident, hit Rajinder, as a result of which, he sustained injuries and succumbed to the injuries.

6. The respondents contested the claim petition on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"1. *Whether on 19.07.204, at about 8.45 p.m., at Samala the respondent No. 3 was driving Jeep No. HP-10-1165 rashly and negligently and as such caused death of Sh. Rajinder? …OPP*

2. If issue No. 1 is proved in the affirmative, to what amount of compensation the petitioners are entitled to and from whom? ….OPP

3. Whether the driver was not holding valid and effective driving licence to drive Jeep No. HP-10-1165 at the time of accident? …OPR

4. Whether the Jeep was being plied without route permit? ….OPR

5. Relief."

8. There is no dispute about issues No. 1 & 2. The dispute revolves around issues No. 3 & 4.

9. The claimants have led evidence. Owner-insured and driver have stepped into the witness box and their statements were recorded. The insurer has not led any evidence. Thus, the evidence led by the claimants, owner-insured and driver has remained unrebutted.

10. The onus to prove issues No. 3 & 4 was upon the insurer, which it has failed to do so. Thus, I am of the considered view that the Tribunal has rightly decided issues No.

3 & 4 in favour of the claimants and against the respondents. Having said so, no interference is required.

11. Learned Counsel for the appellant argued that the amount awarded is excessive.

12. The insurer has also not sought permission to contest the case in terms of Section 170 of the Act and has also not led any evidence. Thus, this ground is not available to the appellant. However, the amount awarded is meager, cannot be said to be excessive.

13. Having said so, the impugned award is upheld and the appeal is dismissed.

14. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' account cheque.

15. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO (MVA) No. 565 of 2008 a/w FAO No. 561 of 2008
Date of decision: 28th August, 2015.

FAO No. 565/2008.	
Oriental Insurance Co. Ltd.	.....Appellant
Versus	
Sandeep Kumar and others	....Respondents
FAO No. 561/2008.	
Sandeep Kumar	.....Appellant
Versus	
Chetan Chauhan and others	....Respondents

Motor Vehicles Act, 1988- Section 149- Insurer contended that claimant was a gratuitous passenger and owner had committed willful breach- claimant had specifically pleaded that he was travelling in the vehicle as owner of the goods- this fact was also admitted by the owner and driver- no evidence was led by the insurer- held, that plea of the insurer that claimant was a gratuitous passenger cannot be accepted. (Para-5 to 7)

For the appellant(s):	Ms. Shilpa Sood, Advocate for the appellant In FAO No. 565/2008 and Mr. V.S. Chauhan, Advocate, for the appellant in FAO No. 561/2008.
For the respondent(s):	Mr. V.S. Chauhan, Advocate, for respondent No. 1 in FAO No. 565 of 2008 and Mr. Neeraj Gupta, Advocate, for respondents No. 1 and 2 in FAO No. 561 of 2008. Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral).

Both these appeals are outcome of a common award made by the Motor Accident Claims Tribunal, (II), Shimla in M.A.C. Petition No. 71-S/2 of 06/05, titled

Sandeep Kumar versus Chetan Chauhan and others, whereby compensation to the tune of Rs.7,18,200/- came to be awarded in favour of the claimant and insurer was to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. The owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far as it relates to them.

3. The insurer, by the medium of FAO No. 565 of 2008 has questioned the impugned award on the ground that the claimant was a gratuitous passenger and owner has committed willful breach. Thus, the insurer was not liable.

4. The claimant has questioned the impugned award by the medium of FAO No. 561 of 2008, on the ground of adequacy of compensation. Thus, I deem it proper to determine both these appeals by this common judgment.

5. The learned counsel for the insurer has argued that the insurer has taken a specific plea before the Tribunal that the claimant was a gratuitous passenger and issue No. 3 was framed. The insurer has not proved the said fact. However, I have gone through the pleadings. The claimant in para 10 of the claim petition specifically averred that the claimant was traveling in the vehicle as owner of the goods, which is admitted by the owner and driver by filing reply to para 10 of the claim petition herein. It is apt to reproduce para 10 of the claim petition herein:

> *"10.Yes the injured was traveling in the ill fated utility jeep at the time of accident as he was going from Kotkhai to Chaknol in the capacity of owner of goods. It is submitted here that the injured with other occupant of the ill fated jeep were carrying."*

6. It is also apt to reproduce para 10 of the reply to para 10 of the claim petition herein:

> *"10. Contents of para-8 to 10 of the petition are admitted. The petitioner and other occupants were traveling in the capacity of owner of the goods in the ill fated Jeep."*

7. Having said so, there is no need to lead evidence to prove that the claimant was traveling in the offending vehicle as owner of the goods. It is not the case of the insurer that there was collusion between the owner, driver and the claimant. However, I have gone through the impugned award and perused the record, which do disclose that the claimant was traveling in the offending vehicle as owner of the goods. Thus, the Tribunal has rightly held that the insurer was liable. No interference is called for. Accordingly, the appeal filed by the insurer is dismissed.

8. I have gone through the impugned award. It appears that the Tribunal has rightly awarded the compensation, cannot be said to be inadequate or excessive in any way. Having said so, the impugned award is upheld.

9. The insurer is directed to deposit the amount, within six weeks from today in the Registry, if not already deposited. On deposit, the entire amount be released to the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account.

10. Accordingly, both the appeals are disposed of, alongwith pending applications if any.

11. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company .....Appellant
Versus
Smt.Subhadra and others ..... Respondents

FAO No.244 of 2008
Date of decision: 28.08.2015

Motor Vehicles Act, 1988- Section 166- Claimants were entitled to compensation in terms of Consumer Protection Act, however, keeping in view time period elapsed from the date of accident, matter settled at Rs.2.27 lacs in lump sum without any interest. (Para- 2 to 5)

For the appellant: Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate.
For the respondents: Mr.D.Ghosh, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 27th February, 2008, passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, in Claim Petition No.82 of 2005, titled Subhadra and another vs. Oriental Insurance Company and others, whereby compensation to the tune of Rs.2,00,000/-, with interest at the rate of 9% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the insurer/appellant was saddled with the liability, (for short the impugned award).

2. At the very outset, it may be placed on the record that the Claim Petition filed under Section 166 of the Motor Vehicles Act, 1988 (for short, the Act) was not maintainable, rather the claimants were entitled to relief under the Consumer Protection Act, 1986. Therefore, on the previous date of hearing, the appeal was adjourned and the learned counsel appearing for the claimants was asked to verify whether the claimants had filed any petition under the provisions of the Consumer Protection Act. Today, the learned counsel for the claimants/respondents No.3 and 4 stated that the claimants had only invoked the jurisdiction in terms of the Motor Vehicles Act and no other proceedings were ever initiated by the Claimants.

3. I have gone through the record of the case. No doubt, the claimants were entitled to compensation in terms of Consumer Protection Act, but that cannot be made a ground, at this belated stage, to direct the claimants to invoke the provisions of the Consumer Protection Act and drag the claimants of a vehicular accident from pillar to post.

4. At this stage, the learned counsel for the insurer stated that the insurer is ready and willing to settle the claim at Rs.2.27 lacs as full and final payment, but without interest. The learned counsel for the claimants has accepted the said offer.

5. In the given circumstances, the claimants are held entitled to Rs.2.27 lacs in lump sum without any interest. The Registry is directed to release the amount in favour of the claimants and thereafter, the remaining amount of interest be released in favour of the insurer/appellant through payee's account cheque.

6. The appeal stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Subhash Chand .....Appellant
Versus
Subhash Chand and others ....Respondents

FAO (MVA) No. 542 of 2008
Date of decision: 28th August, 2015.

Motor Vehicles Act, 1988- Section 166- Petitioner having suffered injuries in an accident filed a Claim Petition before the Tribunal- same was dismissed on the ground that claimant has not proved his case beyond reasonable doubt- Tribunal certainly fell in error- strict proof is not required in claim petition and only prima facie proof sufficient- law has undergone see changes, even FIR can be treated as a Claim Petition- appeal allowed and award of Rs.1,02,803/- passed in favour of the petitioner alongwith interest @ 7.5% per annum. (Para-5 to 12)

For the appellant: Mr. Surinder Saklani, Advocate.
For the respondents: Nemo for respondent No.1.
Mr. V.S. Chauhan, Advocate, for respondent No.2.
Mr. J.R. Poswal, Advocate, for respondents No. 3 and 4.

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 31.7. 2008, made by the Motor Accident Claims Tribunal, Bilaspur in M.A.C. No. 15 of 2006, titled *Subhash Chand versus Subhash Chand and others,* whereby the claim petition was dismissed, hereinafter referred to as "the impugned award", for short.

2. It appears that the claimant had invoked the jurisdiction of the Motor Accident Claims Tribunal, Bilaspur, for the grant of compensation to the tune of Rs.4 lacs, as per the break-ups given in the amended claim petition.

3. The claim petition was resisted and contested by the respondents and following issues came to be framed.

(i) Whether the petitioner had sustained injuries on 23.2.2005 at about 11.30 A.M. at place near Slapper Bridge, District Bilaspur, H.P. due to the rash and negligent driving of Van No. HP31-6889 being driven by respondent NO. 1, as alleged? OPP

(ii) If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioner is entitled to an from whom? ....OPP

(iii) Whether the accident had taken place as a result of contributory negligence of Sh. Subhash Chand, driver of Van

NO. HP-31-6889 and driver of Scooter No. HP31-1720 as alleged? OPR-2.

(iv) Whether the drivers of both the vehicles , i.e. Maruti Van No. HP31-6889 and Scooter No. HP-31-1720 involved I the accident, were not having valid and effective driving license as alleged? OPR-2.

(v) Whether Van No. HP-31-6889 was being plied without valid documents as alleged ?OPR-2

(vi) Relief.

4. The claimant has led evidence. Owner and driver has also stepped into the witness-box.

5. The claimant has also produced the documents, the details of which are given in Form-A appended to the impugned award. The claimant has specifically averred that the driver Subhash Chand has driven the offending vehicle rashly and negligently and has led evidence to that effect but the Tribunal has rejected the claim petition on the ground that the claimant has not proved his case beyond reasonable doubt. The Tribunal has decided the said issue illegally and has fallen in an error while determining the claim petition. The strict proof, as per the mandate of the Evidence Act and the Code of Civil Procedure is not applicable. The claim petitions have to be decided on the preponderance of probabilities and *prima facie proof* is sufficient.

6. It is apt to record herein that the law on motor accidents claims has gone through the see change. Even copy of FIR can be treated as claim petition, under Sections 158 (6) and 166 (4) of the Motor Vehicles Act, for short "the Act". The copy of FIR Ext. PW1/A is on the record, which do disclose that the FIR was lodged against the driver. The evidence led by the claimant has remained unrebutted. The respondents have not denied the pleadings contained in the claim petition specifically.

7. Having said so, the findings returned on issues No. 1 are set aside and it is held that the driver had driven the offending vehicle rashly and negligently and has caused the accident, wherein the claimant has sustained injuries.

8. I deem it proper to deal with issues No. 3 to 5 before I deal with issue No.2. In view of the finding on issue No. 1 there is no need to determine issue No. 3. Accordingly, issue No. 3 is decided against respondent No.2.

9. Respondent No. 2 has not led evidence to discharge the onus and has failed to prove that the driver was not having a valid and effective driving license. Respondent No. 2- insurer has also not led evidence, has failed to discharge the onus on issues No. 4 and 5. Accordingly, both these issues are decided in favour of the claimant and against the insurer.

10. Now coming to issue No. 2. The factum of insurance is admitted and the insured has admitted that the claimant has sustained injuries and was admitted in the hospital. The claimant has placed on record medical bills Ext. PW2/A which are at pages 55 to 79 of the record which do disclose that the claimant remained hospitalized from 23.2.2005 to 24.2.2005 and has suffered pain and sufferings and was attended upon by the attendant in the hospital. He was made to suffer agony and pain. The disability certificate is Mark-A, which also do disclose that the claimant has sustained injuries and suffered temporary disablement.

11. In the given circumstances, a guess work is required to be made and it is held that the claimant is entitled to Rs.12803/ under the head "medical expenses",

Rs.50,000/- under the head "pain and suffering", Rs.15000/- under the head "special diet" and Rs.25000/- under the head "loss of amenities of life".

12. Having said so, the claimant is entitled to Rs.12803+Rs.50,000/-+ Rs.15000/-+Rs.25000/-, total Rs.1, 02,803/- alongwith interest at the rate 7.5% per annum from the date of claim petition till the realization of the same and the insurer is saddled with the liability.

13. The insurer is directed to deposit the amount along with interest from the date of filing of the claim petition till its realization, within six weeks from today in the Registry. On deposit, the entire amount be released to the claimant, through payees' cheque account.

14. Accordingly, the appeal is allowed and the impugned award is set aside. 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.

Sukhvinder Singh and another ..... Appellants

Versus

The New India Assurance Ltd. and others ..... Respondents

FAO No.312 of 2012
Date of decision: 28.08.2015

Motor Vehicles Act, 1988- Section 149- Driver was driving Mahindra Maxi Cab (Jeep) which falls within the definition of light motor vehicle- driver had a valid driving licence to drive light motor vehicle- held, that Tribunal had erred in holding that driver did not possess a valid driving licence at the time of accident. (Para-4 to 7)

For the appellants: Ms. Ritta Goswami, Advocate.
For the respondents: Mr.Praneet Gupta, Advocate for respondent No.1.
Ms.Suchitra Sen, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 30th April, 2011, passed by the Motor Accident Claims Tribunal(I), Mandi, (for short, the Tribunal), in Claim Petition No.59 of 2009, titled Savitri Sen and another vs. Sukhvinder Singh and others, whereby compensation to the tune of Rs.6,57,780/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the owner/insured was saddled with the liability, (for short the impugned award).

2. The insurer and the claimants have not questioned the impugned award on any count, thus the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the owner/insured has questioned the impugned award on the ground that the Tribunal has fallen in error in discharging the insurer from the liability. Thus, the findings returned by the Tribunal viz. a viz. Issue No.3 are in dispute.

4. Admittedly, the driver of the offending vehicle was having a valid and effective driving licence to drive a light motor vehicle. The vehicle involved in the accident was Mahindra Maxi Cab (Jeep), which falls within the definition of Light Motor Vehicle in terms of Section 2(21) of the Motor Vehciles Act, 1988, (for short, the Act).

5. This Court, relying upon the decision of the Apex Court, has held in a series of cases that a vehicle the gross unladen weight of which is below 7,500 kilograms, falls under the definition of "light motor vehicle".

6. Having said so, the findings returned by the Tribunal on issues No.3 and 4 are set aside and it is held that the driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle and the owner has not committed any breach.

7. Accordingly, the insurer is held liable to satisfy the impugned award. The insurer is directed to deposit the award amount, alongwith interest as awarded by the Tribunal, within a period of six weeks from today and on deposit the same be released in favour of the claimants strictly in terms of the conditions contained in the impugned award.

8. It is informed that the appellant/owner has deposited Rs.25,000/- in the Registry of this Court. The said amount, alongwith interest accrued thereon till date, is awarded as costs in favour of the claimants.

9. The appeal is allowed and the impugned award stands modified, as indicated above. Copy dasti.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Smt. Tripta Devi and another ...Appellants.

Versus

Shri Rajesh Kumar @ Billa and others ...Respondents.

FAO No. 142 of 2009
Decided on: 28.08.2015

Motor Vehicles Act, 1988- Section 166- Deceased was aged 17 years- multiplier of '14' would be applicable- by guess work, it can be said that deceased would have been earning not less than Rs.5,000/- on attaining the age of 18 years- deceased was unmarried and 50% amount is to be deducted towards his personal expenses- taking the loss of the dependency as Rs.2,500/- per month- claimants are entitled to compensation of Rs.2,500x12x14= Rs.4,20,000/- + Rs.10,000/- under the head 'loss of love and affection + Rs. 10,000/- under the head 'funeral charges' +Rs.10,000/- under the head 'loss of estate'. (Para-6 to 8)

Cases referred:

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

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

For the appellants: Mr. Dushyant Dadwal, Advocate.
For the respondents: Ms. Anita Dogra, Advocate, for respondents No. 1 and 2.
Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 05.02.2009, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 5 of 2007, titled as Tripta Devi versus Rajesh Kumar and others, whereby compensation to the tune of Rs.1,65,000/- with interest @ 7% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants, against the respondents and the insurer was directed to satisfy the award (for short "the impugned award").

2. The insurer, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellants-claimants have questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is - whether the amount awarded is inadequate? The answer is in affirmative for the following reasons:

5. Admittedly, the deceased was a young boy of 17 years, who died because of the cruel traffic accident which was caused by the driver, namely Shri Rajesh Kumar, while driving the offending vehicle, i.e. bus, bearing registration No. HP-21 A-4646, rashly and negligently on 24.12.2006 near Petrol Pump, Bangana.

6. Keeping in view the age of the deceased, multiplier of '14' was to be applied in view of the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

7. By guess work, it can be safely said and held that the deceased would have been earning just after one year, i.e. on attaining the age of 18 years, and would have been earning not less than Rs.5,000/- per month. The parents have lost their budding son, who was the source of hope and help to them in their old age and have been left high and dry. 50% was to be deducted towards his personal expenses while keeping in view the principles laid down by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra).**

8. In view of the above, it is held that the claimants, who are the parents of the deceased, have lost source of income/dependency to the tune of Rs.2,500/- per month, i.e. Rs. 2,500/- x 12 = Rs.30,000/- per annum. Thus, the claimants are entitled to compensation to the tune of Rs.30,000/- x 14 = Rs.4,20,000/-. The claimants are also held entitled to Rs.10,000/- under the head 'loss of love and affection, Rs. 10,000/- under the head 'funeral charges' and Rs.10,000/- under the head 'loss of estate'.

9. Viewed thus, the claimants are held entitled to compensation to the tune of Rs. 4,20,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs.10,000/- = Rs.4,50,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization, which is inclusive of the interim compensation awarded under 'No Fault Liability'.

10. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

11. The insurer is directed to deposit the enhanced awarded amount before the Registry within six weeks from today. On deposition of the same, the entire awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

12. 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.

FAOs No. 132 & 144 of 2009
Decided on: 28.08.2015

FAO No. 132 of 2009
United India Insurance Company Ltd. ...Appellant.
Versus
Smt. Tripta Rana and others ...Respondents.

.....

FAO No. 144 of 2009
United India Insurance Company Ltd. ...Appellant.
Versus
Sh. Ranbir Singh Rana and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving license- license was proved on record and it was renewed from time to time- owner had examined driving license before engaging the driver- therefore, it cannot be said that owner had committed any willful breach. (Para-9 to 11)

Motor Vehicles Act, 1988- Section 157- Insurer contended that vehicle had been transferred and he is not liable to pay compensation- held, that mere transfer of vehicle is not enough to absolve the insurer from liability. (Para-13 to 15)

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
Ashok Kumar & another versus Smt. Kamla Devi & others, I L R 2014 (IX) HP 1192
Vipan Kumar versus Naushad Ahmed and another, I L R 2014 (VI) HP 607
National Insurance Company Ltd. vs Smt. Santoshi Devi & others, I L R 2015 (II) HP 183

For the appellant(s): Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.

For the respondents: Mr. Neel Kamal Sood & Mr. Vasu Sood, Advocates, for respondent No. 1.
Ms. Jamuna, Advocate, vice Mr. Ramakant Sharma, Advocate, for respondents No. 2 and 4.
Mr. Balwant Kukreja, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of one motor vehicular accident, thus, I deem it proper to determine both these appeals by this common judgment.

2. The claimants-injured filed two claim petitions before the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, (H.P.) (for short "the Tribunal") for grant of compensation, as per the break-ups given in the respective claim petitions, on the ground that they became the victims of the traffic accident, which was caused by the driver, namely Shri Narinder Chand, while driving the offending vehicle, i.e. bus, bearing registration No. HP-55-4390, rashly and negligently, on 02.07.2004, at about 4.45 P.M., at place Jhanepari.

3. The respondents in the claim petitions contested the claim petitions on the grounds taken in the respective memo of objections.

4. Similar set of issues came to be framed in both the claim petitions. Thus, I deem it proper to reproduce the issues framed in one of the claim petitions herein:

> *"1. Whether the petitioner suffered injuries due to the rash and negligent driving of Bus No. HP-55-4390 by respondent No. 3? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OP Parties*
>
> *3. Whether respondent No. 4, if held liable, is not liable to indemnify respondent No. 2, as alleged? OPR-4*
>
> *4. Whether the petition is bad for non-joinder of necessary parties? OPRs*
>
> *5. Whether respondent No. 3 was not holding valid and effective driving license to drive the Bus in question at the time of accident, as alleged? OPR-4*
>
> *6. Whether the bus in question was being driven in contravention of the terms and conditions of Insurance Policy? OPR-4*
>
> *7. Relief."*

5. The Tribunal, after examining the record and the evidence, oral as well as documentary, held, in terms of the judgments and awards, dated 07.01.2009, that the driver of the offending vehicle was having a valid and effective driving licence, the owner-insured has not committed any willful breach and awarded compensation to the tune of Rs.1,38,000/- in favour of the claimant-injured in the claim petition, subject matter of FAO

No. 132 of 2009 and Rs.17,000/- in favour of the claimant-injured in the claim petition, subject matter of FAO No. 144 of 2009 (for short "the impugned awards").

6. The claimants-injured, the owner-insured and the driver of the offending vehicle have not questioned the impugned awards on any count, thus, have attained finality so far these relate to them.

7. The insurer has questioned the impugned awards on the grounds that the driver of the offending vehicle was not having a valid and effective driving licence and the vehicle in question was transferred at the relevant point of time.

8. Both the grounds are not tenable for the following reasons:

9. The driving licence is on the file as Ext. RW-2/A, was renewed from time to time. The owner-insured has examined the driving licence before engaging the driver. He was not supposed to make inquiries. Thus, it cannot be said and held that the owner-insured has committed any willful breach.

10. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(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."*

11. 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:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."*

12. Now coming to the second ground; the respondents have not proved the transfer of the vehicle. However, at all, had it been proved, mere transfer of the vehicle is not enough to absolve the insurer from its liability. The insurer is liable till the expiry of the insurance contract.

13. This Court while dealing with the issue of the same and similar nature in **FAO No. 7 of 2007** titled **Ashok Kumar & another versus Smt. Kamla Devi & others,** decided on 5.9.2014, in terms of the Apex Court judgments, have held that transfer of a vehicle cannot absolve the insurer. It is apt to reproduce paras 15 to 19 of the said judgment herein:

> "15. Section 157 of the Act reads as under:
>
> *"**Transfer of certificate of insurance.***
>
> *(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.*
>
> *Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.*
>
> *(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."*
>
> While going through the aforesaid provision, one comes to an inescapable conclusion that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award.
>
> 16. Admittedly, on the date of accident, i.e. 05.06.2000, the offending vehicle was not transferred in the name of appellant-Ashok Kumar. It was transferred in his name w.e.f. 17.06.2000. Thereafter, the appellant-respondent No. 1 Ashok Kumar was supposed to give information regarding transfer of the vehicle to the insurer-Insurance Company. The vehicle was not transferred on the date of accident, thus the question of informing the insurer about the transfer of the vehicle does not arise, at all. If the offending vehicle would have been transferred on the date of accident, i.e. 5th June, 2000, that can not be a ground to defeat the rights of the third party. As per the mandate of the Section (supra), the insurance policy shall be deemed to have been issued in favour of the transferee.
>
> 17. My this view is fortified by the Apex Court Judgment in case titled as **G. Govindan versus New India Assurance Company Ltd. and others,** reported in **AIR 1999 SC 1398**. It

is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:

> *"10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.*
>
> *11. .....*
>
> *12. .....*
>
> *13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.*
>
> *14. .....*
>
> *15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."*

18. The Apex Court in case titled as **Rikhi Ram and another versus Smt. Sukhrania and others**, reported in ***AIR 2003 SC 1446*** held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, supra, herein:-

"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.

7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

19. The Apex Court in latest judgment titled as **United India Insurance Co. Ltd., Shimla versus Tilak Singh and others**, reported in **(2006) 4 SCC 404** has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:

"12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third

party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

14. The same principle has been laid down by this Court in **FAO No. 164 of 2007,** titled as **Sh. Vipan Kumar versus Naushad Ahmed and another,** decided on 28.11.2014, and **FAO No. 207 of 2007,** titled as **National Insurance Company Ltd. versus Smt. Santoshi Devi & others,** decided on 13.03.2015.

15. Having said so, the Tribunal has rightly saddled the insurer with liability in terms of the impugned awards, need no interference.

16. Viewed thus, the impugned awards are upheld and both the appeals are dismissed.

17. Registry is directed to release the awarded amount in favour of the claimants-injured strictly as per the terms and conditions contained in the respective impugned awards after proper identification.

18. 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.

Aman Kumar .....Appellant.

Versus

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

Cr. Appeal No. 387 of 2014
Reserved on: August 28, 2015.
Decided on: August 31, 2015.

N.D.P.S. Act, 1985- Section 20- Accused found in possession of 1.3 kgs. charas at Mini Bus Stand, Kasauli- personal search of the accused was conducted after giving him option to be searched before the Magistrate or any Gazetted Officers or SHO- compliance of Section 50 of N.D.P.S Act not made - Section 50 of N.D.P.S. Act does not provide for third option to be given- compliance of Section 50 is not a bare formality- accused has to be apprised of his right as emanating from sub-section (1) of Section 50- held, that in these circumstances, conviction and sentence of the accused by the trial Court not sustainable- appeal allowed.

(Para-13 to 16)

Cases referred:
Suresh and others vrs. State of Madhya Pradesh, (2013) 1 SCC 550
State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant: Mr. Pawan Kumar Sharma, Advocate.
For the respondent: Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 25.6.2014 and 30.6.2014, respectively, rendered by the learned Special Judge, Solan, H.P, in Sessions Trial No. 16-S/7 of 2012, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 22.8.2012, SI/SHO, Police Station, Kasauli, Prabal Singh alongwith other police officials was on patrolling duty and checking traffic at Mini Bus Stand Kasauli. At about 8:15 PM, they saw accused coming from Military Hospital side towards Mini Bus Stand. On seeing the police, he turned back from the street light. He was carrying a bag in his right hand. They stopped him at some distance. They suspected some suspicious material in the bag carried by him. Amit Kumar came there in his vehicle. He was requested by the police officials to be a witness in the case. Another shopkeeper Brijesh Kumar was summoned by SI Prabal Singh through HC Sandeep Kumar. Thereafter, the police in the presence of these independent witnesses Amit Kumar and Brijesh Kumar gave in writing to the accused that he was being suspected of to be carrying some intoxicated material. The information under Section 50 of the ND & PS Act was reduced into writing vide memo Ext. PW-1/A. It was brought to the notice of the accused that he was free to get the carry bag searched from any Magistrate or Gazetted Officer or from the police officer at the spot. The information was given to the accused in the presence of Amit Kumar and Brijesh Kumar. The accused gave his consent to be searched by the police personnel. Thereafter, carry bag, red in colour Ext. P-2 was checked and inside it one blue coloured carry bag Ext. P-3 was taken out, which on checking was found to be containing black substance in the form of wicks. It was found to be charas. It weighed 1.3 kgs. The sealing process was completed on the spot. NCB forms in triplicate were filled in. Rukka Ext. PW-11/B was prepared and sent to the Police Station through Const. Mohd. Shahid. Thereafter, FIR Ext. PW-5/A was registered. The case property was handed over to MHC Bhupinder Singh for depositing in the malkhana. The case property was sent by HC Bhupinder Singh to FSL Junga through Const. Hem Raj. The FSL report is Ext. PW-10/A. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 12 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Pawan Kumar Sharma, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General for the State has supported the judgment/order of the learned trial Court dated 25/30.6.2014.

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

6. PW-1 Const. Mohd. Shahid deposed that on 22.8.2012, they were standing near the booth where street light is situated. The accused was coming on foot from Military Hospital side towards down side. He was carrying a carry bag in his hand. When he came near the street light and saw the police, he turned back and started walking. They apprehended him. One person from the vehicle was associated by the SHO in the party and another person was asked to join from the front Khokha (tea stall). The person who was associated from Khokha was Brijesh Kumar and the person who came in the vehicle was Amit Kumar. The accused was conveyed that there was chance of his carrying some contraband items. His consent for search was taken vide memo Ext. PW-1/A. He was asked as to where and before whom he wanted to give his search. The accused disclosed that he was ready to give his search to the SHO. Again deposed that accused was given option to be searched either before the Magistrate or any Gazetted Officer or the SHO himself and he exercised the option for his search by the SHO. This memo was signed by the independent witnesses. The charas was recovered. It weighed 1 kg 300 gms. The charas was kept in the same bag which was sealed in cloth parcel by affixing seven seals of seal impression "A". Separate seal impression of seal "A" was also taken on the piece of cloth vide Ext. PW-1/F. The charas was taken into possession vide memo Ext. PW-1/H. Rukka was prepared and handed over to him for taking it to the Police Station for registration of the FIR. He handed over the rukka to acting SHO ASI Hari Singh in the Police Station.

7. PW-2 Amit Kumar deposed that when he reached near Mini Bus Stand Kasauli, many people had assembled there. Some police people were also present on the spot. He also stopped his vehicle. Some arguments were going on in between some persons. There was one bag with the police at that time which was containing charas. At that time, one boy was there who was having some injury. The police told him that the bag containing charas was recovered by them from the accused. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, by the learned Public Prosecutor, he admitted that before searching the accused, he was given option by the police to get his search done either from the Magistrate or from any Gazetted Officer or from the SHO himself vide memos Ext. PW-1/A and PW-1/B.

8. PW-3 Naresh Kumar deposed that at about 8:00-8:30 PM, the police came to his shop and instructed him not to close the shop as the police was to do some work. There were 2-3 persons with the police who came to his shop with a bag which was weighed in his shop. He did not remember the quantity of the charas weighed. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he admitted that in his presence "charas" was kept back in the blue bag which was again placed inside the red carry bag and the same was sealed in a cloth parcel outside his shop.

9. PW-5 HC Bhupinder Singh, deposed that on 22.8.2012, he was performing the duties of MHC. Constable Mohd. Shahid brought rukka to the Police Station, on the basis of which, FIR Ext. PW-5/A was registered. At about 2:30 AM, on the intervening night of 22nd and 23rd August, 2012, SHO Prabal Singh deposited one cloth parcel sealed with seal "A" with him alongwith the sample of the seal, NCB form in triplicate. The same were

entered by him in the malkhana register at Sr. Nos. 314 and 315. He proved extract of the copy of malkhana register vide Ext. PW-5/C.

10. PW-8 HC Sandeep Kumar also deposed the manner in which the accused was apprehended, contraband was seized and sealing process was completed on the spot. He also deposed that the accused was told that as per his legal right, he was entitled to have his search from a Magistrate or any Gazetted Officer or from the police present there. The accused gave his consent for his search by the police party.

11. PW-11 SI Prabal Singh, testified the manner in which the accused was apprehended, contraband was seized and sealing process was completed on the spot. According to him, in the presence of the witnesses, he told the accused that he was likely to be searched for being suspected to be carrying some contraband item and that he was free to get his search done either from the Magistrate or from the Gazetted Officer or from him, being police officer at the spot. To this effect, memo Ext. PW-1/A was prepared. NCB forms in triplicate were filled in. The case property was taken into possession vide memo Ext. PW-1/H. He prepared the site plan and recorded the statements of the witnesses. The case property was deposited with the MHC, Police Station Kasauli.

12. PW-12 HHC Hem Raj, deposed that the case property was handed over to him by MHC Bhupinder Singh to be deposited in FSL, Junga. He deposited the same at FSL, Junga under receipt.

13. Mr. Pawan Kumar Sharma, Advocate appearing for the accused has drawn the attention of the Court to memo Ext. PW-1/A. It is evident from Ext. PW-1/A that the option was given to the accused for his personal search as well as of the carry bag, either before the Executive Magistrate or Gazetted Officer or SI/SHO. The accused gave his option to be searched by the SHO. Similarly, as per Ext. PW-1/B, the accused has given consent to personal search as well as the bag by the SI/SHO. Ext. PW-1/A and Ext. PW-1/B are not in conformity with Section 50 of the ND & PS Act. There are only two options which are to be given by the police to the accused to be searched either by the Executive Magistrate or the Gazetted Officer. There is no third option, as given to the accused vide memos Ext. PW-1/A and PW-1/B. The third option was given to the accused for his personal search as well as search of the bag. PW-1 Const. Mohd. Shahid deposed that the accused was given option to be searched either from the Magistrate or any Gazetted Officer or the SHO. Similarly PW-2 Amit Kumar has also admitted in his cross-examination that the accused was given option by the police to be searched either before the Executive Magistrate or Gazetted Officer or Police Officer, as per Ext. PW-1/A. PW-8 Const. Sandeep Kumar has also deposed that the accused was told that as per his legal right, he was entitled to have his search from a Magistrate or any Gazetted Officer or from the police present there as per Ext. PW-1/A. PW-11 SI Prabal Singh deposed that he told the accused that he was likely to be searched for being suspected to be carrying some contraband item and that he was free to get his search done either from the Magistrate or from the Gazetted Officer or from him, being police officer at the spot.

14. Their lordships of the Hon'ble Supreme Court in the case of ***Suresh and others vrs. State of Madhya Pradesh,*** reported in ***(2013) 1 SCC 550,*** have held that the accused were merely asked as to whether they would offer their personal search to the police officer concerned or to gazetted officer. Thus, Section 50(1) was not complied with in respect of recovery of contraband from the person of appellants. It has been held as follows:

> "16. The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow

the police party to take their search and opt for being searched before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to him, i.e., the police officer or to gazetted officer may not satisfy the protection afforded under Section 50 of the NDPS Act as interpreted in Baldev singh's case.

17. Further, a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "failure to inform" the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. In Vijaysinh Chandubha Jadeja's case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. The concept of substantial compliance as noted in Joseph Fernadez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law.

18. We reiterate that sub-section (1) of Section 50 makes it imperative for the empowered officer to "inform" the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate, failure to do so vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of possession of the contraband. We also reiterate that the said provision is mandatory and requires strict compliance."

15. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of

judgments of this Court mentioned in the preceding paragraphs,Section 50 of the NDPS Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval.

18. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was

improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

16. The non-compliance with mandatory procedure under Section 50 of the N.D & P.S. Act, in the present case, has vitiated the entire proceedings initiated against the accused.

17. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment and order of conviction and sentence dated 25.6.2014 and 30.6.2014, respectively, rendered by the learned Special Judge, Solan, H.P., in Sessions trial No. 16-S/7 of 2012, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

18. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

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

State of Himachal Pradesh ....Appellant.

Vs.

Harbans Lal son of Shri Mukesh Kumar and another .....Respondents.

Cr. Appeal No. 104 of 2008
Judgment reserved on: 27th July 2015
Date of Judgment: 31st August, 2015

Indian Penal Code, 1860- Section 377- Accused committed sodomy with the victim- Medical Officer found injuries on the person of the victim- victim was minor at the time of accident- he had narrated the incident to his father – testimony of the victim was duly corroborated by the testimony of his father- delay in lodging the FIR was satisfactory explained- minor contradictions in the testimony are not sufficient to discard the testimony

of the prosecution witnesses- held, that in these circumstances, prosecution version was duly proved and the accused was rightly convicted by the Trial Court. (Para-11 to 26)

Cases referred:
Childline India Foundation and another vs. Allan John Waters and others, (2011)6 SCC 261
C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, IR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Rai Singh vs. State of Haryana, AIR 1971 SC 2505
Jose vs. State of Kerala, AIR 1973 SC 944
Dalbir Singh Vs. State of Punjab, AIR 1987 S.C. 1328

For the Appellant: Mr. Ashok Chaudhary Additional Advocate General with Mr. V.S.Chauhan, Additional Advocate General and Mr.J.S.Guleria, Assistant Advocate General.
For the Respondents: Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment passed by learned Additional Sessions Judge Fast Track Court Kangra at Dharamshala in appeal RBT No. 44/D/05/02 titled Harbans Lal and another vs. State of H.P. decided on dated 1.10.2007.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that minor victim Abhishek Sharma was student of 7th class in Government Middle School Bhagsunag in the year 1998. It is alleged by prosecution that on dated 29.4.1998 at about 1.15PM minor victim was playing with other students after the recess hours. It is alleged by prosecution that accused called minor Abhishek and took him to the store room of his shop under the pretext of arranging the empty sacks. It is alleged by prosecution that accused persons committed sodomy with minor victim forcibly against his will. It is alleged by prosecution that FIR Ext.PW4/A was recorded and further alleged that minor victim was medically examined by Dr. Reeta Dutt who issued MLC Ext.PW1/A. It is alleged by prosecution that investigating officer went to the spot and prepared site plan Ext.PW7/A. It is alleged by prosecution that I.O. also submitted application for medical examination of minor victim and opinion of medical officer was sought. Challan was filed against accused persons under Section 377 IPC.

3. Charge was framed against the accused persons by learned trial Court under Section 377 IPC. Accused persons did not plead guilty and claimed trial.

4. Prosecution examined the following witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Dr. Reeta Dutt
PW2	Dr. Dinesh Mehta
PW3	Suresh Kumar
PW4	Dile Ram
PW5	Abhishek
PW6	Suresh Kumar
PW7	R.P. Jaswal

4.1 Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description:
Ex.PW1/A	MLC of Abhishek minor aged 14 years.
Ext.PW2/A	MLC of Mukesh Kumar co-accused
Ext.PW2/B	MLC of Harbans Lal co-accused
Ex.PW4/A.	FIR No. 106 dated 1.5.1998
Ex.PW7/A.	Site plan
Ext.PW7/B	Statement of Suresh Kumar for contradiction purpose.

5. Learned trial Court convicted both accused persons under Section 377 read with Section 34 IPC and sentenced the convicted persons to rigorous imprisonment of two years and imposed fine to the tune of Rs. 1000/- (Rupees one thousand only) each. Learned trial Court further directed that in case of default of payment of fine convicted persons would undergo simple imprisonment for one month. Thereafter accused persons Harbans Lal and Mukesh filed criminal appeal No. 44/D/05/02 titled Harbans Lal and another vs. State of H.P. Learned Additional Sessions Judge Fast Track Court Kangra at Dharamshala allowed the appeal and set aside the judgment and sentence passed by learned trial Court and held that prosecution has not succeeded beyond shadow of doubt to prove commission of carnal intercourse upon minor victim.

6. Feeling aggrieved against the judgment passed by learned first appellate Court State of H.P. filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the State of H.P. and learned Advocate appearing on behalf of the respondents and also perused the entire record carefully.

8. Point for determination in present appeal is whether judgment and sentence of learned trial Court should be sustained or whether judgment of learned first appellate Court should be sustained.

9. ***ORAL EVIDENCE ADDUCED BY PROSECUTION:***

9.1. PW1 Reeta Dutt has stated that she is serving as medical officer in zonal hospital Dharamshala since June 1997. PW1 has further stated that on dated 1.5.1998 at about 3.50 PM she examined minor Abhishek Sharma victim. PW1 identified minor Abhishek Sharma in Court and stated that after medical examination she observed following injuries. (1) Linear abrasion on anterior part of his left bone. Middle linear abrasion. Slight bleeding with clotted blood. (2) One cm slanting linear superificial abrasion over the left malar prominse. (3) Linear superificial abrasion over upper left quardarant of left buttock. Size of abrasion was 3 inches x 3 inches. On the same location there was another superificial abrasion size of which was 2/1/2x 1 inch. (4) External genitalia was well developed. (5) Superificial abrasion size of 2x2x1/2 was found just below external anal opening sepics and foul smell was present. (6) External anal opening was slightly gaping with slight mucosal abrasion present on lower part of external anal and sphinctar and anal canal. Tenderness was present. She has stated that there was no evidence to suggest that sodomy was not committed. She has stated that probable duration of injury was 48 hours anterior to the time of his examination. She has also stated that she has brought the original MLR and Ext.PW1/A is true copy of MLC. She has admitted that minor victim had not disclosed the identity of person who had sodomized minor victim.

9.2 PW2 Dr. Dinesh Mehta has stated that he is serving as medical officer at zonal hospital Dharamshala since 1997. He has stated that on dated 5.5.1997 at about 11.40 AM he examined Mukesh Kumar accused present in Court. He has stated that there was nothing to suggest that he was suffering from a disease pertaining to impotency. He has stated that on local examination of gentials it was found that he could effect his penis and he was quite competent to do intercourse. He has further stated that no local or other injury was found present either on penis or other parts of the body and no facial matter was present on penis nor there was foul smell and further stated that shape and size of penis was found normal. He has stated that in his opinion there was nothing to suggest that accused had not committed rectum intercourse. He has stated that he issued MLR and its true copy is Ext.PW2/A. He has stated that he has brought the original MLR. He has stated that on the same day he also examined co-accused Harbans Lal and he identified the accused in Court. He has stated that accused was not found to be suffering from such disease as relating to impotency and on local examination of the gentials he was found capable of errecting the penis and no facial matter or foul smelling was present on gentials or clothings. He has stated that shape and size of penis of accused Harbans was found normal. He has stated that in his opinion there was nothing to suggest that he had not done rectum intercourse and he issued MLC Ext.PW2/B. In his cross examination he has stated that there was no injury or sign on person of Mukesh Kumar and Harbans Lal to suggest that they had committed anal intercourse.

9.3 PW3 Suresh Kumar has stated that he is labourer and accused persons are not known to him. He has stated that accused are not familiar with him and further stated that accused persons did not commit any criminal offence in his presence. Witness was declared hostile by prosecution. He has stated that on dated 29.4.1998 he was working at Bhagsunag. He has denied suggestion that son of Suresh namely minor Abhishek was playing in the play ground of school. He has stated that he does not know that co-accused Harbans called minor Abhishek and took minor Abhishek inside shop. He has denied suggestion that he went to the shop of co-accused Harbans. He has denied suggestion that co-accused Harbans committed sodomy with minor Abhishek. He has stated that he does not know that Mukesh Kumar was also present. He has stated that he had not given any statement mentioned in portion 'A' to 'A' of Mark X to the Investigating Agency. He has

denied suggestion that he has resiled from his earlier statement in collusion with accused persons. He has stated that complainant is not known to him. He has stated that he does not know who is the owner of shop where co-accused Harbans is running shop.

9.4 PW4 Dile Ram has stated that in the year 1998 he was posted as Additional SHO at P.S. Dharamshala. He has stated that on dated 1.5.1998 he recorded statement of complainant minor Abhishek. He has stated that thereafter FIR Ext.PW4/A was registered which is signed by him. He has stated that contents of FIR were explained to complainant and after hearing the contents of complaint as correct complainant had signed it. He has stated that FIR is not personally written by him. He has stated that complaint was written by Munshi (Official posted in police station). He has stated that FIR was written in his presence and father of complainant was also present.

9.5 PW5 minor Abhishek has stated that he is student of 10th class and at the time of incident of sodomy he was student of 7th class. He has stated that on dated 29.4.1998 at 1.15 PM he was playing in play ground of Government Middle School Bhagsunag. He has stated that co-accused Harbans Lal called him and took him inside the store room of shop on the pretext of arranging empty sacks. He has stated that thereafter co-accused Harbans had committed sodomy by way of removing his pant. He has stated that servant of Harbans Lal namely Mukesh had also committed sodomy with him. He has stated that thereafter he came back to his residential house and slept. He has stated that on dated 1.5.1998 co-accused Harbans Lal again called him and thereafter he narrated the entire incident to his father. He has stated that he recorded FIR Ext.PW4/A. He identified the accused persons in Court. He has admitted that his father had also beaten him. He has admitted that his father had also beaten him because foreigner also committed sodomy with him.

9.6 PW6 Suresh Kumar has stated that he used to run tea shop at Bhagsunag. He has stated that he has two sons and his elder son Abhishek was student of 7th class on dated 29.4.1998 and younger son was student of 4th class and both used to reside with him. He has stated that on dated 29.4.1998 his elder son Abhishek came from school at 5.30 PM and slept. He has stated that his son told that co-accused Harbans Lal called him inside the store room of shop on the pretext of arranging empty sacks. He has stated that his son also informed him that inside the store room of shop co-accused Harbans Lal and Mukesh have committed sodomy with his son. He has stated that thereafter FIR filed in P.S. on dated 1.5.1998 when again co-accused Harbans Lal called his elder minor son Abhishek for committing sodomy. He identified the accused persons in Court. He has stated that his minor son Abhishek was medically examined in zonal hospital Dharamshala. He has denied suggestion that he has friendly relations with Braham Dutt who is owner of shop of co-accused Harbans Lal. He has denied suggestion that he has filed the present case in collusion with owner of shop Braham Dutt so that co-accused Harbans Lal should vacate the shop. He has denied suggestion that he has threatened co-accused Harbans to vacate the shop otherwise he would send him to civil imprisonment.

9.7 PW7 R.P. Jaswal has stated that in the year 1998 he was incharge of police post. He has stated that after registration of FIR he visited the spot and prepared site plan Ext.PW7/A. He has stated that after investigation criminal case under Section 377 IPC was made out against accused persons. He has stated that complainant and accused persons were medically examined and MLCs obtained. He has stated that after investigation challan was filed in Court. He has stated that there are three shops adjoining to the shop of co-accused Harbans Lal. Again stated that there is a shop of tea. He has stated that co-accused Harbans Lal is running the shop of confectionery. He has stated that building of shop comprised of two stories. He has stated that in the building there are five shops and

restaurant. He has stated that he did not interrogate the shopkeepers of adjoining shops. He has stated that he also did not interrogate the teachers of school. He has denied suggestion that he has filed false present case.

10. Statements of accused recorded under Section 313 Cr.P.C. Accused have stated that they were outsiders and due to this reason witnesses deposed against them on account of conspiracy committed by father of victim. Accused did not examine any witness in their defence.

11. Submission of learned Additional Advocate General appearing on behalf of the State that as per testimony of PW1 Dr. Reeta Dutt who had examined the minor victim namely Abhishek it is proved on record that sodomy was committed upon the minor victim who was school going minor child aged 14 years is accepted for the reasons hereinafter mentioned. We have carefully perused the testimony of PW1 Dr. Reeta Dutt who had medically examined minor Abhishek Sharma aged 14 years. PW1 has specifically stated in positive manner that minor Abhishek victim had sustained six injuries upon his body. PW1 Reeta Dutt has specifically stated in positive manner that she has observed superficial abrasion upon anal portion of minor Abhishek and further stated that there was no evidence to suggest that sodomy was not done. As per testimony of PW1 Dr. Reeta Dutt who had medically examined the minor it is proved beyond reasonable doubt that sodomy was committed upon minor Abhishek. Testimony of PW1 is trusworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Dr. Reeta Dutt. There is no evidence on record in order to prove that PW1 has hostile animus against accused persons at any point of time.

12. We have carefully perused the testimony of PW2 Dr. Dinesh Mehta who had medically examined co-accused Harbans Lal and Mukesh. PW2 has specifically stated in positive manner that there was nothing to suggest that accused persons have not committed errectal intercourse. Even as per testimony of PW2 it is proved on record that there was nothing to suggest that accused persons have not committed errectal intercourse. Testimony of PW2 is also truswrothy reliable and inspires confidence of Court. There is no reason to disbelive the testimony of PW2. There is no evidence on record in order to prove that PW2 has hostile animus against accused persons.

13. We have carefully perused the testimony of PW5 minor victim namely Abhishek. At the time of incident minor Abhishek was student of 7th class and his age was 14 years. PW5 has specifically stated in positive manner that on the date of incident he was student of 7th class and further stated in positive manner that on dated 29.4.1998 at about 1.15 PM he was playing in Government middle school Bhagsunag playground. PW5 has further stated in positive manner that co-accused Harbans Lal called him to arrange empty sacks in store room of shop. PW5 has further stated that thereafter co-accused Harbans Lal had committed sodomy with him after removing his pant. PW5 has stated in positive manner that thereafter servant of co-accused Harbans namely Mukesh had also committed sodomy with him. PW5 has further stated that thereafter again on dated 1.5.1998 co-accused Harbans Lal called him for committing offence of sodomy and thereafter he filed FIR. Testimony of minor Abhishek is trustworthy reliable and inspires confidence of Court. There is no reason to disbelive the testimony of PW5 Abhishek. There is no evidence on record in order to prove that PW5 has hostile animus against accused persons at any point of time.

14. Testimony of PW5 is further corroborated by PW6 Suresh Kumar who is father of minor victim. PW6 has specifically stated in positive manner that on dated 29.4.1998 minor victim namely Abhishek aged 14 years came at 5.30 PM from school and slept and did not work in shop. He has stated that minor Abhishek had informed him that

accused persons had committed sodomy with him in store room of shop. Testimony of minor Abhishek is corroborated by PW6 Suresh Kumar.

15. Criminal offence of sodomy is defined under Section 377 IPC which means non coital carnal copulation with a member of the same or opposite sex e.g. per anus or per os. It is well settled law that coitus per os is committed in the mouth and coitus per anus is committed when penis is injected into anus.

16. In present case as per testimony of minor victim namely Abhishek aged 14 years it is proved beyond reasonable doubt that accused persons have injected their penis into anus of minor victim. Testimony of minor Abhishek is corroborated with testimonies of medical officers i.e. PW1 and PW2 and is also corroborated with medical certificates placed on record and is also corroborated with testimony of PW6 father of complainant. ***(See (2011)6 SCC 261 titled Childline India Foundation and another vs. Allan John Waters and others)*** It is well settled law that testimony of minor should be believed if same is trustworthy reliable and inspires confidence of Court. We are of the opinion that testimony of minor Abhishek aged 14 years is trustworthy reliable and inspire confidence of Court.

17. Submission of learned defence Advocate appearing on behalf of accused persons that there is delay in filing the FIR and on this ground appeal filed by State of H.P. be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record that offence of sodomy was committed upon minor aged 14 years on dated 29.4.1998 at 1.15 PM in grocery shop of co-accused Harbans Lal at Bhagsunag District Kangra (H.P.) with victim namely Abhishek Sharma aged 14 years who was student of 7th class at the time of incident. It is proved on record that FIR was registered on dated 1.5.1998 under Section 377 read with Section 34 IPC in P.S. Dharamshala District Kangra (H.P.) Minor Abhishek has satisfactorily explained the delay in present case for lodging FIR. Minor Abhishek has specifically stated in FIR that due to fear he remained silent. Minor Abhishek has specifically stated in positive manner that again on dated 1.5.1998 co-accused Harbans Lal called minor victim Abbishek and thereafter Abhishek narrated the incident to his father and thereafter FIR was lodged. Present criminal offence was committed upon minor aged 14 years. It is well settled law that Courts are under legal obligation to protect the interest of minors in the society. It is well settled law that law of limitation is non-operative upon minor till minor attains age of majority as per Section 6 of Limitation Act 1963. In the present case victim is minor aged 14 years. In view of the fact that criminal offence of sodomy was committed upon minor aged 14 years who was student of 7th class we are of the opinion that delay in lodging the FIR is satisfactorily explained by prosecution. Hence it is held that delay in lodging the FIR is not fatal to prosecution in present case.

18. Another submission of learned Advocate appearing on behalf of the accused persons that similar complaint of sodomy was filed against Karon resident of Bhagsunag by victim and thereafter same was withdrawn and on this ground appeal filed by State of H.P. be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that before us matter is not relating to incident of sodomy by Karon but before us the matter is relating to sodomy committed by accused persons on dated 29.4.1998. We are of the opinion that it is not expedient in the ends of justice to disbelieve the testimony of minor Abhishek in present case simply on the ground that another complaint of sodomy against Karon was withdrawn by victim relating to some other incident.

19. Another submission of learned Advocate appearing on behalf of accused persons that medical evidence did not corroborate the commission of criminal offence of

sodomy is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the testimony of PW1 Dr. Reeta Dutt who had medically examined minor victim Abhishek Sharma and we have carefully perused the testimony of PW2 Dr. Dinesh Mehta who had medically examined the accused persons namely Harbans and Mukesh. PW1 Dr. Reeta Dutt has stated in positive manner that there was superficial abrasion upon the anal opening with skin pelling. Dr. Reeta Dutt who had medically examined the victim has stated that there was abrasion upon external anal opening portion of victim. PW1 has specifically stated that there was no evidence to suggest that sodomy was not committed upon minor Abhishek. Similarly PW2 who had examined the accused persons has specifically stated that there was nothing to suggest that rectum intercourse was not committed by accused persons. It is held that medical officers PW1 and PW2 have also corroborated the version of minor victim namely Abhishek Sharma in present case.

20. Another submission of learned Advocate appearing on behalf of accused persons that there was no school record to prove that on the date of incident minor victim namely Abhishek had gone to school and on this ground appeal filed by State of H.P. be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that facts can be proved by way of oral evidence as per Section 59 Chapter IV of Indian Evidence Act 1872. PW5 has specifically stated when he appeared in witness box that on dated 29.4.1998 at about 1.15 PM minor victim was playing in play ground of school and thereafter co-accused Harbans Lal brought the minor victim aged 14 years in store room of his shop and committed criminal offence of sodomy. Testimony of PW5 is also corroborated by PW6 father of victim that on dated 29.4.1998 victim i.e. minor Abhishek aged 14 years had gone to school. Hence it is held that it is proved on record by way of oral evidence of PW5 and PW6 that on dated 29.4.1998 the victim i.e. minor Abhishek had gone to school when victim was student of 7th class. Accused persons did not examine any official from school in order to disprove the testimonies of PW5 and PW6. Oral testimonies of PW5 and PW6 that victim namely Abhishek aged 14 years had gone to school remained unrebutted on record.

21. Another submission of learned Advocate appearing on behalf of accused persons that there was no evidence on record in order to prove that victim had played with children in playground of government school and on this ground appeal filed by State of H.P. be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. PW5 has specifically stated in positive manner that on dated 29.4.1998 at 1.15 PM he was playing in playground of school and thereafter he was called by co-accused Harbans Lal and was took inside store room and thereafter inside store room accused persons have committed criminal offence of sodomy upon the minor victim. Testimony of PW5 to this effect remained unrebutted on record. Accused did not adduce any rebuttal evidence on record in order to prove that victim Abhishek was not playing in playground of school as alleged by victim. The fact that victim was playing in playground of school is proved as per Section 59 of Indian Evidence Act 1872.

22. Another submission of learned Advocate appearing on behalf of accused persons that father of minor had given beating to victim and injuries mentioned in MLC were sustained by minor victim due to injuries inflicted by father of victim and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. There is no evidence on record in order to prove that superficial abrasion injuries were given by father of victim upon the anal part of body of victim. It is proved on record as per testimonyof PW1 that victim had superficial abrasion injuries upon the anal part of his body due to rectum intercourse. Hence it is held that offence did not

connect the superficial injury upon anal part of body of victim with beatings given by father of victim.

23. Another submission of learned Advocate appearing on behalf of accused persons that present criminal case was filed against accused persons under Section 377 IPC in collusion with owner of shop in order to pressurize co-accused Harbans Lal to vacate the shop is also rejected being devoid of any force for the reasons hereinafter mentioned. There is no positive cogent and reliable evidence on record in order to prove that present criminal case under Section 377 IPC was filed against Harbans Lal in collusion with owner of shop. The plea of accused that present criminal case was filed in collusion with owner of shop is defeated on the concept of *ipse dixit* (An assertion made without proof).

24. Another submission of learned Advocate appearing on behalf of accused persons that there is material contradiction between testimonies of prosecution witnesses and on this ground appeal filed by State of H.P. be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Incident took place on dated 29.4.1998 and testimonies of prosecution witnesses were recorded on dated 27.5.2000, 24.5.2001, 18.6.2001 and 17.7.2001. Prosecution evidence was recorded after two years of incident. It is well settled law that when evidence of prosecution witnesses is recorded after a gape of sufficient time then minor contradictions are bound to come in criminal case. It was held in case reported in ***(2010)9 SCC 567 titled C. Muniappan and others vs. State of Tamil Nadu that*** even if there are some omissions contradictions and discrepancies then entire evidence would not be discarded. It was held that undue importance should not be given to omissions, contradictions and discrepancies which do not go to the root of the case. ***(See: AIR 1972 SC 2020 titled Sohrab and another vs. The State of Madhya Pradesh, See: AIR 1985 SC 48 titled State of U.P. 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 alias Prithi Chand and another vs. State of Himachal Pradesh; (2009)9 SCC 626 titled State of Uttar Pradesh vs. Santosh Kumar and others; See:AIR 1988 SC 696 titled Appabhai and another vs. State of Gujarat; See: AIR 1999 SC 3544 titled Rammi alias Rameshwar vs. State of Madhya Pradesh; See: (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another; See: (2004) 10 SCC 94 titled Laxman Singh vs. Poonam Singh and others; See: (2012)10 SCC 433 Kuriya and another vs. State of Rajasthan)*** In present case learned defence Advocate did not point out any material contradiction which goes to the root of case.

25. It is well settled law that *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***(See AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh vs. State of Haryana)*** It was held in case reported in ***AIR 1973 SC 944 titled Jose vs. State of Kerala*** that conviction can be given on testimony of solitary witness in criminal case if testimony of witness inspires confidence of Court. It was held in case reported in ***AIR 1987 S.C. 1328 Dalbir Singh Vs. State of Punjab*** that there is no hard and fast rule which could be laid down for appreciation of evidence and it is a question of fact and each case has to be decided on the fact as they proved in a particular case.

26. Another submission of learned defence counsel appearing on behlaf of accused persons that independent witness namely PW3 Suresh Kumar son of Kirpa Ram did not support the case of prosecution and on this ground appeal filed by State of H.P. be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is not the case of prosecution that Suresh Kumar PW3 was present when criminal offence of sodomy was committed inside the store room of shop as shown in site plan Ext.PW7/A

placed on record. As per site plan Ext.PW7/A placed on record offence of sodomy upon minor child aged 14 years namely Abhishek Sharma was committed by accused persons inside the store room which was closed from all sides. It is proved on record that inside the store room which was closed from walls from all corners the criminal offence of sodmy was committed in presence of accused persons and victim Abhishek only and no independent witness was present inside the store room when criminal offence of sodomy was committed by accused persons. It is well settled law that prosecution is not under legal obligation to examine the independent witness when criminal offence of sodomy was committed inside the forewalls of store room which was not accessible to general public.

27. In view of above stated facts judgment passed by learned Additional Sessions Judge Fast Track Court Kangra at Dharamshala in criminal appeal i.e. RBT No. 44/D/05/02 titled Harbans Lal and another vs. State of H.P. is set aside and we affirm judgment and sentence passed by learned trial Court in criminal case No. RBT-22-II/2001/98 titled State of H.P. vs. Harbans Lal and another. Files of learned first appellate Court and learned trial Court be sent back forthwith along with certified copy of judgment. File of this Court i.e. criminal appeal No. 104 of 2008 be consigned to record room after due completion. Criminal appeal No. 104 of 2008 is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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